Of Masters, Slaves, Behemoths and Bees –

The Rise and Fall of the Link between Competition, Competition Law and Democracy

Elias Deutscher

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 09 July 2020

European University Institute
Department of Law

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I confirm that Chapters I and III draw upon some ideas and arguments discussed in an earlier article I jointly co-authored and published together with Stavros Makris: Deutscher E and Makris S, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11(2) Competition Law Review 181. The overlap between both chapters and the article is very limited

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This thesis has not been corrected for linguistic and stylistic errors.

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Abstract

The idea that the preservation of competition through competition law contributes to the protection of democracy constitutes a recurrent theme, or even a foundational myth, of US antitrust and EU competition law. Yet, legal scholarship has so far failed to provide a coherent explanation as to why the preservation of competitive markets and the control of private economic power are important for democracy. This study purports to unpack this idea of a competition-democracy nexus and to put forward a clear answer to the question of how competition and competition law promote and protect democracy.

The primary claim of this study is that the idea of a competition-democracy nexus can only be explained by the republican concept of liberty as non-domination that originated from republican thought in Ancient Rome. This republican concept of liberty differs from our predominant understanding of negative liberty which perceives only the actual or likely interference by somebody else with our choices or actions as a source of unfreedom. Instead, republican liberty defines liberty in opposition to a master-slave relationship. It considers the mere presence of and defenceless subjugation to the arbitrary power and domination of another person as an obstacle to individual liberty, even if this person does not interfere with our choices. This republican concept of liberty can, thus, explain the basic assumption underlying the idea of a competition-democracy nexus that the mere existence of concentrated economic power is in itself incompatible with a republican democracy and a society of free and equals, in spite of the absence of any concrete risk of interference.

Using the concept of republican liberty as the explanatory variable for the idea of a competition-democracy nexus, this study makes four major contributions. First, it traces the historical trajectory of the idea that competition promotes democracy. It shows that early proponents of competitive markets, such as Adam Smith, as well as various antitrust movements in the US, and the Ordoliberal School in Europe shared the common belief that competition by diffusing economic power operates as an institution of 'antipower' that promotes republican liberty and democracy. Second, this study also explores how US and EU competition law have operationalised this concern about republican liberty and democracy by protecting a polycentric market structure in which power is dispersed amongst many independent decision-makers. Third, it sheds light on how the rise of the Chicago School in the US and the More Economic Approach in Europe have displaced the concern about the competition-democracy nexus and republican liberty with a negative understanding of liberty that only perceives welfare-decreasing interference as an obstacle to economic liberty. Fourth, in light of growing societal concerns about the concentration of corporate power, this study also signposts some of the parameters which would have to be recalibrated in order to realign competition law with a republican understanding of economic liberty and to reinvigorate the link between competition and democracy.

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INTRODUCTION

> *Desunt omnino ei populo multa, qui sub rege est, in primisque libertas, quae non in eo est, ut iusto utamur domino, sed ut nul{lo}.*
>
> *The people that is ruled by a king lacks a great deal, and above all it lacks liberty, which does not consist in having a just master, but in having none.*[1]

'[G]overnment of the people, by the people, for the people'.[2] At a time when the American nation was torn by the deep divisions of a hemorrhagic civil war, the 16th President of the United States of America ('US'), Abraham Lincoln, evoked with these solemn words democracy as unifying political future for the United States. Lincoln's 'Gettysburg Address' coined the triad of 'government of, by and for the people', which became deeply engrained in the political creed of liberal democracies.

On a chilly Saturday in October in 2016, at the peak of the campaign for the US presidential elections, the then Presidential candidate Donald Trump visited Gettysburg. On the same 'hallowed grounds'[3] of the battlefield of Gettysburg, where Lincoln uttered his famed definition of democracy, yet 153 years later, Donald Trump lamented that Lincoln's vision of American democracy was in tatters. He painted a bleak picture of US society, as a deeply 'divided nation' whose democratic and economic 'system is totally rigged and broken'. Trump blamed a 'power structure', epitomised in the surge of industry concentration in the US economy, as one of the reasons for the decline of America's political and economic system. And he lambasted several recent mergers for unifying 'far too much power in one massive entity' and 'destroy[ing] democracy'.

It is certainly not a historical coincidence that Donald Trump chose the symbolic venue of Lincoln's Gettysburg Address to bemoan the alleged decline of the US political and

[1] M. T. Cicero and M. v. Albrecht (eds), *De re publica: Lateinisch/Deutsch = Vom Staat* (Reclam 2013) Liber II, 42, p. 132. See for the English translation M. T. Cicero, *On the Commonwealth and On the Laws* (Cambridge University Press 1999) Book II, 42.

[2] Quotation based on the reproduction of Lincoln's Gettysburg address in R. D. Heffner (ed), *A Documentary History of the United States* (Penguin 2013) 210.

[3] All quotations in this paragraph are based on CNN, 'Trump Speaks in Pennsylvania; Examining Proposed Actions in First 100 Days of Trump Administration: Unofficial Transcript' (22 October 2016) <http://transcripts.cnn.com/TRANSCRIPTS/1610/22/cnr.03.html> accessed 7 November 2017.

economic system. Nor is it a coincidence that he mentioned the demise of democracy in the same breath as the decline of competition due to the combination of economic power in the hands of a few. On the contrary, the view that excessive concentration of private economic power is inimical to democracy has, over the last century, become a basic tenet of the self-understanding of US democracy and is widely shared across the political spectrum. Indeed, the notion that the concentration of economic power is incompatible with a democratic government is at least as old as US competition law itself. It has been repeatedly aired by the Congressmen during the legislative debate leading to the enactment of the Sherman Act as the first federal competition law in the US in 1890. Most prominently, Senator Sherman, the sponsor of the antitrust bill, called for the adoption of competition law arguing that the concentration of economic power within the hands of a few powerful corporations creates a 'kingly prerogative, inconsistent with our form of government' and urged that '[i]f we will not endure a king as a political power we should not endure a king over production, transportation, and sale of any of the necessaries of life.'[4]

Since then, the claim that concentrated economic power is detrimental to democracy has become a central theme of US antitrust policy, often repeated by policymakers, judges, academics, and political leaders alike. The idea that concentrated economic power poses a threat to democracy is, however, not only a uniquely American phenomenon. About half a century after Senator Sherman, in light of the rise of the German Nazi Regime and the doom of the Weimar Republic, a group of scholars at the University of Freiburg, the so-called 'Ordoliberals' or 'Freiburg School', warned that the destruction of competition by industry concentration and cartelisation ultimately undermines democracy. This Ordoliberal idea that competition contributes to the preservation of democracy has become a recurrent theme in the academic and political discourse about EU competition law.[5]

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[4] Senator 20 Cong Rec 2455 (1890) 1890 2458.

[5] G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997). J. Rankin, 'EU tech czar Margrethe Vestager: 'Social media could deactivate democracy' Competition regulator eschews a personal Facebook account 'to give her children free space'' <https://www.theguardian.com/world/2018/jun/08/margrethe-vestager-eu-tech-regulator-i-fear-social-media-will-deactivate-democracy> accessed 29 September 2019; M. Vestager, 'Speech - Competition and the digital economy: Paris OECD G7 conference' (2019) <https://wayback.archive-it.org/12090/20191129200956/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en> accessed 29 September 2019; J. Laitenberger, 'Speech - Competition enforcers and the body social: Rome Autorità, Mercato, Concorrenza. Farewell conference for Giovanni Pitruzzella' (2018) <https://ec.europa.eu/competition/speeches/text/sp2018_13_en.pdf> accessed 29 September 2019; A. Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018). Oxford Legal Studies Research Paper No. 17/2018; I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' [2013] CLES Working Paper Series, 26.

In recent times, the claim that concentration of economic power poses a threat to democracy has again moved centre stage, as the result of growing societal and political concerns about the unprecedented level of industry concentration in the US and, albeit to a lesser extent,[6] in the European economy. The soaring levels of industry concentration are increasingly perceived as a catalyst for the surge in economic inequalities,[7] waning productivity and lack of competition.[8] Not least the recent revelations of the infamous role of Cambridge Analytica, Facebook, Google and Twitter during the 2016 presidential elections and the Brexit referendum have sparked growing awareness for the political power that a few digital giants derive from their control over vast amounts of personal data and its potentially detrimental impact on the integrity of our democratic processes and institutions.[9] Recent studies, moreover, suggest that

[6] T. Valletti and others, 'Concentration trends in Europe: Presentation' (2017) <https://ecp.crai.com/wp-content/uploads/2017/12/Valletti-Concentration_Trends_TV_CRA-002.pdf> accessed 26 August 2019; M. Bajgar and others, 'Industry Concentration in Europe and North America' (2019). OECD Productivity Working Papers 18; M. C. Cavalleri and others, 'Concentration, market power and dynamism in the euro area' (2019). ECB Discussion Papers No 2253; T. Bell and D. Tomlinson, 'Is everybody concentrating?: Recent trends in product and labour market concentration in the UK' (2018); S. Corfe and N. Gicheva, 'Concentration not competition: the state of UK consumer markets' (2017); G. Gutiérrez and T. Philippon, 'How EU Markets Became More Competitive Than US Markets: A Study of Institutional Drift' (2018). NBER Working Paper No. 24700.

[7] See for instance J. Furman and P. Orszag, 'A Firm-Level on the Role of Rents in the Rise in Inequality: Presentation at "a Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University' (16 October 2015) <goodtimesweb.org/industrial-policy/2015/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf> accessed 4 November 2017.J. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Norton & Company 2013); R. B. Reich, *Saving Capitalism: For the Many, Not the Few* (Vintage 2015); J. Stiglitz, 'Inequality, Stagnation, and Market Power' (2017) <https://rooseveltinstitute.org/inequality-stagnation-market-power/> accessed 26 August 2019; D. Autor and others, 'Concentrating on the Fall of the Labor Share' (2017) 107(5) American Economic Review: Papers and Proceedings 180; Bajgar and others (n 6); S. Calligaris, C. Criscuolo and L. Marcolin, 'Mark-ups in the digital era' <OECD Science, Technology and Industry Working Papers> accessed 24 April 2019; T. Philippon, *The great reversal: How America gave up on free markets* (Harvard University Press 2019). See, however, the 'superstar firm' thesis suggesting that increases in concentration can be explained by superior productivity of a minority of large-scale firms D. Autor and others, 'The Fall of the Labor Share and the Rise of Superstar Firms' (2019) forthcoming Quarterly Journal of Economics.

[8] J. Furman and P. Orszag, 'Slower Productivity and Higher Inequality: Are They Related?' (2018). Working Paper 18-4; The Economist, 'Too much of a good thing: Profits are too high. America needs a giant dose of competition' (2016) <https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing> accessed 26 August 2019; J. B. Baker, 'Market power in the U.S. economy today' (2017) <https://equitablegrowth.org/market-power-in-the-u-s-economy-today/> accessed 26 August 2019; Stiglitz (n 7); R. Decker, J. Haltiwanger and Jarmin, Ron S. Miranda, Javier, 'Declining Dynamism, Allocative Efficiency, and the Productivity Slowdown' . FEDS Working Paper No. 2017-019 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922380> accessed 26 August 2019. Philippon (n 7); J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019) 17–31. For a critical discussion of this literature C. Shapiro, 'Antitrust in a time of populism' (2018) 61 International Journal of Industrial Organization 714; G. J. Werden and L. M. Froeb, 'Don't Panic: A Guide to Claims of Increasing Concentration' (2018) 33(1) Antitrust.

[9] M. Schwartz, 'Facebook Failed to Protect 30 Million Users From Having Their Data Harvested By Trump Campaign Affiliate' (30 March 2017) <https://theintercept.com/2017/03/30/facebook-failed-to-protect-30-million-users-from-having-their-data-harvested-by-trump-campaign-affiliate/>. The Economist, 'Do Social Media threaten Democracy: Facebook, Google and Twitter were supposed to save politics as good information drove out prejudice and falsehood. Something has gone very wrong' (4 November 2017) <https://www.economist.com/leaders/2017/11/04/do-social-media-threaten-democracy> accessed 23 September 2019; Select Committee on Communications of the House of Lords, 'Regulating in a digital world' (2019). 2nd

powerful firms are successful in transforming their corporate power through lobbying into political influence.[10]

In 2017, this concern about concentrated economic power has gained even more political prominence, as the Democratic Party issued a new political program, which promises a 'Better Deal' for American citizens and focuses on combatting economic concentration through reinvigorated competition law enforcement in order to re-empower American citizens.[11] Since then, two bills bolstering US merger control have been introduced to Congress with the aim of addressing the trend towards increased economic concentration.[12] In 2018, Senator Elizabeth Warren emerged as one of the leading candidates of the Democratic Party for the 2020 presidential race, marshalling growing popular support with her flagship proposition to break up big tech giants such as Google, Facebook or Amazon. The growing political concern about the negative impact of industry concentration and the power of big business on consumers, competition and democracy is also reflected in a (re)nascent debate on both sides of the Atlantic about the consequences of economic concentration on competition, distributive justice, and democracy.[13]

Report of Session 2017–19 HL Paper 299; R. Epstein and R. E. Robertson, 'The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections' (2015) 112(33) Proceedings of the National Academy of Sciences of the United States of America E4512-21; R. Epstein, 'How Google Could Rig the 2016 Election' (19 August 2015) <http://www.politico.com/magazine/story/2015/08/how-google-could-rig-the-2016-election-121548> accessed 9 August 2017; E. D. Hersh, *Hacking The Electorate: How Campaigns Perceive Voters* (Cambridge University Press 2015); D. Kreiss, *Prototype Politics: Technology-Intensive Campaigning and the Data of Democracy* (Oxford University Press 2016).

[10] M. Gillens and B. I. Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens' (2014) 12(3) Perspectives on Politics 564; K. Dellis and D. Sondermann, 'Lobbying in Europe: new firm-level evidence' (2017). ECB Working Paper Series No 2071/June 2017 <https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp.2071.en.pdf.> accessed 20 May 2019; M. D. Hill and others, 'Determinants and Effects of Corporate Lobbying' (2013) 42(4) Financial Management.

[11] US Democratic Party, 'A Better Deal - Better Jobs, Better Wages, Better Future: Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power' (2017) <https://abetterdeal.democraticleader.gov/crack-down-on-abuse-of-power/> accessed 4 November 2017.

[12] Merger Enforcement Improvement Act 14 September 2017. S. 1811 (115th Congress 1st session); Consolidation Prevention and Competition Promotion Act of 2017 14 September 2017. S. 1812 (115th Congress 1st Session).

[13] See for instance B. C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (Wiley 2010); H. First and S. Weber Waller, 'Antitrust's Democracy Deficit' (2013) 81(5) Fordham Law Review; S. Weber Waller, 'Antitrust and Democracy' (2019) 45((forthcoming)) Florida State University Law Review accessed 20 February 2019; E. M. Fox, 'The Symbiosis of Democracy and Markets: OECD - Directorate for Financial and Enterprise Affairs Competition Committee - Global Competition Forum - Competition and Democracy' (2017) <https://www.oecd.org/daf/competition/democracy-and-competition.htm>; E. M. Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) Legal Issues of Economic Integration 317.L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710; K. S. Rahman, 'From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age' (2016) 35 Yale Law & Policy Review 316; Competition Policy International, 'Antitrust's Inequality Conundrum?' [2017] Antitrust Chronicle; Z. Teachout and L. Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2014) 9 Duke Journal of Constitutional Law & Public Policy 37; T. Wu, *The Curse of Bigness: Antitrust in the new gilded age* (Columbia Global Reports 2018); A. Gerbrandy, 'Rethinking Competition Law within the European Economic

1 The Gap in the Literature

The notion of a link between competition and democracy has played and still plays a prominent role for the history and rhetoric of competition law and antitrust policy on both sides of the Atlantic. It is, therefore, all the more surprising that this link between competition and democracy has remained largely under-researched by the antitrust and broader social science literature. Currently, one can distinguish two types of studies attempting to shed light on this relationship.

The link between competition and democracy is, on the one hand, examined by political scientists and political economists who try to explore the general relationship between capitalism, competitive markets, and democracy.[14] As part of this 'democratic capitalism' literature, a recent number of empirical cross-country studies have inquired into whether there is a correlation or even causal link between democracy and competition law. These studies try to gauge whether (i) democracy furthers competition law,[15] and, *vice versa*, whether (ii) competition law enhances democracy.[16] Even if these studies find a positive relationship, which operates in both ways, the existing data does not suggest that there is a significant correlation.

On the other hand, since the late 1970s, there has been a critical strand in the antitrust literature that harnessed the theme of a competition-democracy nexus to challenge the argument put forward by the ascendant Chicago School that consumer welfare and efficiency are the sole legitimate goals of competition law. These scholars pointed out that the protection of competition through antitrust rules also pursues objectives other than economic welfare and efficiency; amongst them, most importantly, the protection of democracy.[17] This claim has

Constitution' (2019) 57(1) Journal of Common Market Studies 127; J. Drexl, 'Economic Efficiency versus Democracy: On the Potential Role of Competition Policy in Regulating Digital Markets in Times of Post-Truth Politis' . Research Paper 16-16; Ezrachi (n 5); M. Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (Simon & Schuster 2019).

[14] G. A. Almond, 'Capitalism and Democracy' (1991) 24(3) Political Science & Politics 467; R. Parakkal and E. E. Laine, 'Capitalism, Antitrust and Democracy: Perfect Partners or Strange Bedfellows?' (2) 61(2016) The Antitrust Bulletin.

[15] S. Weymouth, 'Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries' (2016) 61(2) Antitrust Bulletin 296.

[16] N. Petersen, 'Antitrust Law and the Promotion of Democracy and Economic Growth' (2013) 9(3) Journal of Competition Law & Economics 593; T.-C. Ma, 'Antitrust and Democracy: Perspectives from Efficiency and Equity' (2016) 12(2) Journal of Competition Law & Economics 233.

[17] L. B. Schwartz, '"Justice" and Other Non-Economic Goals of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1076; E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140; E. M. Fox, 'The Battle for the Soul of Antitrust' (1987) 75(3) California Law Review 917; E. M. Fox and L. A. Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming from-Where Are We Going' (1987) 62 N.Y.U. L. Rev. 936; R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051; R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008); Amato (n 5).

recently gained new traction amongst American critics of the consumer welfare standard as the lodestone of antitrust policy – the so-called 'Hipster Antitrust' or 'Neo-Brandeisian' movement.[18]

Both types of studies, however, omit to disentangle and spell out the link between competition and democracy. They fail to provide a clear and convincing answer to the question of how competition contributes to democracy; or conversely, why the concentration of private economic power is actually detrimental to democracy. These studies consequently neglect to articulate the precise link between competition, competition law and democracy.

1.1 The Lobbying or Interest Capture Account

In the existing literature, one can discern two complementary attempts to explain why the concentration of economic power is bad for democracy. The most recurrent explanation tries to identify some form of direct causality between the concentration of economic power and harm to democracy. This account assumes that powerful businesses can easily convert their economic power into political power through lobbying and interest capture. As a consequence, excessive concentration of economic power may erode or corrupt democratic processes and institutions and lead to rent-seeking, oligarchy and crony capitalism. Economic power allows big business to gain political power and influence, for instance, by enabling powerful corporations to lobby the government more effectively than smaller competitors. By influencing legislation and regulations in their favour or to the detriment of other market participants, big corporations are able to entrench or expand their economic power.[19] The existence of this reinforcing spill-over effect between economic and political power, or what Luigi Zingales has tellingly called the 'Medici vicious cycle',[20] has also been recently observed by empirical studies. Recent studies show a positive relationship between industry concentration, firm size and firms' contributions to political campaigns and lobbying

[18] Khan (n 13); Teachout and Khan (n 13). K. S. Rahman, 'Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?' (2016) 94 Tex. L. Rev. 1329; Rahman (n 13); K. S. Rahman and Khan Lina, 'Restoring Competition in the U.S. Economy' in N. Abernathy, M. Konczal and K. Milani (eds), *Untamed: How to Check Corporate, Financial, and Monopoly Power.* A Roosevelt Institute Report (2016); Khan (n 13); L. Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) Journal for European Competition Law & Practice 131; L. M. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harv. L. & Pol 235; Wu (n 13).

[19] L. Zingales, 'Towards a Political Theory of the Firm' (2017) 31(3) Journal of Economic Perspectives 113; Wu (n 13) 55–58; Baker (n 8) 27, 30, 55-56.

[20] Zingales (n 19), 114.

expenses.[21] Other studies also suggest that powerful corporations are more successful than smaller players and other social groups in lobbying government and capturing regulatory processes.[22] On this basis, some antitrust scholars have recently called for a more heavy-handed antitrust enforcement against big businesses with a view to disrupting the Medici vicious cycle and preserve the integrity of the political institutions.[23]

The concern about lobbying and interest capture as a transmission belt between economic and political power has certainly played a role in the emergence of the idea of a competition-democracy nexus. Yet, it nonetheless falls short of providing a comprehensive account as to why economic power is detrimental to democracy and why it should be the role of antitrust law to address this problem by tackling instances of concentrated economic power.

First, on a conceptual level, it is far from clear why interest capture is necessarily a problem that is particularly detrimental to democracy. On the contrary, it is equally conceivable that interest capture by big business undermines the integrity or impartiality of political institutions in an autocratic regime or a monarchy. While it can rightly be said that the Medici vicious cycle is likely to corrupt and undermine the impartiality of political institutions, proponents of this account fail to explain how interest capture actually undermines the specific democratic nature of those institutions and, thus, is contrary to a democratic form of government. On the contrary, pluralistic theories of democracy, coined by Madison's Federalist Paper No 10[24] and the work of Robert Dahl,[25] endorse to some extent lobbying, or in other words, interest group representation as an important element and alternative channel of democratic participation.

Second, this interest capture account also omits to explain why it should actually be the role of antitrust law to protect democratic institutions against the corrosive effect of lobbying and rent-seeking by big business. Arguably, this problem could be addressed more effectively

[21] G. Gutiérrez and T. Philippon, 'How Amercia lost its competitive edge' (2018) 18–20 <https://pdfs.semanticscholar.org/b004/082757b119adcbac267494789d631ac13838.pdf> accessed 14 March 2020; Philippon (n 7) 166–168.
[22] Gillens and Page (n 10); Dellis and Sondermann (n 10); J. E. Bessen, 'Accounting for Rising Corporate Profits: Intangibles or Regulatory Rents?' (2016). Boston Univ. School of Law, Law and Economics Research Paper No. 16-18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778641> accessed 20 March 2018; OECD, 'Market Concentration - Issues paper by the Secretariat' (2018). DAF/COMP/WD(2018)46 19–20 <https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf> accessed 20 May 2019; Khan and Vaheesan (n 18), 266–267; Teachout and Khan (n 13), 41–53.
[23] Wu (n 13) 58; Khan and Vaheesan (n 18), 265–268; Teachout and Khan (n 13), 70–72.
[24] A. Hamilton, J. Madison and John Jay, *The Federalist Papers: ed. Lawrence Goldman* (Oxford University Press 2008) Federalist No 10, p. 48.
[25] R. A. Dahl, *A Preface to Democratic Theory* (Chicago University Press 1956). R. A. Dahl, *Democracy and its Critics* (Yale University Press 1989).

through the adoption of specific regulations and rules, such as stricter campaign financing and lobbying regulations, which shield democratic processes and institutions from undue interest capture.[26]

Third, even if one were to agree that antitrust has a role to play in protecting democracy, the interest capture account fails to explain why this problem necessitates a more heavy-handed application of competition law against big business, which seeks to reduce instances of concentration of economic power. If interest capture and lobbying constituted the channels through which concentrated market power undermines democracy, it would arguably be more effective and less costly to apply antitrust rules directly against harmful rent-seeking or lobbying activities by which firms try to obtain anticompetitive legislation than seeking to reduce the level of industry concentration. Robert Bork, for instance, while being firmly opposed to any attempt to address the concentration of economic power directly through the application of antitrust laws, supported the application of competition law to anticompetitive lobbying. Such an approach would be much more targeted than a sweeping tightening of antitrust laws against big business, for it would only screen out those attempts of lobbying, which actually harm or are likely to harm competitors or competition.[27] Yet, the US Supreme Court[28] and, to some extent, the EU Courts[29] have rejected the application of competition law to lobbying out of fear that this would chill rather than protect democracy by curtailing the right to petition and inhibiting political participation.

The argument that a more rigorous application of competition law against concentrated economic power is necessary to protect democracy from undue corporate influence ignores yet another solution to address interest capture, which was also advocated by several members of the Chicago School. Based on George Stigler's seminal theory of regulation, many Chicago Scholars argued that the easiest way to protect democracy and competition from undue interest capture and special-interest protectionism consists of cutting back regulation and reducing the scope of government intervention.[30]

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[26] Baker (n 8) 61.
[27] R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 347–364.
[28] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington* 381 U.S. 657 (1965).
[29] Case T-432/05 *EMC Development v Commission* ECLI:EU:T:2010:189.
[30] G. J. Stigler, 'The Theory of Economic Regulation' (1971) 2(1) The Bell Journal of Economics and Management Science 3; S. Peltzman, 'Toward a More General Theory of Regulation' (1976) 19(2) The Journal of Law and Economics 211.

Even if there is a positive correlation between economic and political power, the argument that competition law should become tougher on big business to protect democracy, without any further qualifications, actually rests on shaky grounds and does not convincingly explain the idea of a competition-democracy nexus.

1.2 The Liberty Account

Apart from attempts to explain the idea of a competition democracy-nexus based on the causal relationship or correlation between high levels of economic and political power, antitrust scholars have also endeavoured to frame this link in more conceptual terms. Since the 1970s, heterodox antitrust scholars have suggested that the link between competition and democracy is grounded in the fact that competition promotes economic liberty and, at least to some extent, equality of opportunity.[31] This strand in the literature suggests that competition and antitrust law ultimately serve democracy by guaranteeing liberty and contributing to a free society. This 'liberty account' of the competition-democracy nexus echoes the assertion coined by libertarian thinkers, such as Friedrich August von Hayek and Milton Friedman, that competitive markets and capitalism are normatively superior to other economic systems because they enhance liberty.[32] This explanation of the competition-democracy nexus, however, also leaves many questions unanswered. In particular, the liberty account fails to explain how the protection of liberty promotes or protects democracy.

To understand the shortcomings of this liberty account in explaining the competition-democracy nexus, it is necessary to clarify the notion of liberty itself: What do we mean when we talk about liberty? In one of the most influential articles in the recent history of political theory, Isaiah Berlin has answered this question by coining the seminal distinction between positive and negative liberty.[33] Positive liberty describes what one could call 'self-determination'. From the perspective of positive liberty, I am free when I can realise my genuine, inner self, and decide on my own destiny. The notion of positive liberty lies at the heart of the ancient Athenian notion of democracy. Democracy was viewed as a manifestation

[31] See for instance Pitofsky (n 17); Fox (n 17); Fox (n 17); Fox and Sullivan (n 17); Amato (n 5); R. J. Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2000).
[32] Hayek, Friedrich A. von, *The Road to Serfdom* (Routledge 2001); Hayek, Friedrich A. von, *The Constitution of Liberty [1960]* (University of Chicago Press 2011); M. Friedman, *Capitalism and Freedom* (University of Chicago Press 1962).
[33] I. Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty : incorporating Four essays on liberty/ Isaiah Berlin* (Oxford University Press 2002) 168–181.

of positive liberty because it constituted the ultimate form of collective exercise of self-determination.

Since the terrors of the French revolution and the totalitarian experiences of the 20th century, positive liberty has, however, lost most of its normative and political appeal. From the 19th century onwards, liberals have been adamant in pointing out that the ideal of positive liberty and popular self-determination can be abused to inflict and justify the most atrocious violations of individual liberty in the name of the majority.[34] They, therefore, advocated an alternative, negative concept of liberty, which equals liberty with the absence of interference.[35] From the perspective of negative liberty, I am free when nobody else is interfering and obstructing my otherwise unrestricted choices or actions. Over the course of the last two centuries, this negative concept of liberty has become the predominant way of thinking about liberty. When we speak about liberty, we normally refer implicitly to this negative concept of liberty as non-interference. It is also this negative concept of liberty, understood as the absence of state and private interference with the sphere of autonomy and choices of (other) market participants, which Hayek, Friedman and other antitrust scholars seem to have in mind when they argue that competition enhances liberty.

The problem with attempts to explain the competition-democracy nexus by the fact that competition enhances economic liberty is that negative liberty is by no means inextricably linked with democracy. On the contrary, Berlin and Hayek have pointed out that negative liberty can be guaranteed irrespective of the specific form of the political regime, if there are some basic guarantees of liberty, such as constitutional rights and the rule of law, in place. This means that negative liberty can also be ensured in an autocratic system or a monarchy, as long as the autocrat or monarch is benevolent or constrained by constitutional rules and does not interfere with my actions or choices.[36] Not least, Hayek's and Friedman's support of the free-market reforms of the Pinochet regime in Chile provides empirical evidence for the argument that there is no direct or inescapable relationship between negative economic liberty, competitive markets, and democracy.[37]

[34] ibid 198. A. d. Tocqueville, *De la démocratie en Amérique I [1835]* (Éditions Gallimard 1981) 375; J. L. Talmon, *The Origins of Totalitarian Democracy* (Norton 1970).
[35] Berlin (n 33) 168–179.
[36] Berlin (n 33) 178; Hayek, Friedrich A. von (n 32) 72–74.
[37] J. Meadowcroft and Ruger William, 'Hayek, Friedman, and Buchanan: On Public Life, Chile, and the Relationship between Liberty and Democracy' (2014) 26(3) Review of Political Economy 358; B. Caldwell, Montes and Leonidas, 'Friedrich Hayek and His Visits to Chile' (2015) 28(3) The Review of Austrian Economics 261.

The concept of negative economic liberty, moreover, also fails to explain why Senator Sherman and others perceived the mere presence of concentrated economic power as a danger for democracy. The negative liberty of an individual, as defined by Berlin and other liberal thinkers, is only obstructed if another person or authority is actually interfering or likely to interfere with the individual in such a way that it cannot carry out a course of action it would otherwise embark on in the absence of actual or the threat of likely interference. Put simply, for the concentration of economic power, say in the hand of a giant firm, to be an obstruction of negative liberty, this power must be exercised in a way that the giant firm interferes or is likely to interfere with the sphere of autonomy of other market participants. The attempt to attribute the link between competition and democracy to the conduciveness of competitive markets to further negative economic liberty fails to explain why proponents of a competition-democracy nexus perceive the very existence and not only the exercise of concentrated market power as being at odds with liberty and democracy. The scholarly literature, which tries to ground the idea of a competition-democracy nexus in the role of competitive markets in enhancing economic liberty in its common negative sense, is hence also unconvincing on a conceptual and empirical level.

2 The Argument: Republican Liberty as Non-Domination at the Heart of the Competition-Democracy Nexus

Existing attempts to explain the link between competition, competition law, and democracy, thus, remain unsatisfactory. The goal of this study is to address this shortcoming, by taking a fresh look at the often repeated, but only rarely substantiated claim that there is a link between competition, competition law and democracy. It does so by drawing upon a new turn in political theory, which took place over the last twenty-odd years. More recent scholarship on the concept of liberty, most prominently by Philipp Pettit[38] and Quentin Skinner,[39] has sought to overcome the Berlinian dichotomy between positive and negative liberty. This scholarship has discovered that, along with positive and negative liberty, political thought has been for a long-time shaped by a distinct, third concept of republican liberty as non-domination. This third concept of republican liberty originates from the political philosophy

[38] P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997).
[39] Q. Skinner, *Liberty before Liberalism* (Cambridge University Press 1998); Q. Skinner, 'Rethinking Political Liberty' [2006] History Workshop Journal 156; Q. Skinner, 'A Third Concept of Liberty: Isaiah Berlin Lecture' in The British Academy (ed), *Proceedings of the British Academy: 2001 Lectures.* Volume 117 (Oxford University Press; British Academy 2002).

and legal doctrine in the ancient Roman Republic, which is most prominently recorded in the writings of Marcus Tullius Cicero,[40] Titus Livius (Livy)[41] and the Digest on Roman law by Justinian.[42]

2.1 A Third Concept of Republican Liberty as Non-Domination

Recent scholarship on this third, republican concept of liberty shows that Roman law defined liberty primarily in opposition to serfdom or slavery.[43] A person enjoys freedom if it is, unlike a slave, not subject to, or dependent on the arbitrary will or domination of a master. Being free in the Roman Republic was hence synonymous with enjoying the status of a free and independent citizen who is not subordinated to a master-slave relationship. This republican or neo-Roman version of liberty was carried over from antiquity in the Italian city-republics and is most prominently reflected in the writings of Machiavelli.[44] Being rooted in Roman law, it also influenced English common lawyers and shaped the struggle between Parliament and the Crown during the English Civil war. Republican liberty, moreover, fundamentally fashioned the ideal of a democratic republic envisaged by the founding fathers of the US Constitution, most prominently Thomas Paine,[45] Thomas Jefferson[46] and James Madison.[47] The ideal of republican liberty, thus, lay at the origin of the first republican democracy and has been the predominant way of how liberty was conceived until the late 18th century. Only during the 19th century, this republican version of liberty has non-domination has been crowded out and superseded by the negative concept of liberty as non-interference.

This third, republican concept of liberty as non-domination is inherently distinct from the categories of positive and negative liberty coined by Isaiah Berlin. Unlike positive liberty, the republican notion of independence and self-mastery has a clearly negative dimension because it is not confined to mere self-realisation. Rather, it is thought of as a defensive mechanism directed against domination. Unlike negative liberty, however, liberty in the republican sense does not only perceive interference as a source of unfreedom. On the contrary,

[40] Cicero (n 1).
[41] Titus Livius (Livy), *The History of Rome: Translated from the Original with Notes and Illustrations by George Baker, A.M.* (Peter A. Mesier et al. 1823).
[42] A. Watson (ed), *The Digest of Justinian: Volume I* (University of Pennsylvania Press 1985).
[43] 'Certainly, the great divide in the law of persons is this: all men are either free men or slaves.' ibid I, 5 (3).
[44] N. Machiavelli, *Discourses on Livy* (University of Chicago Press 1998).
[45] T. Paine, *Political Writings* (Cambridge University Press 2000).
[46] T. Jefferson, *Political Writings* (Cambridge University Press 2004).
[47] Hamilton, Madison and John Jay (n 24).

from the perspective of republican liberty, a person is unfree if it is subject to a relationship of subordination and dependent upon the arbitrary will of another powerful person.

Take, for instance, the relationship between a slave and his master. From the perspective of negative liberty, the slave is to be considered free as long as the master does not interfere or threaten to interfere with his actions. Likewise, a slave contract whereby a person voluntarily sells himself into the dominion of a master is not considered an obstruction of negative liberty. On the contrary, it is nothing more than the emanation of individual contractual freedom. By contrast, to proponents of republican liberty, a slave or servant cannot be considered free even if the master is benevolent and does not interfere with his choices or actions. And even if the slave-master relationship is the outcome of a contractual arrangement. From the republican vantage point, the liberty of the slave remains obstructed because the benevolent master can, at any time, change his mind and interfere with the slave at will.[48] A person, therefore, cannot be said to be free, as long as it is exposed to the whim and caprice of another person who has the discretionary power or capacity to interfere with him. In contrast to negative liberty, proponents of republican liberty are hence not only concerned about the actual or likely interference resulting from the *exercise* of power, but they rather perceive already the potential of arbitrary interference deriving from the mere *existence* of power as a source of unfreedom.

The second difference between negative and republican liberty is that the latter does not only presuppose the absence of interference, but its realisation is also predicated on individuals' enjoying an equal status of independence. The concept of republican liberty was always associated with the equal status of citizens in a republic. Republican liberty is, thus, best understood as civil liberty, which is equally guaranteed to all citizens by the laws of the Republic. As it seeks to guarantee liberty as equal and independent status, republican liberty is opposed to hierarchies and asymmetries of power and has an important egalitarian dimension. Republican liberty as non-domination hence offers a 'thicker' concept of liberty than the more recent negative version of liberty as non-interference does.

The third difference between negative and republican liberty, which is of crucial importance for the understanding of the competition-democracy nexus, is that republican liberty has always been associated with political self-government. Proponents of republican liberty argued that citizens could only be considered free, independent and not subject to some state of enslavement if they do not live under the authority of somebody else. Enjoying republican

[48] For this master-slave metaphor see Pettit (n 38) 22–24.

liberty, thus, presupposes that one lives under a free form of government, which ensures that the citizens can decide upon their own laws.[49] Republican liberty is hence closely associated with a specific form of republican polity in which the end of all government is to guarantee civil liberty as non-domination. Unlike negative liberty, republican liberty, therefore, cannot exist under any form of government, but can only thrive under a specific, republican form of government: in short, a republican democracy.[50]

2.2 The Core Argument

The central argument of this study is that the idea of a link between competition, competition law and democracy is anchored in and can only be explained by this third republican concept of liberty as non-domination. The concept of republican liberty succeeds where existing attempts to elucidate the link between competition and democracy fail.

First, republican liberty provides a better conceptual explanation of the link between competition and democracy than conventional accounts, which ground the competition-democracy nexus in the propensity of competitive markets to enhance liberty. Unlike the predominant way of thinking about economic liberty in negative terms as absence of interference by the state or private players, the republican concept of liberty as non-domination allows us to explain why proponents of a competition-democracy nexus perceived the existence of concentrated power in itself, and not only its exercise, as 'kingly prerogative' incompatible with 'our form of government'.[51] From the perspective of negative liberty, concentrated economic power can only represent a source of unfreedom when it gives rise to actual or likely interference. By contrast, from the vantage point of republican liberty, it is the mere existence of this power and the concomitant subjugation of market participants to the capacity of powerful firms to arbitrarily interfere with them whenever they see fit, which constitutes a source of unfreedom. From a republican perspective, living in the presence of concentrated economic power is like living in dependence on and under the domination of a benevolent, non-interfering master.

[49] See for instance P. Pettit, *On The People's Terms : A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 22, 179-185. Skinner (n 39) 23–28. While positive and republican liberty overlap in this point, unlike proponents of positive liberty, republican thinkers generally advocated representative rather than direct democracy.

[50] See however for the tensions between republicanism and (popular) democracy Mc Cormick, John P. 'Republicanism and Democracy' in A. Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2014) 89.

[51] Senator Sherman 20 Cong Rec 2455 (1890) (n 4) 2458.

Beyond answering the question of why the proponents of the competition-democracy nexus decried concentrated economic power as such, and not only its exercise, as a source of unfreedom, the concept of republican liberty also provides a convincing explanation of why they perceived the concentration of economic power and the ensuing unfreedom as being at odds with democracy. The crucial difference between negative and republican liberty is that republican freedom is linked with a specific form of republican, democratic government. Obstruction of liberty as non-domination hence becomes tantamount to an obstruction of a republican form of government. It is this crucial link between the perception of concentrated power as obstruction of republican liberty and the close kinship between republican liberty and republican democracy, which underpin and allow us to understand the idea of a competition-democracy nexus.

Second, the claim of this study that the competition-democracy nexus is grounded in republican liberty also offers a more convincing account of the link between competition and democracy than the existing literature, which suggests that competition law ought to protect democracy from lobbying or interest capture. Under the republican account, the primary channel through which concentrated economic power harms democracy is by creating instances of economic domination and frustrating the republican liberty as non-domination of market participants. The concept of republican liberty explains why proponents of the idea of a competition-democracy affirmed that the answer to the danger that concentrated economic power poses to democracy lies primarily in antitrust or competition laws, and not in, say, stricter rules on lobbying or campaign financing. This is not to say that the proponents of a competition-democracy nexus were not wary of the ability of big business to transform economic into political power. On the contrary, interest capture by big business was also considered an important channel through which concentrated economic power frustrates liberty as non-domination and democracy, as it undermines the ability of political institutions to adopt non-arbitrary laws and regulations. Yet, proponents of the competition-democracy nexus laid emphasis on the role of competition law to tackle domination in the economic sphere as the primary effect of the concentration of economic power. In tackling domination in the market place, antitrust law also indirectly addresses the capture of democratic institutions as the secondary adverse effect of concentrated economic power.

By drawing upon the concept of republican liberty, this study thus puts forward an alternative model of thinking about competition, which goes beyond the nowadays predominant, purely economic understanding of competition law. Competition, from this

perspective, can be understood as an institution, which prevents the concentration and abuse of economic power by dispersing it amongst many players and by ensuring that all players keep each other in check through their rivalrous interaction. Competition thus plays the role of what Philipp Pettit calls an 'institution of antipower',[52] which reduces domination by dispersing economic power amongst many players and subjects them to competitive pressure.

This study shows that the role of competition in promoting republican liberty as non-domination and the equal status of market participants prominently figured as an essential feature in the understanding of competitive markets by early political economists, such as Adam Smith, John Steuart and the English Levellers. These early proponents of competitive markets celebrated the ascent of a competitive market society as a harbinger of liberty and equality, which would transform the feudal society characterised by hierarchical relationships of subordination and domination into a heterarchical society of free and equals. It is already these early proponents of competitive markets who coined the rudimentary idea of a competition-democracy nexus. Indeed, they argued that, by diminishing domination and promoting equality, the advent of competitive markets also brought about political liberty, the rule of law and a republican or democratic form of government.

This idea of a competition-democracy nexus which perceives competition as a catalyst of liberty as non-domination and equal status, I argue, also laid at the root of US and EU competition law. Revisiting the legislative debates of the Sherman Act, I suggest that the concern about liberty as non-domination and the egalitarian ideal of a Jeffersonian society in which economic power and opportunity are dispersed amongst many, small and independent businesses has played a prominent role in the adoption of the Sherman Act. Until the 1970s, the concern about the domination resulting from concentrated economic power and its adverse effect on liberty and democracy constituted a recurrent theme of American antitrust policy.

This study also shows that the ideal of republican liberty lay at the origins of the idea of a competition-democracy nexus in EU competition law. It identifies the concern about liberty as non-domination as a central value in the thinking of the German Ordoliberal school which importantly influenced the design and interpretation of EU competition law.[53] The study also

[52] P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576 577, 588.
[53] The influence of Ordoliberalism on EU competition law is well documented D. J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (1994) 42(25) American Journal of Comparative Law 25. D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press; Oxford University Press 1998) Chapter VII and IX; K. K. Patel and H. Schweitzer, 'Introduction' in K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* 7–8; S. M. Ramírez and van de Scheur, Sebastian, 'The Evolution of the Law on Articles 85

describes how the central proposition of the Ordoliberal School that competition plays a vital role in the preservation of democracy emanates from this concern about republican liberty as non-domination. The Ordoliberals perceived competition as a safeguard of the ideal of what they called a 'private law society'. In a similar vein as the ideal of the Jeffersonian society in US antitrust, this Ordoliberal concept of a private law society envisages a republican, domination-free society of free and equals. In line with the republican tradition, the German Ordoliberals located the link between competition and democracy primarily in the fact that competitive markets disperse economic power and facilitate a domination-free coordination of economic activity.

This study also explores how the concern about republican liberty as the normative backbone of the competition-democracy nexus shaped the interpretation and application of US antitrust law until the 1970s and of EU competition rules until the 2000s. It shows how US and EU antitrust policy operationalised the ideal of republican liberty as non-domination through a structuralist approach, which was geared towards the protection of competition as a polycentric market structure. Focusing on the use of presumptions of illegality, a specific standard of proof, and understanding of the costs and benefits of competition law intervention, the study also identifies the principal legal devices or channels through which US and EU competition law translated the concern about republican liberty into concrete competition policy. This allows us to identify the essential features of what one can call 'republican antitrust' or a 'republican approach' to competition law.

This study, however, does not only confine itself to elucidating the role of republican liberty for the idea of a competition-democracy nexus and its operationalisation through US and EU competition law. Rather, it also seeks to explain why the republican concept of liberty and with it the idea of a competition-democracy nexus became largely irrelevant for contemporary antitrust law. The influence of the concern about liberty as non-domination started to wane and eventually went astray with the rise of the Chicago School during the 1960s and 1970s in the US. With the shift towards a More Economic Approach in EU competition law at the end of the 1990s, the republican approach and the idea of a competition-democracy nexus also lost foothold in Europe.

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and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge' in K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* 20–27. For the opposite view see however P. Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (CCP Working Paper, 2007); A. Wigger, 'Debunking the Myth of the Ordoliberal Influence on Post-war European Integration' in C. Joerges and J. Hien (eds), *Ordoliberalism: Law and the rule of economics* (Hart Publishing 2018).

The conventional account suggests that the decline of political goals of antitrust and competition law was the consequence of the Chicago School's precept to reconcile antitrust with the insights of economics and the consequentialist goal of wealth maximization. This study provides a different account of how the Chicago School antitrust revolution contributed to the decline of the republican concept of liberty in US and EU antitrust. It shows that the consumer welfare standard put forward by the Chicago School constituted at the same time a disguise of and a principled framework for the realignment of competition law with the logic of negative liberty. The Chicago School, indeed, understood consumer welfare as the sum of all voluntary mutually-beneficial transactions, or, in other words, the aggregate of all exercises of freedom of contract in an economy.[54] Maximising consumer welfare, thus, means nothing else than maximizing the exercise of negative (contractual) liberty in the market. Based on the consumer welfare approach, the Chicago School advocated a limitation of antitrust intervention to the instances where business conduct actually or likely interferes with the negative economic liberty of other market participants. As a consequence of this alignment of US and EU competition law with the negative understanding of liberty as non-interference, the concern about the concentration of economic power and the ensuing domination became irrelevant for antitrust enforcement. The Chicago-inspired modernisation of US and EU competition law and the endorsement of a consumer welfare standard thus entailed a shift from an antitrust policy, which hinged on the concern about the adverse impact of domination flowing from economic concentration on republican liberty and democracy, to an approach which seeks, in the first place, to protect entrepreneurial liberty against state interference and coercion.

The study, moreover, explores how this shift from a republican approach, grounded in the concern about republican liberty, to a '*laissez-faire* approach', anchored in negative liberty, reconfigured the interpretation and application of the substantive US and EU competition rules. This study, thus, also identifies the main parameters of what one could call '*laissez-faire* antitrust' and illustrates how the ascent of the consumer welfare standard coined by the Chicago School entrenched a *laissez-faire* competition policy which clearly leans towards the protection of the negative entrepreneurial liberty against state intervention.

[54] R. A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8(1) The Journal of Legal Studies 103. R. A. Posner, 'Wealth Maximization Revisited' (1985) 2 Notre Dame Journal of Law, Ethics and Public Policy 85; G. J. Stigler, 'Wealth, and Possibly Liberty' (1978) 7(2) The Journal of Legal Studies 213.

3 Contribution to the Existing Literature

The most important contribution of this study to the existing scholarly literature is that it provides a clear answer to the research question of what the link between competition and democracy actually consists of. With the argument that the idea of a competition-democracy nexus is anchored in the concern about republican liberty as non-domination, this study puts forward an answer that is firmly grounded in political and legal theory. It also excavates how this concept has influenced antitrust policy in the US and Europe both in terms of the understanding of the goals of competition law and the substantive interpretation of competition law provisions. To this end, it embarks on a full-fledged analysis of the role of republican liberty as the essential conceptual backbone of the idea of competition-democracy nexus and inquires into how this concern has been operationalised through the interpretation and application of antitrust rules. Moreover, in arguing that the rise of the Chicago School entailed the crowding out and superseding of the concept of republican liberty by a narrowly defined negative concept of liberty, this study also provides a new, theory-based account of why the idea of a competition-democracy nexus went astray over the last decades. By elucidating the claim that competition and competition law are crucial for the preservation of democracy, this study constitutes the first comprehensive attempt to disentangle a basic normative assumption underpinning competition law, which has often been alluded to but never fully spelled out.

The second overarching contribution of this study is of methodological and conceptual nature. The history of US antitrust law[55] and EU competition law[56], as well as the rise of the More Economic Approach[57] in the aftermath of the Chicago antitrust revolution are well-researched. Yet, the existing scholarly research lacks a coherent theory of liberty which allows

[55] H. B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Johns Hopkins Press 1955); W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago University Press 1981 [1959]); Peritz (n 31); D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013).

[56] Gerber (n 53); Gerber (n 53).H. Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008); K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* ; P. Behrens, 'The "Consumer Choice Paradigm" in German Ordoliberalism and its Impact upon EU Competition Law' (Europa-Kolleg Hamburg - Discussion Paper N°1/14, Hamburg 2014) <http://www.econstor.eu/handle/10419/95925> accessed 15 February 2015.

[57] R. A. Posner, 'The Chicago School of Antitrust Analysis' (1979) 127(4) University of Pennsylvania Law Review 925; H. Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84(2) Michigan Law Review 213; Pitofsky (n 17); Fox and Sullivan (n 17); Fox (n 17); Fox (n 17); W. E. Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago-Harvard Double-Helix' (2007) 1(1) Columbia Business Law Review 1; Pitofsky (ed) (n 17). For a comprehensive analysis of the advent and ascent of the more economic approach in Europe A. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016).

it to grasp and articulate the most fundamental tensions and shifts pervading the history of antitrust. The author, who comes perhaps closest to the approach taken in this study, is Rudolph Peritz. He argued that the history of US antitrust is marked by a tension between what he sometimes refers to as 'republicanist conception of industrial liberty'[58] on the one, and an understanding of economic liberty understood as contractual freedom and the protection of common law property rights on the other.[59] Along similar lines, Eleanor Fox intimated in her critique of the Chicago School antitrust revolution that the ascent of the Chicago School brought about an important shift in the understanding of economic liberty as liberty of competitors and consumers to entrepreneurial liberty.[60] The existing literature, moreover, has rightly underlined the important role of the goal of economic liberty for Ordoliberalism and EU Competition law, without however actually offering a consistent account of the Ordoliberal concept of liberty.[61] All those studies have in common that they do not rely on a coherent theoretical framework to flesh out the specific characteristics, commonalities, and differences of those various, at times conflicting, notions of economic liberty.

This study addresses this conceptual shortcoming by turning to political theory with a view of bringing some more conceptual clarity into the role of liberty in shaping the idea of a link between competition and democracy. It is the first study, which brings together the rather recent rediscovery of the third concept of republican liberty by political theory and the analysis of competition law. Apart from the recent work by K. S. Rahmaan,[62] whose research, however,

[58] Peritz (n 31) 15.
[59] ibid 34. See for an overview the entire chapter 1 of ibid. See also R. J. Peritz, 'A Counter-History of Antitrust Law' (1990) 39(2) Duke Law Journal 263. See for another author pointing out the tension between different concepts of liberty as 'dilemma of liberal democracy' Amato (n 5) 2.
[60] Fox (n 17), 1156–1157. Fox and Sullivan (n 17), 945-947 and Annex entitled 'Rewriting the lexicon.
[61] Gerber (n 53); Gerber (n 53); F. Maier-Rigaud, 'On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete' in D. Zimmer (ed), *The Goals of Competition Law* (Elgar 2012); H. Schweitzer, 'Efficiency, Political freedom and the Freedom to Compete: Comment on Maier-Rigaud' in D. Zimmer (ed), *The Goals of Competition Law* (Elgar 2012); Amato (n 5) 99. W. Möschel, 'Competition Policy from an Ordo Point of View' in A. T. Peacock, H. Willgerodt and D. Johnson (eds), *German neo-liberals and the social market economy* (Macmillan for the Trade Policy Research Centre 1989) 142; G. Monti, 'Article 81 EC and Public Policy' (2002) 39(5) Common Market Law Review 1057 1059–1061; J. S. Venit, 'Article 82: The Last Frontier - Fighting Fire with Fire' (2004) 28(4) Fordham International Law Journal 1157 1163–1164; J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 25(5) European Competition Law Review 263 263, fn 41.
[62] Rahman (n 18); Rahman (n 13); K. S. Rahman, *Democracy against Domination* (2017). Rahman's work is reflected in some of the recent scholarly writings of academics who are associated with the 'Neo-Brandeisian' approach to antitrust law. Some authors, for instance suggest that Louis Brandeis and other advocates of an heavy-handed antitrust enforcement were not only concerned about the exercise but existence of economic power Teachout and Khan (n 13), 58–60. In another piece, Khan also states that antitrust law has moved away from an approach which perceived the concentration of private power as domination and observes a shift 'from a republican theory of antitrust to a neoliberal one', without however engaging in a detailed discussion of the republican concept of liberty L. M. Khan, 'The Ideological Roots of America's Market Power Problem' [2018] Yale Law Journal Forum 960, 970..

mostly focuses on the role of the concept of republican liberty for the political economy of Louis Brandeis and President Woodrow Wilson, no such attempt has been made. This study, thus, offers a new language and conceptual framework to understand the historical trajectory and transformation of antitrust law from an approach grounded in concern about the concentration of economic power and market structure to a More Economic Approach pursuing the goal of consumer welfare. In harnessing the concepts of republican and negative liberty to gain a better understanding of antitrust law, this study offers what one could consider a rudimentary theory of liberty for competition law.

Based on this innovative methodological and conceptual framework, this study also makes a number of substantive contributions. First, the concept of republican liberty allows us to trace back the concept of a competition-democracy nexus to the early proponents of competitive markets, such as Adam Smith. It also identifies republican liberty as the common denominator of the concept of a competition-democracy nexus amongst the framers and most fervent advocates of the antitrust laws in the US, and Ordoliberalism in Europe. This study thus goes beyond the existing literature on the link between competition and democracy both in terms of its historical and geographical scope.

Second, the substantive scope of this study also transcends existing scholarly writing on the idea of a competition-democracy nexus. Scholarly work, which claims that competition law contributes to the preservation of democracy, confines itself to stating that democracy traditionally constitutes an important goal of US and EU competition law.[63] Yet, it omits to spell out how the competition-democracy nexus has been operationalised through concrete competition policy. By identifying the main features of 'republican antitrust' in the US and in Europe, this study traces how the idea of a competition-democracy nexus has been translated through the application of US and EU competition rules to anticompetitive agreements, unilateral abuses of market power and merger control.

Third, this study is also innovative because it explains the shift from a structuralist towards a More Economic Approach on both sides of the Atlantic by the thinning out of a republican concept of economic liberty and its displacement by a narrow, *laissez-faire* understanding of negative liberty. It thus diverges from existing scholarship, which explains the shift towards a More Economic Approach as an attempt to align US antitrust law and EU

[63] Pitofsky (n 17).Fox (n 17); Fox and Sullivan (n 17); Amato (n 5); Lianos (n 5); Ezrachi (n 5); First and Weber Waller (n 13).

competition law with a concern about total or consumer welfare.[64] It challenges the prevailing account, which portrays the rise of the More Economic Approach and the consumer-welfare standard as a triumph of the value-free, objective, and quasi-scientific discipline of economics over the ideologically overloaded understanding of competition prevailing in the US up to the 1970s and, albeit to a lesser extent, in Europe until the late 1990s.[65] Approaching the Chicago School antitrust programme as a blueprint of an antitrust policy based on the concept of negative liberty, this study enriches a heterodox strand in the literature, which underscores that the ascent of the Chicago School and the More Economic Approach took place in the broader context of a deregulatory shift in the economic policy in the US and was driven by the goal of curtailing the scope of competition law and government intervention.[66] It thus sheds new light on the ideological thrust, precepts, and implications of the modern, *laissez-faire* version of antitrust prevailing in the US and gaining a foothold in Europe.

Competition law in the US and in Europe is currently at the crossroads. In light of the soaring levels of industry concentration, the rise of new business models and powerful companies in particular in the digital economy, a growing number of scholars advocate a more robust and holistic application of antitrust law, which accounts for the economic and non-economic implications of concentrated economic power. To this end, those scholars call for an abandoning of the predominant consumer welfare standard and inquire into alternative goals and standards which would render competition law capable of accounting for the adverse effects of concentration of economic power going beyond higher prices. [67] In the light of growing concerns about the economic power of digital platforms, competition authorities and expert

[64] Posner (n 57); Hovenkamp (n 57); Fox and Sullivan (n 17); Fox (n 17); Fox (n 17); Kovacic (n 57); Pitofsky (ed) (n 17). Pitofsky (n 17).For a comprehensive analysis of the advent and ascent of the more economic approach in Europe Witt (n 57).

[65] See for instance Bork (n 27) 5, 8, 91, 116-129. Posner (n 57). F. H. Easterbrook, 'The limits of Antitrust' (1984) 63(1) Tex. L. Rev. 1. J. D. Wright, 'Statement of Joshua D. Wright University Professor Antonin Scalia Law School at George Mason University before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Protection: Hearing on 'The Consumer Welfare Standard in Antitrust Law: Outdated or Harbor in a Sea of Doubt?' Washington D.C December 13, 2017' (2017) <https://www.judiciary.senate.gov/download/12-13-17-wright-testimony> accessed 29 September 2019. For a similar account with respect to EU competition law A. J. Padilla and C. Ahlborn, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008).

[66] Fox (n 17), 1145. E. M. Fox, 'Consumer Beware Chicago' (1986) 84(8) Michigan Law Review 1714 1715, 1719; E. M. Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window' (1986) 61 N.Y.U. L. Rev. 554 555, 576.

[67] See for instance Lynn (n 13); First and Weber Waller (n 13); Weber Waller (n 13); Fox (n 13).Khan (n 13); Rahman (n 13); Competition Policy International (n 13); Teachout and Khan (n 13); Wu (n 13); Gerbrandy (n 13); Drexl (n 13).

panels across the globe have produced reports which explore how competition law should be reformed so that it can address the challenges posed by the digital economy.[68]

As a fourth substantive contribution, this study offers with the concept of republican liberty as non-domination a framework to better understand the currently re-emerging concern about the concentration of economic power and the calls for a return towards a more structuralist approach. It contributes to this policy discussion by revealing the major vectors through which the shift from a republican towards a *laissez-faire* approach has materialised. In so doing, this study signposts which parameters would have to be modified in order to revert this trend and align competition law with concern about liberty as non-domination and the ideal of a competition-democracy nexus. The conclusion provides a synthesis of these vectors and discusses some of the existing and potential avenues of reform, which would recalibrate the current application of US and EU competition law with the concern about republican liberty as non-domination and reinvigorate the link between competition and democracy.

This study also purports to contribute to a broader scholarly debate that transcends the strict remits of competition law scholarship. First, this study makes a contribution to the growing literature on republican liberty in the field of political economy[69] and economic law.[70] By spelling out how republican liberty has shaped antitrust law on both sides of the Atlantic, this study puts forward a concrete case study for the role of the concept of republican liberty in economic law and regulation. It thus adds to the literature on republican liberty in legal and political theory alike.

Second, by inquiring into the role of republican liberty as non-domination and its replacement by a narrow concept of negative liberty under the auspices of the Chicago School, this study also contributes to the existing literature on neoliberalism. Apart from some

[68] H. Schweitzer and others, 'Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany): English Abstract' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742> accessed 3 April 2018; J. Furman and others, 'Unlocking digital competition: Report of the Digital Competition Expert Panel' (2019); J. Crémer, A.-Y. de Montjoye and H. Schweitzer, 'Competition policy for the digital era' (2019); Stigler Committee on Digital Platforms, 'Final Report' (2019) <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report> accessed 20 September 2019; M. Schallbruch, H. Schweitzer and A. Wambach, 'Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft Bericht der Kommission Wettbewerbsrecht 4.0' (2019) <https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4-0.html> accessed 20 September 2019.

[69] See for a recent use of the concept of republican liberty D. Acemoglu and J. A. Robinson, *The Narrow Corridor* (Viking-Penguin 2019) 6.

[70] P. Pettit, 'Freedom in the Market' (2006) 5(2) politics, philosophy & economics 131.E. Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination?' (2017) 9(2) European Journal of Legal Studies 103; Rahman (n 62).

exceptions,[71] the existing literature on neoliberalism arguably remains unsatisfactory in so far as it fails to pin down which concept(s) of liberty underlie(s) the ascent of what is often treated as a monolithic ideological paradigm of neoliberalism. Recent literature, indeed, centres on the role that epistemic communities and networks, such as the Mont Pèlerin Society founded in 1947 by Friedrich August von Hayek and Wilhelm Röpke, played in the emergence and rise of neoliberalism. Drawing on this primarily institutional understanding of neoliberalism, this literature considers 'any person or group that bears any links to the Mont Pèlerin Society (MPS) since 1947 as falling within the purview of the neoliberal thought collective'.[72] As a consequence, this literature all too easily bunches together Ordoliberalism, the Austrian School of von Hayek and von Mises and the Chicago School of law and economics as sharing the same features of a 'neoliberal thought collective'.[73] This mainstream account of neoliberalism does not only obfuscate the fundamental disagreements about competition policy that existed between Ordoliberal, Austrian and later Chicagoan thinkers within the Mont Pèlerin Society.[74] It also brushes over the divergent understandings of economic liberty that, for instance, differentiated the liberalism, say of the Ordoliberal or Harvard School, from that of the Chicago School, and which, in turn, explain their conflicting conceptions of competition law and policy. In thoroughly distinguishing between the different concepts of republican and negative liberty underpinning various streams of liberal thought of competition law paradigms during the 20th century, this study provides a more nuanced picture of the rise of the Chicago School as a specific version of neoliberalism, its presuppositions and its underpinning understanding of the relationship between the state and the market.

[71] M. Foucault, *Naissance de la Biopolitique: Cours au Collège de France, 1978-1979* (Gallimard; Seuil 2004).
[72] D. Phlewe, 'Introduction' in D. Plehwe and P. Mirowski (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective, With a New Preface* (Harvard University Press 2015) 4.
[73] P. Mirowski, *Never let a serious crisis go to waste: How neoliberalism survived the financial meltdown* chapter 2; A. T. Peacock, H. Willgerodt and D. Johnson (eds), *German neo-liberals and the social market economy* (Macmillan for the Trade Policy Research Centre 1989); H. Buch-Hansen and A. Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy' (2010) 17(1) Review of International Political Economy 20; C. Joerges, 'What is left of the European economic constitution?' (Working Paper, 2004); F. W. Scharpf, 'The asymmetry of European integration, or why the EU cannot be a 'social market economy'' (2010) 8(2) Socio-Economic Review 211; R. Ptak, 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy' in D. Plehwe and P. Mirowski (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective, With a New Preface* (Harvard University Press 2015); Wigger (n 53) 169–170.
[74] S. Kolev and J.-O. Hesse, 'Walter Eucken's Role in the Early History of the Mont Pèlerin Society' . Freiburg Discussion Papers on Constitutional Economics 14/02 9–20; S. Kolev, N. Goldschmidt and J.-O. Hesse, 'Debating liberalism: Walter Eucken, F. A. Hayek and the early history of the Mont Pèlerin Society' (2019) 13(4) The Review of Austrian Economics 543.

4 Methodology

At this point, some further comments about the methodology of this study are in order. This study largely relies on doctrinal legal research as it tries to understand how the concept of a competition-democracy nexus influenced competition law and legal reasoning. This, however, does not mean that this study relies on a 'black letter law' approach. On the contrary, to get to grips with the concept of the competition-democracy nexus, this study relies on a multi-disciplinary, 'law-in-context' approach that harnesses political theory, economics, legal analysis, and historical research.

This study also takes a comparative angle, as it focuses on the idea of a competition-democracy and its operationalisation in US antitrust and EU competition law. To this end, this study draws upon a comprehensive analysis of the case law, legislation, decisional practice and policy documents of the US and EU courts and competition authorities. The choice of US antitrust and EU competition law for this comparative study is motivated by three reasons. First, even though the idea of a competition-democracy nexus also percolates other competition law regimes, such as Japan[75] or South Africa,[76] US antitrust law and EU competition law were historically the first competition law regimes that were grounded in a concern about the adverse effect of private economic power on democracy. Second, despite important differences, the three substantive pillars of US and EU competition law – the prohibition of anticompetitive agreements, the regulation of firms with monopoly power and merger policy – display important commonalities and are sufficiently close to lend themselves for an insightful comparison.[77] The third reason for the choice of US and EU competition law is a pragmatic one. Most literature on the role of competition law for democracy focuses on either US[78] or EU[79] competition law or both[80] regimes. Taking a transatlantic focus, thus, on the one hand, allows us to build upon and engage with already existing research; on the other hand, this transatlantic focus also allows us to contribute to the ongoing debate about the role of

[75] S. Vande Walle, 'Competition and Competition Law in Japan: between Scepticism and Embrace' in M. W. Dowdle, J. Gillespie and Maher Imelda (eds), *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge University Press 2013).
[76] E. M. Fox, 'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41(2) Harvard International Law Journal 579.
[77] See for instance D. J. Gerber, 'Comparative Antitrust Law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).
[78] Pitofsky (n 17). Fox (n 17); Fox and Sullivan (n 17).
[79] Gerber (n 53).
[80] Amato (n 5).

competition law in curtailing private power, which so far focuses mostly on US and EU competition law.

One word of caution may appear necessary with respect to the methodology of the comparative analysis of US and EU competition law carried out in this study. The goal of this study is to uncover the rise and fall of republican liberty as the common denominator underpinning the idea of a competition-democracy nexus in EU and US competition law. As a consequence, its emphasis naturally lies on the common features in the evolution of both competition law systems. This focus on the commonalities should, however, not obfuscate the important differences that have always existed and that will – signs of growing convergence notwithstanding[81] – continue to exist between US and EU antitrust law. These differences are well documented in the literature.[82] Some of them are also addressed in Chapters IV to VII of this study.

A number of important methodological choices of this study are also worth being made explicit. This study provides the first comprehensive account of the history of the idea of a competition-democracy nexus in the US and in Europe. Its account and structure, therefore, follow a historical timeline. This, however, does not mean that it aspires to provide an exhaustive historical account of the impact of the idea of republican liberty on economic regulation from Ancient Rome to our days. Instead, it centres on several historical episodes that arguably had the most important impact on the trajectory of the imaginary of the competition-democracy in US and EU antitrust law. This historiographic approach is hence inherently selective, as it leaves aside some historical periods of the evolution of competition law in Europe and the US, such as the regulation of competition by English common law,[83] the history

[81] On this point D. J. Gerber, *Global competition: Law, markets and globalization* (Oxford University Press 2010) 186–203. Witt (n 57) 258–260; F. Szücs, 'Investigating transatlantic merger policy convergence' (2012) 30(6) International Journal of Industrial Organization 654.
[82] See for instance R. Whish and B. Suffrin, 'Article 85 and the Rule of Reason' (1987) 7(1) Yearbook of European Law 1; Schweitzer (n 56); P. Larouche and M. P. Schinkel, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act' (TILEC Discussion Paper No. 2013-02, Tilburg 2013)); S. Weber Waller, 'The Omega Man or The Isolation of U.S. Antitrust Law' [2018] <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295988> accessed 20 January 2020; For an excellent and succinct comparative analysis of all three pillars of EU and US competition law van den Bergh, Roger, *Comparative Competition Law and Economics* (Edward Elgar 2017).
[83] See for instance Thorelli (n 55) 9–50; Letwin (n 55) 18–52.

of competition law in Europe prior to Ordoliberalism,[84] the New Deal era[85] and the drafting history of EU competition rules.[86]

In tracing the trajectory of the link between competition and democracy, this study uses a few dates, such as the 1970s or the late 1990s and early 2000s, to mark the historical turning points of the rise and fall of republican antitrust and the idea of a competition-democracy nexus. These dates should, however, not be read as precise historical cut-off points indicating a sudden reversal in the way how competition law has been understood, interpreted and applied. The evolution of US and EU antitrust doctrine and case law has always been an incremental, often non-linear and, at times, messy process. Instead of seeking to squeeze this evolution into clearly distinct historical eras, the dates provided in this study should serve the reader with some chronological signposts and points of reference in the eventful history of the competition-democracy nexus in EU and US competition law.

It is further important to note that, despite its historical approach, this study in some parts also openly reverts to anachronisms. Most importantly, it uses various theoretical and legal concepts, such as republican and negative liberty, legal presumptions, standard of proof or error-costs as epistemological tools to discern and illustrate how the idea of a competition-democracy nexus has been given shape through competition law. In so doing, I am not suggesting that the protagonists of what I describe as a republican vision of antitrust or Chicago scholars actually or consciously thought in exactly these categories or used the same terminology. Of course, this would have been in part utterly impossible because, for instance, the notion of 'error-costs' has only been coined in the 1970s, [87] and the concept of republican liberty as a distinctive understanding of liberty has only been rediscovered in the last 20-odd years. Rather, I argue that these concepts articulate most faithfully how the idea of a competition-democracy nexus was conceived, how it was operationalised and why it largely disappeared. This study thus applies these concepts in retrospect in order to provide a systematic account of how competition law and lawyers on both sides of the Atlantic gave effect to and defied the abstract idea of the competition-democracy nexus. Using these contemporary concepts and terminology, is also the most effective way to convey the policy instruments and

[84] See for instance Gerber (n 53) Chapters 1-6.
[85] See for instance Peritz (n 31) 111–180.
[86] H. Schweitzer, 'Parallels and Differences in the Attitudes towards Single-Firm Conduct: What are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC' . EUI Law Working Paper 32/2007 9–18 <http://cadmus.eui.eu/handle/1814/7626> accessed 30 September 2018.
[87] R. A. Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2(2) The Journal of Legal Studies 399 400; I. Ehrlich and R. A. Posner, 'An Economic Analysis of Legal Rulemaking' (1974) 3(1) The Journal of Legal Studies 257 262.

legal mechanisms through which republican liberty and the ideal of competition-democracy nexus have been translated into competition policy to the contemporary reader and antitrust community. Linking the concepts of republican and negative liberty with specific notions of legal presumptions, the standard of proof and error-cost frameworks thus also allows us to harness new tools to enhance our understanding of the evolution of US and EU competition law.

This study has also occasionally recourse to political economy in its contemporary meaning – that is, the 'methodology of economics applied to the analysis of political behavior and institutions'[88] – to explore the dynamics underlying the emergence and retreat of the goal of republican liberty and the ideal of a competition-democracy in US and EU competition law. Yet, this study does not purport to provide a systematic analysis of the question of '*cui bono?*' to identify specific interest groups that benefitted from the rise and fall of republican antitrust.[89] Nor does it harness political economy to analyse the role of political and regulatory institutions in promoting or implementing the goal of a competition-democracy nexus. While it touches on some institutional and procedural features of antitrust enforcement, the gist of this study lies in the discussion of role republican liberty and the idea of a competition-democracy nexus played in the evolution and interpretation of the substantive competition laws on both sides of the Atlantic.

Two further clarifications of the terminology used in this study may also be helpful at this point. The first pertains to the notion of democracy used in this study. The central claim of this study affirms that it is a specific republican understanding of liberty which lies at the heart of the idea of the competition-democracy nexus US and EU antitrust law. Unless it is stated otherwise, this study, therefore, also refers to the specific conception of 'republican democracy' when it uses the terms 'democratic, 'democracy', or 'competition-democracy nexus'. The concept of 'republican democracy', which will be further discussed in Chapter I, designates a polity or form of government that derives its legitimacy from promoting or maximising republican liberty as non-domination by guaranteeing citizens an equal share in a system of popular control over government.[90] The distinctive feature of republican democracy is hence that it promotes the primary public good of equal liberty as non-domination. It does so by

[88] For this definition and a discussion of different meanings and methods of political economy D. A. Wittman and B. R. Weingast, 'The Reach of Political Economy' in B. R. Weingast and D. A. Wittman (eds), *The Oxford handbook of political economy* (The Oxford handbooks of political science. Oxford Univ. Pr 2008) 4.
[89] See for such an approach T. J. Di Lorenzo, 'The origins of antitrust: An interest-group perspective' (1985) 5(1) International Review of Law and Economics 73.
[90] Pettit (n 49) 22–24.

guaranteeing electoral and non-electoral institutions that ensure and enhance the contestability of public and private power,[91] both in the vertical relation between private individuals and the state; and in the horizontal relationship between the private individuals to one another.[92] The second clarification refers to the way how I use the notions of 'liberty' and 'freedom' in this study. While both terms may have at times slightly different meanings,[93] this study, in line with the approach taken by Quentin Skinner and Philip Pettit, uses both concepts interchangeably.[94]

The overall approach this study takes is mostly analytical and descriptive. Its primary aim is to gain a better understanding of the proposition that competition and its protection through competition laws play or ought to play a crucial role in enhancing democracy. By excavating the basic assumptions underlying an approach of competition law grounded in a concern about liberty as non-domination, discussing their appeals and shortcomings, as well as the reasons for its demise and the rise of an approach grounded in a negative concept of liberty under the auspices of the Chicago School, this study, however, also provides rich material both for normative arguments in defence of the prevailing *laissez-faire*, consumer welfare approach and in support for a return towards 'republican antitrust'. This study thus seeks to speak to both camps of the current discussion on the future of competition law.

5 Structure

The argument and analysis of this study unfold in three parts. The first part (Chapters I to III), provides the theoretical framework for the analysis of the competition-democracy nexus. It introduces the concepts of republican liberty as non-domination and negative liberty as non-interference, which serve as crucial methodological tools for the understanding of the claim that there is a link between competition and democracy. It, then, recounts the historical influence of the idea of a competition-democracy nexus as a goal of competition law in the US and EU. Chapter I discusses why our current economic understanding of competition does not allow us to understand the claim that there is a link between competition and democracy. Against this

[91] P. Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997) ix, 180-205; Pettit (n 49) 22, 179-184, 302; P. Pettit, 'Democracy, Electoral and Contestatory' in I. Shapiro and S. Macedo (eds), *Designing Democratic Institutions* (New York Univeristiy Press 2000) 119–133; Pettit (n 52). See also R. Bellamy, 'Rights, Republicanism and Democracy' in A. Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2014). For a critical discussion of this notion of republican democracy Mc Cormick, John P. (n 50).
[92] Pettit (n 49) 136, 181.
[93] H. F. Pitkin, 'Are Freedom and Liberty Twins?' (1988) 16(4) Political Theory 523.
[94] Skinner (n 39) 17 fn 53. Pettit (n 91) vii. For a similar interchangeable use of both terms I. Carter, 'Liberty' in R. Bellamy and A. Mason (eds), *Political Concepts* (Manchester University Press 2003).

backdrop, it introduces the concepts of negative and republican liberty as key concepts for the analysis of the competition democracy nexus. It also illustrates how early proponents of competitive markets, such as Adam Smith, associated polycentric competitive markets in which economic power is diffused amongst many, individual players with the ideal of republican liberty and thus coined the rudimentary idea of a link between competition and republican democracy. Chapter II traces the role of republican liberty as non-domination as the underpinning concept of the idea of a competition-democracy nexus in the history of US antitrust until the 1970s. Chapter III locates the origins of the concept of a link between competition and democracy in EU competition law in the school of thought of the Ordoliberal Freiburg School. This chapter provides a new, alternative account of Ordoliberalism, as it shows that the Ordoliberals, in a similar vein as the proponents of a competition-democracy nexus in the US, grounded the idea that there is a link between competition and democracy in the concept of economic liberty as non-domination.

The second part of this study (Chapter IV and V) spells out how the ideal of republican liberty and the concept of a competition-democracy nexus have been operationalised through concrete competition policy, by looking at the interpretation and application of the three substantive pillars of antitrust and competition law in the US and EU: the prohibition of anticompetitive agreements, the regulation of monopoly power and the control of mergers. Chapter IV shows that US and EU competition law translated the concern about republican liberty and democracy into a structuralist policy objective and approach. Under the republican approach, all three pillars of US and EU competition law pursued the goal of preserving competition as polycentric market structure wherein economic power is dispersed amongst a multitude of players. Chapter V identifies the extensive use of broad presumptions of illegality, a standard of proof of potential harm and an error-cost framework erring in the case of doubt on the side of over-deterrence (type I errors) as the main channels of republican antitrust in the US and EU.

The third part (Chapter VI and VII) illustrates how this concern about liberty as non-domination and with it the idea of a competition-democracy nexus went astray with the ascent of the Chicago School and the rise of a More Economic Approach towards antitrust law which prevails until today on both sides of the Atlantic. Chapter VI describes how the Chicago School put forward with the consumer welfare standard a versatile, principled framework to supersede the concept of republican liberty with an approach, which is grounded in the concern about negative liberty and seeks, in the first place, to preserve entrepreneurial liberty against state

coercion. It also shows how this consumer welfare standard has been gradually endorsed by competition authorities and courts on both sides of the Atlantic. Chapter VII, in turn, shows how this shift from republican to negative liberty as normative bedrock of competition law led to a recalibration of legal presumptions, the standard of proof and the error-cost framework.

The Conclusion draws the various strings of analysis together and summarises the main vectors of the shift from a republican towards a *laissez-faire* approach. In so doing, it also offers an outlook on potential avenues of reform that would enable the recalibration of EU and US competition law with the goal of republican liberty as non-domination and the idea of a competition-democracy nexus.

The overall purpose and claim of this study are, at the same time, humble and far-reaching. The humble version of its argument is that the idea of a link between competition and democracy can be best explained by the concept of republican liberty as non-domination. The far-reaching implication of this claim is that competition law has as much to do with the aversion to the slave-master relationship that can be traced back to the ancient Roman republican thought of Cicero as with considerations about consumer welfare and efficiency. The rest of this study will undertake the challenging task of convincing the reader of both the humble and the far-reaching version of the idea of a competition-democracy nexus.

CHAPTER I – REPUBLICAN LIBERTY AS THE EXPLANATORY VARIABLE FOR THE IDEA OF A COMPETITION-DEMOCRACY NEXUS

> *[C]ommerce and manufactures gradually introduced order and good government, and with them, the liberty and security of individuals, among the inhabitants of the country, who had before lived almost in a continual state of war with their neighbours, and of servile dependency upon their superiors. This, though it has been the least observed, is by far the most important of all their effects.*[1]

1 Introduction

The central claim of this study that there is a link between competition, competition law and democracy might simply sound terribly odd or even heretic to the reader. To avoid too much confusion as of the beginning, I will start this study by clarifying some basic features of the underlying theoretical fabric of this claim. I argue here that the link between competition and democracy constitutes a 'tacit dimension'[2] of the political and economic thought about competitive markets. In other words, the idea of a competition-democracy nexus has been a proposition or idea shared by proponents of competitive markets 'so obvious to [them] that [it] has never fully or systematically articulated'.[3]

This tacit dimension was perhaps most prominently voiced by the US Supreme Court in *Northern Pacific Railroads* where it held that antitrust law

> *rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.*[4]

[1] A. Smith, *An inquiry into the nature and causes of the wealth of nations [1776]* (Oxford University Press 1976) III, iv, § 4, p. 412.
[2] M. Polanyi, *The Tacit Dimension* (University of Chicago Press 1966) 4, 9-10; A. O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton University Press 1977) 69.
[3] Hirschman (n 2) 69.
[4] *Northern Pac. Ry. Co. v. United States* 356 U.S. 1 (1958) 4.

Re-emerging concerns about the adverse effects of increased industry concentration on competition, inequality and democracy that have recently caught the attention of the public[5] and academic[6] debate on antitrust on both sides of the Atlantic also reverberate this tacit dimension of a competition-democracy nexus. Current critics of surging industry concentration and the prevailing consumer welfare-oriented antitrust policy – the so-called 'new Brandeisian movement' or 'hipster antitrust' movement – resuscitate a long-standing strand of antitrust literature[7] that points out that competition laws were not only adopted to secure economic welfare but also to protect our democracies against excessive concentration of private economic power. So far, the academic debate, however, omits to articulate clearly how competition (law) enhances democracy and to substantiate how the goal of democracy actually guides antitrust rules and standards. Existing scholarly literature hence fails to disentangle the competition-democracy nexus by treating it as a black box.

To address this research gap and get to grips with the tacit dimension underlying the link between competition and democracy, this chapter lays out the theoretical framework that

[5] N. Irwin, 'Liberal Economists Think Big Companies Are Too Powerful. Hillary Clinton Agrees.' (4 October 2016) <https://www.nytimes.com/2016/10/05/upshot/liberal-economists-think-big-companies-are-too-powerful-hillary-clinton-agrees.html> accessed 4 November 2017. CNN, 'Trump Speaks in Pennsylvania; Examining Proposed Actions in First 100 Days of Trump Administration: Unofficial Transcript' (22 October 2016) <http://transcripts.cnn.com/TRANSCRIPTS/1610/22/cnr.03.html> accessed 7 November 2017; US Democratic Party, 'A Better Deal - Better Jobs, Better Wages, Better Future: Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power' (2017) <https://abetterdeal.democraticleader.gov/crack-down-on-abuse-of-power/> accessed 4 November 2017; Merger Enforcement Improvement Act 14 September 2017. S. 1811 (115th Congress 1st session); Consolidation Prevention and Competition Promotion Act of 2017 14 September 2017. S. 1812 (115th Congress 1st Session).

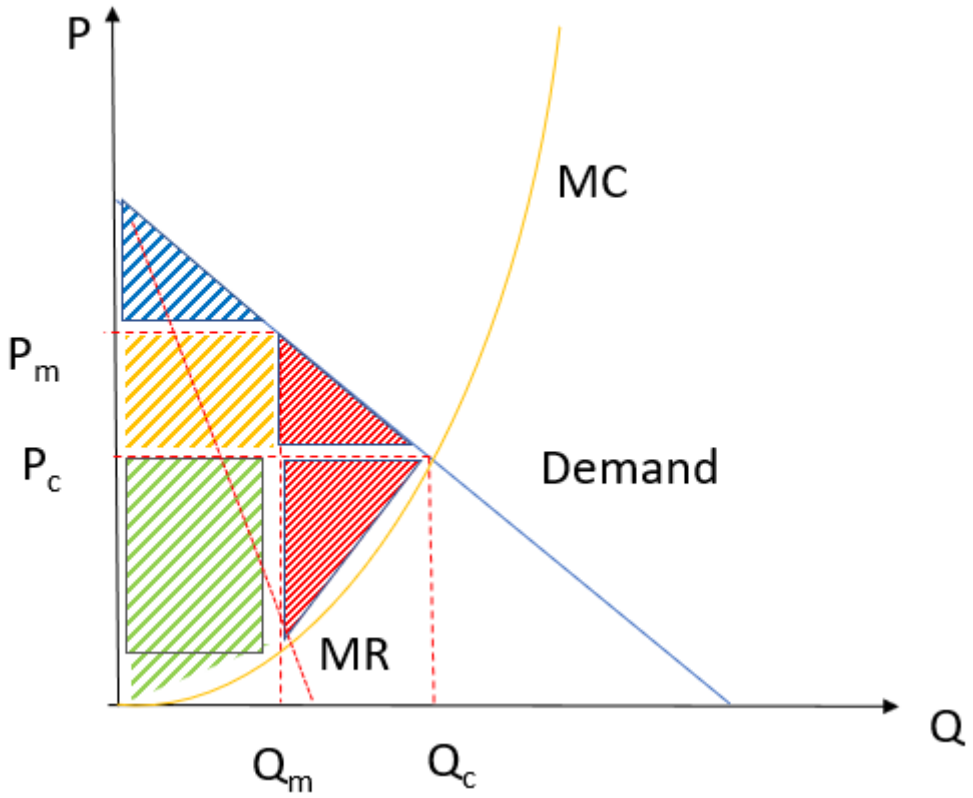
[6] J. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Norton & Company 2013); L. Zingales and R. G. Rajan, *Saving Capitalism from the Capitalists: Unleashing the Power of Financial Markets to Create Wealth and Spread Opportunity* (Princeton University Press 2004); L. Zingales, *A Capitalism for the People: Recapturing the Lost Genius of American Prosperity* (Basic Books 2014); R. B. Reich, *Saving Capitalism: For the Many, Not the Few* (Vintage 2015). B. C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (Wiley 2010); Council of Economic Advisers to the US President, 'Brief: Benefits of Competition and Indicators' (2016); K. S. Rahman, 'Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?' (2016) 94 Tex. L. Rev. 1329; K. S. Rahman, 'From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age' (2016) 35 Yale Law & Policy Review 316; K. S. Rahman and Khan Lina, 'Restoring Competition in the U.S. Economy' in N. Abernathy, M. Konczal and K. Milani (eds), *Untamed: How to Check Corporate, Financial, and Monopoly Power*. A Roosevelt Institute Report (2016); L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710; Competition Policy International, 'Antitrust's Inequality Conundrum?' [2017] Antitrust Chronicle. S. Weber Waller, 'Antitrust and Democracy' (2019) 45((forthcoming)) Florida State University Law Review accessed 20 February 2019. T. Wu, *The Curse of Bigness: Antitrust in the new gilded age* (Columbia Global Reports 2018); A. Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57(1) Journal of Common Market Studies 127.

[7] L. B. Schwartz, 'The Schwartz Dissent' (1955) 1 Antitrust Bulletin 37; L. B. Schwartz, 'Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness' (1960) 55 Northwestern University Law Review 4; L. B. Schwartz, '"Justice" and Other Non-Economic Goals of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1076; E. M. Fox and L. A. Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming from-Where Are We Going' (1987) 62 N.Y.U. L. Rev. 936; E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140; R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051.

will guide my subsequent analysis of the trajectory of the idea of a competition-democracy nexus in US and EU competition law. First, I briefly outline how the economic model of competition, which profoundly shapes our current understanding of competition and competition law, fails to grasp and make sense of statements about the positive relationship between competition and democracy, exemplified by the Supreme Court's *orbiter dictum* in *Northern Pacific* (Section 2). In a second step, I argue that this economic model is not the only possible way to think systematically about competition and that it fails to provide for the adequate analytical tools to inquire into the relationship between competition and democracy. I, therefore, propose an alternative 'republican' or 'democratic' model to analyse competition. This model proposes the variables of liberty and equality as central parameters for a research framework to gain a better understanding of the interplay between competition and democracy (Section 3). The choice of the variables of liberty and equal status is informed by the core argument of this study that the idea of a competition-democracy nexus is grounded in the ideal of republican liberty and, thus, refers to a very specific concept of democracy: namely, the ideal of a republican democracy. In the third section, I illustrate this argument by explaining how the variables of liberty and equality of status as the parameters of this 'republican' or 'democratic' model are derived from the republican concept of liberty as non-domination. (Section 4). Fourth, I show how the idea that competition promotes republican liberty and a republican form of government has its origin in the thought of early proponents of competitive markets, such as the English Levellers movement, Montesquieu, James Steuart, as well as Adam Smith (Section 5). I then trace how this political understanding of competition coined by the early political economist – which I shall call the 'Smithian model' of competition – went astray and has been increasingly supplanted by other models to think about competition. In so doing, I will provide some preliminary thoughts on the reasons why our contemporary thinking about competition and competition law has been almost entirely severed from the idea of a competition-democracy nexus (Section 6).

2 The Predominant Economic Model of Competition

Nowadays, textbooks on competition law usually open with a simple graph that resembles Graph 1. This graph normally depicts what economists call the model of 'perfect competition'. What might, at first sight, look like a couple of lines and triangles, encapsulates the predominant normative explanation of why we value competition and believe that it is socially beneficial.



Graph 1-The model of perfect competition

The graph depicts the circumstances prevailing in a situation of perfect competition. The model of perfect competition presupposes the presence of many buyers and producers selling a homogenous product on a market without barriers to entry and exit. All market players dispose of all relevant information and have no influence over outputs or prices. Modern economic theory posits that rivalry and competition between firms will push producers to choose a quantity of output that allows them to sell their products at a market price, which exactly matches their costs of producing an additional unit of a given product, the so-called marginal costs (MC). Competition thus leads to a situation where the competitive price (P_c) consumers that consumers have to pay equals exactly the cost of producing a given product.

Economists assume that this situation of competitive equilibrium generates a social optimum for two reasons. First, the competitive equilibrium is conducive to what economists call productive efficiency. Competition compels firms to organise their production in a way that allows them to produce their products at the lowest possible cost. Otherwise, they will make losses and be driven out of the market. Firms, thus, have an incentive to copy and adopt efficient production methods. As a result, in a competitive equilibrium only efficient producers are on the market and make zero profits.[8] Their production processes cannot be optimised by reorganising their production factors and resources differently. The model of perfect competition suggests that competition pushes firms to organise their production in such a way that consumers get the greatest possible quantity of a product at the lowest possible price. Second, the competitive equilibrium is also considered a social optimum because, in this situation, the cost of producing an additional unit of a given product matches exactly the value that consumers attach to its consumption. In other words, the consumers' willingness to pay for an additional unit of a given product equates the costs of its production. In this situation, scarce resources are allocated in a way consumers value the most. The allocation of resources corresponds with social wants.[9] No consumer could be made better off if the producers fabricated an additional unit of the product. Nor would they derive any additional benefit from producers allocating their resources to the production of an alternative product. Perfect competition consequently generates allocative efficiency, where neither consumers nor sellers of a given product could be made better off by producing or consuming another product. Under these circumstances, the total welfare the society at large draws from the production of a certain good is maximised.[10]

The model of perfect competition hence illustrates the nowadays most widely shared reason why we value competition. It shows that competition maximises social welfare by enhancing productive and allocative efficiency. From an economic perspective, competition is hence normatively desirable due to its outcomes. By generating the most efficient allocation of resources, competition allows consumers to satisfy their preferences at the lowest possible price and pushes sellers towards the most cost-efficient way of production.

[8] S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010) 20; M. Motta, *Competition policy: Theory and practice* (Cambridge University Press 2004) 45–51; van den Bergh, Roger, *Comparative Competition Law and Economics* (Edward Elgar 2017) 92.
[9] R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 90-91, 101, 104-106.
[10] Bishop and Walker (n 8) 20; Motta (n 8) 40–45; van den Bergh, Roger (n 8) 22–23.

To underscore the benefits of competition, Graph 1 also depicts what happens when markets cease to operate competitively. This counterfactual scenario looks at the situation prevailing under monopoly as the most extreme opposite of perfect competition. Whereas perfect competition is characterised by a high number of sellers who do not have any control over price or output, in the situation of monopoly there is only a single seller on the market. This seller has the power to set the level of prices and output as he sees fit. As he faces a downward-sloping demand curve and marginal revenue (MR) curve, the monopolist will find it profitable to cut its output (shift from Q_c to Q_m) and raise prices (shift from P_c to P_m). The price charged by the monopolist (P_m) lies above marginal costs (MC) and above the competitive price (P_c) at which the same product was produced and sold under perfect competition. In other words, the monopolist sells less quantity at a higher price than under perfect competition.

Economists and competition lawyers tend to agree that monopoly entails, at least under certain circumstances, socially undesirable outcomes. They, however, disagree about the specific circumstances when this is the case. Proponents of a consumer welfare approach focus on the harmful consequences of monopoly on consumers who have to pay higher prices and receive a lower quantity of a certain product than under perfect competition. This decrease in consumer welfare is depicted in Graph 1. It shows that the shift from perfect competition to monopoly leads to a decrease in consumer surplus. The concept of consumer surplus describes what consumers gain from trading in the market. This bargain is the difference between the maximum price (reservation price) consumers are willing to pay for a product (demand curve) and the actual price they have to pay when they buy a certain product (P_c;P_m). Graph 1 also illustrates that the move from competition to monopoly benefits the monopolistic producer who sees his producer surplus increase. The concept of producer surplus describes what producers gain from trading in a market. It designates the amount that producers gain by selling their product at a market price (P_c;P_m), which is higher than the least price at which they would be willing to sell without making losses (their marginal costs). Economists who are concerned about the detrimental effects of monopoly on consumer welfare, hence, consider the wealth transfer (orange shaded rectangle) from consumers to the monopolistic producer as the basis for their normative case against monopoly.

Proponents of a total welfare approach, however, are not that much concerned about this wealth transfer from consumers to producers resulting from the higher prices consumers have to pay for a lower quantity of a given product. They, instead, look at the consequences of monopoly on the welfare of society as a whole. In their view, monopoly is only problematic in

so far as it leads to an inefficient allocation of resources.[11] Hence, they only object monopoly when it generates a so-called deadweight loss (red-shaded triangle in Graph 1). This concept of deadweight loss describes the uncompensated reduction in surplus that consumers and producers suffer alike as a consequence of the shift from perfect competition to monopoly.

Under the total welfare approach, the reduction in consumer welfare resulting from a monopoly is only problematic when it is not offset by gains in producer surplus. In other words, losses in allocative efficiency only lead to a reduction in total welfare in so far as they are not compensated by an increase in productive efficiency.[12] Such losses in total welfare arise when a monopoly creates an imbalance between production costs and consumers' preferences; or, in other words, an imbalance between 'social costs of and social desires'[13] for a certain product, say bananas. As a result of the restriction in bananas output, some consumer demand will not be satisfied. A part of the consumers will have to substitute their consumption of monopolised bananas by an alternative product, say chocolate. To satisfy the new consumer demand for chocolate, productive resources migrate from the banana and other sectors to the chocolate industry, although consumers value an additional unit of chocolate less than they would value an additional banana under perfect competition. The monopoly in the banana industry, therefore, leads to a misallocation of resources, since some resources will lie idle and the resources shifted to chocolate production contribute less to social welfare as consumer preferences define it. Consumers and the society at large would be better off if resources would remain in the bananas industry.

Albeit disagreeing whether one should be more concerned about the negative impact of monopoly on consumers or society at large, competition economists and lawyers value competition for its positive effect on social welfare, either in terms of consumer or total welfare. Even if they have diverging views about the specific social harm caused by monopoly, they converge in the reasons why they perceive competition as socially desirable. Modern economic theory, indeed, cherishes competition for the beneficial results it generates.

What does this mean for our inquiry into the relationship between competition and democracy? Modern economic theory can explain the first part of the US Supreme Court's statement in *Northern Pacific* about the virtues of competition. It elucidates why and how competition 'will yield the best allocation of our economic resources, the lowest prices, the

[11] E.g. Bork (n 9) 101.
[12] ibid 98, 101, 104-105, 107-115.
[13] ibid 101.

highest quality and the greatest material progress'.[14] Yet, the economic model of competition and modern price theory tell us little about why competition also creates an 'environment conducive to the preservation of our democratic political and social institutions.'[15]

3 An Alternative Republican Model of Competition

The principal reason why our predominant way of thinking about competition fails to grasp how competition contributes to democracy lies with its exclusively output-oriented understanding of competition. The economic model of perfect competition provides a purely consequentialist normative argument against monopoly and in support of competition. Figuratively speaking, economic theory assumes that competition is 'good' because it makes the cake of social welfare bigger. It says, however, little about the process through which this increase in the size of the cake is achieved.[16] Our contemporary understanding of competition is hence solely concerned about how competition generates outcomes that are in the general interest of society. In other words, it focuses exclusively on its output-oriented legitimacy.[17]

Let us assume for a moment that it is the capacity of competition to maximise welfare, which the Supreme Court had in mind when it suggested that competition is also conducive to democracy. Such a purely output-oriented explanation of the competition-democracy nexus would hence be entirely contingent upon how well competition fares in comparison with other economic systems in generating welfare. Such an output-oriented claim as the basis of a competition-democracy nexus would, however, fall apart if, say, a Soviet-Union style centrally-planned economy or Chinese state capitalism happened to outperform free competitive market economies in maximising social welfare.[18] In this case, a centrally-planned economy would suddenly appear to be more in line with democracy than a free market economy. This would be

[14] *Northern Pac. Ry. Co. v. United States* (n 4) 4.
[15] ibid.
[16] This methodological note is also made by Friedrich August von Hayek. See for instance Hayek, Friedrich A. von, 'The Meaning of Competition' in Hayek, Friedrich A. von (ed), *Individualism and Economic Order* (University of Chicago Press 1948) 92–94. Hayek, Friedrich A. von, 'The Use of Knowledge in Society' (1945) 35(3) American Economic Review 519 519 - 520, 530.
[17] For the notion of output-oriented legitimacy see F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 2, 6.
[18] This thesis was perhaps most prominently articulated by J. A. Schumpeter, *Capitalism, Socialism and Democracy [1942]* (Harper & Row 1962) Chapter XVII. The view that socialist centrally planned economies were more efficient than market economies was influentially contested by von Mises and von Hayek who underscored the impossibility of economic calculation as the basis of efficient allocation of resources in a centrally planned economy where markets do not generate information about the value individuals attach to a certain economic good. L. v. Mises, 'Economic Calculation in the Socialist Commonwealth [1920]' in Hayek, Friedrich A. von (ed), *Collectivist Economic Planning [1935]* (Routledge 1963); Hayek, Friedrich A. von (ed), *Collectivist Economic Planning [1935]* (Routledge 1963).

an utterly counterintuitive claim if we consider that centrally-planned economies have been historically largely associated with autocratic or totalitarian political regimes.[19] An explanation of the competition-democracy nexus, which focuses merely on the output-oriented legitimacy of competition hence fails to identify what is so specific about competition that makes it more prone than other economic regimes to promote democratic political and social institutions.

To better understand the link between competition and democracy, this study, therefore, proposes to reverse the analytical focus from the outcomes to the process of competition. It suggests that the relationship between competition and democracy can only be fully grasped if we focus on the procedural characteristics of competition. By addressing the question of *how* competition produces the bigger cake, this process-based approach starts the analytical inquiry where the economic analysis of competition stops. The thrust of this inquiry is, hence, less concerned about the question of whether competition actually brings about a bigger cake than other forms of organising an economy, such as a centrally planned economy. Nor is it its primary aim to engage in a social justice debate as to how this cake should be distributed. Instead, the goal of this study is to focus on the procedural characteristics of competition, which is often treated as a 'black box' by contemporary economic and competition law literature. This methodological move has important implications. It implies that economic theory is – and historically was – not the only discipline capable of analysing the functioning and features of competitive markets. Nor does economic welfare provide the sole analytical or normative benchmark against which the performance of markets can be assessed.

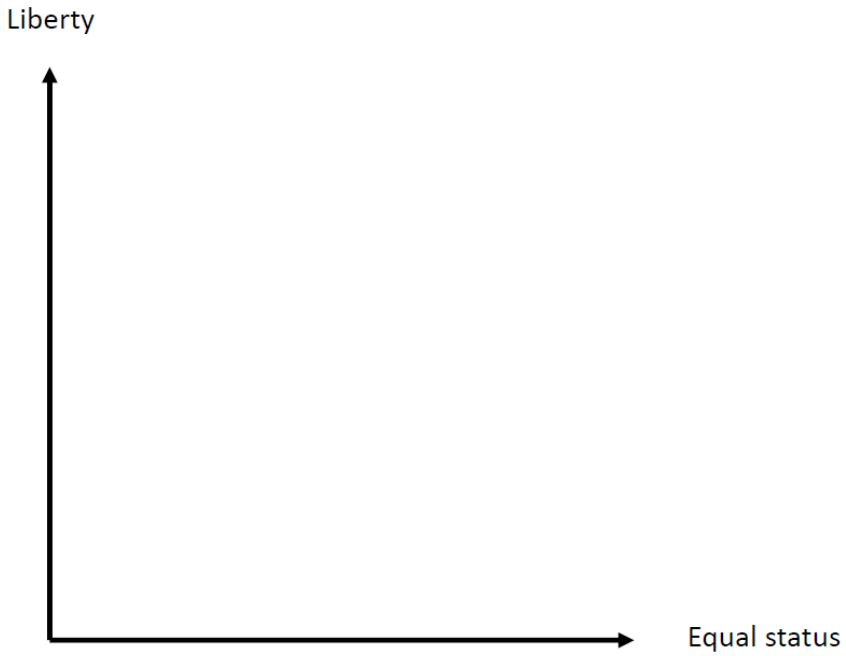
One central argument of this study is that the reason why we cherish competition goes beyond consequentialist, outcome-oriented considerations. It is also – or even in particular – for its specific procedural virtues that we value competition and are concerned about monopoly, cartels or industry concentration. In order to comprehend the link between competition and

[19] von Hayek and Friedman have influentially argued that a centrally planned economy is incompatible with a free society and democratic decision making, because central planning requires some form of 'omniscient dictator'. Democracy, von Hayek argued, is only possible within a competitive system Hayek, Friedrich A. von, *The Road to Serfdom* (Routledge 2001) 58; 73-74. See also M. Friedman, *Capitalism and Freedom* (University of Chicago Press 1962) 8–11. Yet, Hayek and Friedman also observed that competitive markets do not necessarily presuppose a democratic form of government, but can thrive as long as the rule of law is guaranteed and the autocratic leaders do not unduly interfere with the economic freedom of and property rights of the market participants. Hayek, Friedrich A. von (n 19) 72–74; Hayek, Friedrich A. von, *The Constitution of Liberty [1960]* (University of Chicago Press 2011) 166-183; 307-341. See also Friedman (n 19) 27, 34. This might explain Hayek's and Friedman's public support of the Pinochet regime and its free-market based reforms in Chile. B. Caldwell, Montes and Leonidas, 'Friedrich Hayek and His Visits to Chile' (2015) 28(3) The Review of Austrian Economics 261; J. Meadowcroft and Ruger William, 'Hayek, Friedman, and Buchanan: On Public Life, Chile, and the Relationship between Liberty and Democracy' (2014) 26(3) Review of Political Economy 358; J. G. Valdés, *Pinochet's economists : the Chicago school in Chile* (Cambridge University Press 1995).

democracy, we, therefore, cannot exclusively focus on the output-oriented legitimacy of competition; that is, its welfare-enhancing nature. Rather, the idea that there is a link between competition and democracy pertains to the specific features of the competitive process that ensure its 'input-oriented legitimacy'.[20] In other words, we are not only valuing competition because, or as long as, it is the method of economic organisation which is most likely to maximise economic welfare and efficiency. The idea of a competition-democracy nexus, instead, encapsulates the idea that we also prefer competition to other market structures and economic orders because it guarantees a process of coordinating economic activities which make this form of economic organisation compatible with a free society of equals, and ultimately, with a republican and democratic form of government. Put differently, the idea of a competition-democracy nexus stands for the proposition that competition constitutes the sole form of economic organisation, which ensures that the pursuit of economic welfare does not come at the expense of the liberty and equal status of market participants. It is these procedural virtues of competition which build the normative fabric of which the 'tacit dimension' of the perceived link between competition and democracy is made of. Only this tacit, procedural dimension of competition can explain why some or even many of us would arguably continue to prefer competition over other forms of economic organisation even if these more concentrated or centrally-administered forms of economic order turned out to be more efficient.

To illustrate this argument and put forward an alternative model to inquire into the link between competition and democracy, I propose to (re)start this study with a graph which hitherto has been absent in other competition law books. This graph (Graph 2) sketches an alternative, 'republican' or 'democratic' model for thinking about competition. It differs from contemporary economic price theory, which exclusively analyses the performance of different forms of economic organisation with regard to outcome-related parameters of quantity and price. The democratic or republican model, instead, replaces the variables of price and quantity by the procedural parameters of liberty and equality. Both variables serve as procedural benchmarks to assess how different market regimes relate to the ideal of a democracy. Graph 2, thus, depicts the underlying hypothesis of this study. It suggests that in order to qualify as 'democratic' or be deemed compatible with democracy, an economic system or process has to ensure and maximise the liberty and the equal status of market participants.

[20] Scharpf (n 17) 2, 7.



Graph 2 - A democratic or republican model of competition

The term democracy is, admittedly, an elusive concept, subject to varying, often conflicting interpretations.[21] A second core argument of this study is that the idea of a link between competition and democracy is associated with a very specific form of democracy, namely, the ideal of a 'republican democracy'.[22] From a historical perspective, it is indeed somewhat misleading to talk about a link between competition and democracy. One of the key insights of this study is that when people claimed at different points in time that competition promotes democracy, they should have instead said that competition promotes a republic or republican democracy. Indeed, the idea of a competition-democracy nexus historically drew upon the much more ancient argument that competitive markets promote republican liberty and, hence, a republican form of government. Whereas the notions of 'republic' and 'democratic' regimes were for a long time understood as referring to different forms of government, it was with the creation of the American republic in 1787 that both concepts became increasingly

[21] See for instance R. A. Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1971). R. A. Dahl, *Democracy and its Critics* (Yale University Press 1989). F. Cunningham, *Theories of democracy: A critical introduction* (Routledge 2002); A. Downs, 'An Economic Theory of Political Action in a Democracy' (1957) 65(3) Journal of Political Economy 135; Schumpeter (n 18); C. Mouffe, *The Return of the Political* (Verso 1993).
[22] I use the term of 'republican democracy' in a similar way as Quentin Skinner and Philip Pettit Q. Skinner, *Liberty before Liberalism* (Cambridge University Press 1998) 26–36.P. Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997) 180–205. For a comprehensive and controversial discussion of the concept of 'republican democracy' see the contributions in A. Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2014).

congruent, 'as the globe's first modern republic became the world's most archetypical liberal democracy.'[23]

In continuity with this republican tradition, this study refers to this specific republican conception of democracy when it uses the terms 'democratic, 'democracy', or 'competition-democracy nexus'. The conception of 'republican democracy' envisages a polity or form of government that derives its legitimacy from promoting or maximising republican liberty as non-domination by guaranteeing citizens an equal share in a system of popular control over government.[24] This republican concept of democracy is genuinely distinct from other notions of democracy. Unlike popular and communitarian concepts of democracy,[25] it does not consider popular sovereignty, participation and self-rule as ends in themselves. Nor does it reduce democracy to the guarantee of majoritarian rule,[26] electoral competition[27] or open-ended deliberative processes.[28] Rather, republican democracy underlines the need to ensure the contestability of public and private power as a precondition of republican liberty. The distinctive feature of republican democracy is hence that it promotes the primary public good of equal liberty as non-domination by guaranteeing electoral and non-electoral institutions that enable the contestability both of public and private power. [29] In so doing, republican democracy ensures the status of its citizens as free and equals both in the vertical relation between private individuals and the state; and in the horizontal relationship between the private individuals to one another.[30]

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[23] A. Kalyvas and I. Katznelson, *Liberal beginnings: Making a Republic for the Moderns* (Cambridge University Press 2008) 88.
[24] P. Pettit, *On The People's Terms : A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 22.
[25] ibid 12–18.Pettit (n 22) 8, 30-31, 109. For prominent versions of popular or communitarian conceptions of democracy J.-J. Rousseau, *Du contrat social [1767]* (Flammarion 2001). H. Arendt, *On revolution* (Penguin Books 1990). H. Arendt, *The human condition* (Univ. of Chicago Press 2006). Pettit (n 24) 12–18.
[26] Pettit (n 22) 184; Downs (n 21); Schumpeter (n 18); Pettit (n 24) 22–23; J. Waldron, *The dignity of legislation* (Cambridge University Press 1999); J. Waldron, *Law and disagreement* (Clarendon Press 2004).
[27] Pettit (n 24) 22–23.Schumpeter (n 18); Downs (n 21). See however for the role of competitive political processes as safeguards against domination I. Shapiro, *The State of Democratic Theory* (Oxford University Press 2004) 57–63.
[28] J. Habermas, 'Three normative models of democracy' (1994) 1(1) Constellations 1; J. Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* (Polity Press 2009). Republican democracy relies on deliberative processes Pettit (n 22) 187–190.
[29] Pettit (n 22) ix, 180-205; Pettit (n 24) 22, 179-184, 302; P. Pettit, 'Democracy, Electoral and Contestatory' in I. Shapiro and S. Macedo (eds), *Designing Democratic Institutions* (New York Univeristiy Press 2000) 119–133; P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576. See also R. Bellamy, 'Rights, Republicanism and Democracy' in A. Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2014). For a critical discussion of this notion of republican democracy Mc Cormick, John P. 'Republicanism and Democracy' in A. Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2014).
[30] Pettit (n 24) 136, 181.

The proposed alternative, democratic model of competition draws on this specific republican understanding of democracy. It posits that it is the capacity of competition to promote the republican ideal of liberty and equality of status, in particular in the horizontal relation between individuals to one another, which lies at the heart of the claim that competition beyond maximising welfare is also ensuring 'an environment conducive to the preservation of our democratic political and social institutions.'[31] In more general terms, this study suggests that the proposed alternative democratic model of competition, which focuses on how competition performs with regard to the two variables of liberty and equal status, allows us to gain a better understanding of the idea of a competition-democracy nexus and its role for competition law. The model assumes that an institutional market arrangement is in line with the ideal of republican liberty and hence a republican democracy if it maximises the market participants' liberty as non-domination and equality of status. This insight is reflected in the choice of liberty and equality (of status) as the two variables of our democratic model. The values of equality and liberty serve as metrics to measure the degree of 'democratisation' or 'republicanisation' of different market institutions.[32] The sliding scale of both dimensions underlines that the democratic or republican character of a given market institution is a 'more-or-less' question, rather than being an absolute 'whether-or-not' question.[33]

4 The Republican Ideal of Liberty as Non-Domination and Equal Status

This choice of 'liberty' and 'equality of status' as parameters of this democratic or republican model might, at least at first glance, appear as somewhat arbitrary. The critical reader might, at this point, rightly ask what I mean by 'liberty' and 'equality of status' and how both concepts are related to the idea of a republican polity and competitive markets. This and the following section seek to address both questions. This section clarifies what I exactly mean by 'liberty' and 'equality of status' and why they operate as two key variables for our analysis of the link between competition and democracy. To this end, I will further examine the claim that the idea of a competition-democracy nexus turns upon the ideal of republican liberty, by distinguishing the concept of republican liberty from the notions of positive and negative liberty (subsection 4.1 and 4.2). Against this backdrop, I will then flesh out the specific normative

[31] *Northern Pac. Ry. Co. v. United States* (n 4) 4.
[32] This model is inspired by the model of democratization coined by Dahl (n 21) 3–9. Dahl uses the variables of contestation/liberalization and inclusiveness as proxies for liberty and equality.
[33] Shapiro (n 27) 51.

content of republican liberty and explain how it differs from other notions of freedom (4.3). I will further illustrate why the ideal of republican freedom is linked to the ideal of equality of status (4.4), before exploring how both values are operationalised and promoted through institutional design (4.5).

4.1 Positive Liberty and Negative Liberty

Contemporary political thought usually distinguishes between the two rival and incommensurable[34] concepts of negative and positive liberty or freedom,[35] famously coined by the political theorist Isaiah Berlin.[36] Positive liberty is historically the older concept of liberty. It lies at the heart of the ancient understanding of democracy, most prominently exemplified by the Athenian democracy.[37] The 19th French liberal Benjamin Constant (1767-1830), therefore, famously referred to positive liberty as 'liberty of the Ancients'.[38] This positive notion of freedom refers to humans' unrestrained capacity of self-realisation or self-perfection.[39] It grounds in the proposition that a human being should be his or her 'own master'.[40] In the political sphere, positive liberty takes, in particular, the form of self-determination and self-government.[41] Positive liberty, hence, focuses on the source of political power[42], as it pertains to the question '*who* decides?'.

Liberty, in its positive sense, has, therefore, always been closely associated with the idea of democratic participation.[43] This link between positive liberty and democracy hinges upon the distinction between heteronomy and autonomy. Positive freedom is concerned with the right of the people or of individuals to participate in decisions that affect themselves.[44] It assumes

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[34] Q. Skinner, 'A Third Concept of Liberty: Isaiah Berlin Lecture' in The British Academy (ed), *Proceedings of the British Academy: 2001 Lectures.* Volume 117 (Oxford University Press; British Academy 2002) 237–238.
[35] In line with Quentin Skinner and Philip Pettit, I use these two terms interchangeably in this study. Skinner (n 22) 17 fn 53. Pettit (n 22) vii. For a similar interchangeable use of both terms I. Carter, 'Liberty' in R. Bellamy and A. Mason (eds), *Political Concepts* (Manchester University Press 2003). See however H. F. Pitkin, 'Are Freedom and Liberty Twins?' (1988) 16(4) Political Theory 523.
[36] G. C. MacCallum, 'Negative and Positive Freedom' (1967) 76(3) The Philosophical Review 312 314.
[37] Skinner (n 34) 242; Pettit (n 22) 19.
[38] B. Constant, *Political Writings* (Cambridge University Press 1988) 307–328.
[39] Skinner (n 34) 239. See for an interesting discussion of freedom in ancient political thought as action in the political realm H. Arendt, *Between Past and Future: Six exercises in political thought* (The Viking Press 1961) Chapter 4, What is freedom? 143-147, 153-154.
[40] I. Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty : incorporating Four essays on liberty/ Isaiah Berlin* (Oxford University Press 2002) 179–187; Pettit (n 29), 577; Skinner (n 34) 239–240.
[41] Berlin (n 40) 192–200; Thucydides, *The Peloponnesian War* (Oxford University Press 2009) § 37; Polybius, *The Histories* (Loeb Classical Library 2011) Book VI, 8.6 - 9.7. p. 287; M. T. Cicero, *On the Commonwealth and On the Laws* (Cambridge University Press 1999) Book I, § 47.
[42] Berlin (n 40) 176.
[43] Pettit (n 22) 8; J. Ober, 'The Original Meaning of "Democracy": Capacity to Do Things, not Majority Rule' (2008) 15(1) Constellations 3.
[44] Berlin (n 40) 169, 178.

that individuals remain free and autonomous as long as they decide themselves on the laws that they are subject to.[45] Instead of being subject to the external authority of a single or a few rulers (heteronomy), in a democracy citizens remain free to govern their relationships through self-imposed rules (autonomy). They can decide themselves on all rules which have an impact on their interests and, thus, become masters of their own fate.

While positive liberty focuses on individuals' or a community's freedom to (do) something, its negative counterpart is concerned about the individual's freedom from something: namely, interference and coercion.[46] Negative freedom hence pertains to the unconstrained possibility to make choices without any direct or indirect interference by an external instance. It presupposes a sphere of autonomy within which the individual can act as it sees fit and which is insulated against any form of interference by others.[47] A restriction of negative liberty occurs if one person directly, or indirectly, interferes with and restricts the range of options amongst which an individual could choose absent the restraint. From the perspective of negative liberty, not only actual but also the threat of likely interference might constitute a source of unfreedom.[48]

While the idea of positive liberty traces back to ancient Greek republics, the negative understanding of liberty as non-interference is relatively recent. The concept of negative liberty only emerged and grew, soon, predominant in the 17th century with the writings of Thomas Hobbes (1588-1679).[49] Hobbes was the first political thinker who defined liberty as the absence of hindrance or interference. He noted that '*[a] Free-Man, is he, that in those things which by his strength and wit he is able to do is not hindred to doe what he has a will to.*'[50] This rather recent emergence of the negative concept of liberty explains why Benjamin Constant portrayed negative freedom as 'liberty of the Moderns' in order to contrast it with positive freedom as 'liberty of the Ancients'.[51] Unlike the concept of positive freedom, which asks 'who governs me?', negative freedom is concerned with the question of 'how far does government interfere with me?'.[52]

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[45] Rousseau (n 25) 77; J. Locke, *The second treatise of government [1689]* (Reclam 2012) Chapter VIII, § 96-99, p. 156-166.
[46] Berlin (n 40) 171–174; Hayek, Friedrich A. von (n 19) 57, 60-61.
[47] Hayek, Friedrich A. von (n 19) 61.
[48] Pettit (n 22) 11.
[49] T. Hobbes, *Leviathan [1651]: or The Matter, Form & Power of a Common-Wealth Eclasticall and Civill* (Penguin Classics 1985) Part II, Chapter XXI, p. 261 (italics in the original). Pettit (n 29), 245–247.
[50] Hobbes (n 49) Part II, Chapter XXI, p. 262.
[51] Constant (n 38) 307–328.
[52] Berlin (n 40) 177.

Classical liberals mobilised this concept of negative freedom as non-interference to prevent absolute political power from encroaching upon what they perceived the natural freedom and rights of the individual.[53] Liberal thinkers, however, not only relied on the concept of negative freedom to caution against the arbitrary power of monarchs or autocrats. But they also harnessed the concept of negative liberty to put on guard against the excesses of unbridled democracy.[54] They, in particular, levelled criticism against the Rouesseauist populist[55] interpretation of positive liberty. Rousseau (1712-1778) assumed that the exercise of the right to participate in the popular sovereignty automatically guarantees freedom because democracy ensures that the people obeys only to self-imposed constraints. He, therefore, deemed it superfluous and illegitimate to impose limits on the exercise of political power through popular self-government.[56] Classical liberals, in contrast, stressed that democratic decision-making based on the consent of the majority bears the risk of harming the vital rights and interests of the individuals being part of the minority. The concept of positive freedom, as John Stuart Mill observed, obfuscates that '[t]he "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest.'[57]

The concept of negative freedom as non-interference, thus, puts the finger on the potential tensions between democracy and liberty.[58] On the one hand, by repudiating Rousseau's claim that unrestrained popular sovereignty cannot do any harm,[59] liberals showed that positive freedom itself might become a source of unfreedom.[60] Positive freedom and, hence democracy, liberals warned, can easily degenerate into the 'tyranny of the majority'[61] which becomes 'as oppressive as dictatorship'.[62] On the other hand, liberal authors also claimed that negative liberty is not inextricably linked with democracy, but can also be guaranteed under autocracy. One could easily imagine, so the argument goes, a benevolent autocrat or monarch

[53] Locke (n 45) Chapter XI, § 135-148, pp. 218 ff. Chapter XIV, § 168, p. 272 ff. The Supreme power of any political system, "it is not, nor can [it] possibly be absolutely Arbitrary over the Lives and Fortunes of the People." Berlin (n 40) 171.
[54] ibid 208–209.
[55] Pettit (n 22) 30.
[56] Rousseau (n 25) 72. Pettit (n 24) 16. This absolutist understanding of the legitimacy of the popular sovereignty as well as the Rousseau's radical egalitarianism provoked fierce criticism by authors who perceived Rousseau's political theory as the precursor of a 'totalitarian democracy' such as experienced during the 20th century under the Nazi and Soviet regime. See for instance J. L. Talmon, *The Origins of Totalitarian Democracy* (Norton 1970).
[57] J. S. Mill, *On Liberty, Utilitarianism and Other Essays* (Oxford University Press 2015 [1859]) 7.
[58] Berlin (n 40) 173.
[59] Rousseau (n 25) 70.
[60] Berlin (n 40) 190–191.
[61] A. d. Tocqueville, *De la démocratie en Amérique I [1835]* (Éditions Gallimard 1981) 375.
[62] Hayek, Friedrich A. von (n 19) 74.

who is subject to constitutional bounds of powers. The benevolent autocrat might be more likely to guarantee negative freedom than a democratic regime, as long as he does not interfere with individuals' sphere of freedom.[63]

Liberal proponents of negative freedom, therefore, highlighted the importance of constitutional bounds of power that protect individuals from interference and coercion by the state.[64] Negative liberty is primarily preserved through the drawing up of constitutional catalogues, which impose formal constraints upon governmental power and guarantee fundamental rights.[65] Along with constitutional constraints, negative liberty as non-interference, moreover, is guaranteed by the rule of law. In its most rudimentary form, the principle of rule of law requires a framework of impersonal[66], universally[67] applicable legal rules and their enforcement through an independent judiciary.[68]

To preserve negative liberty, liberal thinkers, therefore, seek to significantly constrain the legitimate scope of state coercion or interference, even if it is legitimised by democratic decision-making. In principle, they only recognise two instances of legitimate restriction of individual liberty. The first instance in which an external authority (be it a state or person) can legitimately interfere with individual liberty is when the individual voluntarily consents with the restriction of its freedom by means of a contract or voluntary political agreement.[69] Yet such self-imposed limitations can only exist in situations where there is a true agreement on the restraint of freedom, for instance, in the form of unanimity.[70] The concept of negative freedom thus insulates a number of questions from the scope of democratic majoritarian decision-making.

The second instance of legitimate restriction of individual freedom through state interference occurs when one individual uses its freedom in a way that endangers other individuals and thus actually encroaches on or is likely to interfere with their sphere of

[63] Berlin (n 40) 178; Hayek, Friedrich A. von (n 19) 72–74. This relationship between negative liberty, democracy and authoritarian government is most succinctly summarised by Hayek who observed that 'a democracy may well wield totalitarian powers, and it is conceivable that an authoritarian government may act on liberal principles.' Hayek, Friedrich A. von (n 19) 166; 166-183; Pettit (n 24) 10.
[64] Berlin (n 40) 173. Locke (n 45) Chapter IX, § 131, p. 208 (italics in the original text) and Chapter XI, § 135, p. 218. Hayek, Friedrich A. von (n 19) 182-183; 325-328.
[65] Locke (n 45) Chapter V, § 44, p. 74 and Chapter IX, § 123, p. 198.
[66] Aristotle, *The Politics* (Cambridge University Press 1988) Book IV, Chapter 4, p. 111; Locke (n 45) Chapter II, § 14, pp. 24, 26.
[67] Locke (n 45) chapter XI, 232. Hayek, Friedrich A. von (n 19) Chapter 6, pp. 75-90. Hayek, Friedrich A. von (n 19) 215–231; 308-325.
[68] Hayek, Friedrich A. von (n 19) Chapter 6, pp. 75- 90.
[69] ibid 63–64.
[70] ibid 73.

individual freedom.[71] Accordingly, the state may only legitimately interfere with the negative freedom of its citizens in order to avert encroachments on the sphere of autonomy by other individuals.[72] By contrast, paternalistic laws that purport to ensure the individual's 'true interest' by protecting it against the alleged negative consequences of the exercise of its own freedom,[73] are incompatible with the idea of negative freedom.

4.2 A Third Concept of Republican Liberty

Berlin's taxonomy of positive and negative liberty has, for a long time, dominated the way how we think about freedom.[74] Recent research in the history of political thought, however, points out that this dichotomy between positive and negative liberty obfuscates the existence of a much more ancient and distinct,[75] third concept of republican liberty.[76] This third understanding of liberty takes the middle-ground between positive and negative liberty.[77] It conceptualises liberty as the absence of domination or dependence upon somebody else's will.[78] This concept of freedom traces back to the notion of liberty prevailing in the ancient Roman Republic, as reported most prominently in the writings of Cicero and Titus Livius (Livy).[79]

Roman republican thought defined liberty based on the fundamental distinction in Roman law between the free and independent citizen (*civis*) and the slave (*servus*) who is subject to the dominion and will of somebody else.[80] Freedom was hence conceived as the antonym to servitude, as the capacity of acting in one's own right. [81] The status of a citizen in ancient Rome hence depended primarily on his being an independent free-man[82]; or in other words, of his not being a slave. In ancient republican thought, liberty meant the absence of a

[71] Mill (n 57) 12–13.
[72] ibid 91.
[73] ibid 93.
[74] See for instance MacCallum (n 36).
[75] Skinner (n 34) 262.
[76] Pettit (n 22) 5, 18.
[77] Pettit (n 29), 578. Skinner disagrees on this point, as he perceives republican liberty as genuinely negative concept of freedom Skinner (n 34) 255, fn. 99.
[78] Pettit (n 29), 576. Skinner (n 34) 255; Q. Skinner, 'Rethinking Political Liberty' [2006] History Workshop Journal 156, 162.
[79] Pettit (n 22) 5, 19-20. Skinner (n 22) 38–46.
[80] ‚Certainly, the great divide in the law of persons is this: all men are either free men or slaves.' A. Watson (ed), *The Digest of Justinian: Volume I* (University of Pennsylvania Press 1985) I, 5 (3); Skinner (n 22) 38–39.
[81] Skinner (n 34) 248–252. Cicero and Livy for instance defined liberty in clear opposition to servitude Cicero (n 41) I, 47–49; II, 42-48; III, 37 b. Titus Livius (Livy), *The History of Rome: Translated from the Original with Notes and Illustrations by George Baker, A.M.* (Peter A. Mesier et al. 1823) I, xxiii; III, xxxvii-xxxviii.
[82] Skinner (n 78), 159–162.

situation of dependence and subjugation to the arbitrary power of someone else which is characteristic for a master-slave or master-servant relationship.[83]

Unlike negative freedom, the republican concept of freedom as non-domination hence considers 'dependence on the goodwill of others'[84] or 'subjugation' understood as 'defenseless susceptibility to interference, rather than actual interference'[85] as obstruction of freedom. Republican liberty as non-domination, hence, goes beyond the concept of negative freedom that is merely concerned with the absence of actual or threats of likely interference.[86] Proponents of republican freedom, in effect, affirm that humans are unfree when they live in a slave-like relationship of dependence and subjugation under the dominion of a master. In such a situation, a person is unfree even if the master is benevolent and for one reason or the other does not interfere with their choices.[87] The mere subjugation of the slave under the arbitrary will of the master undermines their freedom, notwithstanding the absence of any interference. For the master remains in the position of interfering at will with another person's choice on the basis of his own idiosyncratic interests, without the need to account for the other person's interests.[88] This subjugation to the arbitrary will of another person not only obstructs individuals' freedom as non-domination due to the permanent risk of interference. It also has important psychological effects, because it negatively affects their (self-)awareness. From a republican vantage point, the continuous awareness of being subject to subjugation and dependence compels the individual to impose on itself self-constraints and self-censorship to placate the master and, thereby, avert potential interference by the master.[89]

The republican tradition, therefore, also perceives conduct that does not amount to actual or likely interference with someone else's choices as an abrogation of liberty. In contrast to the concept of negative liberty, it views manipulations[90] and asymmetries of power as restrictions of freedom, even if they do not amount to interference.[91] Importantly, it also objects forms of dependence or domination, even when they result from contractual freedom.[92] To

[83] Pettit (n 22) 21–28, 31-32. Pettit (n 29), 576; P. Pettit, 'Freedom in the Market' (2006) 5(2) politics, philosophy & economics 131 134; Skinner (n 34) 248–255.
[84] Skinner (n 34) 247.
[85] Pettit (n 29), 577.
[86] Skinner (n 34) 247.
[87] Pettit (n 22) 5, 22-23. See for instance Cicero who pointed out that liberty 'does not consist in having a just master, but in having none.' Cicero (n 41) II, 43.
[88] Pettit (n 22) 5, 22.
[89] Skinner (n 34) 256–261; Pettit (n 22) 25.
[90] Pettit (n 29), 579, 597 - 598.
[91] ibid 598. For the proponents of negative liberty, by contrast, power imbalances are not objectionable. Pettit (n 24) 11.
[92] Pettit (n 29), 585.

adherents of negative liberty a contract by which someone voluntarily sells himself as a slave to a (for the moment non-interfering) master does not annihilate his liberty. It rather constitutes an expression of his contractual freedom.[93] By contrast, to republicans such a contract would be incompatible with the idea of republican liberty as non-domination.[94]

Taking its roots in the Roman Republic, this distinctive understanding of liberty as non-domination and antonym of servitude survived the decay of the ancient Roman republic. It importantly shaped the self-understanding of the medieval and Renaissance Italian and Dutch republics as free states.[95] The republican concept of freedom had a particularly prominent place in the writings of Machiavelli and his understanding of the *vivere libero*.[96] It also lived on in the texts of common lawyers such as Henry de Bracton, Sir Thomas Littleton, and Sir Edward Coke.[97] Liberty as non-domination prominently came to the fore of modern political thought during the power struggle between the English Parliament and the crown culminating in the English Civil War (1641-1651). During this standoff, several common lawyers and political groups – amongst them most prominently the English Levellers movement[98] – mobilised the notion of republican freedom as non-domination to contest the prerogatives of the English crown. They argued that the prerogatives of the monarchy made the respect of their rights subject to and dependent upon the goodwill of the King. Such a state of subjugation, oppression and precarious security, the Levellers claimed, subjected them to servitude and unfreedom even in the absence of any actual or threat of likely interference by the Crown.[99]

By coining the idea of negative liberty in his *Leviathan*, published in 1651, Thomas Hobbes sought to respond directly to and fence off this republican, anti-monarchist claim that the mere subjugation to authority and arbitrary will of the monarch amounts to oppression and abrogation of liberty. Arguing that liberty cannot be annihilated by anything else than actual interference, Hobbes put forth the idea of negative liberty as a counter-revolutionary device to

[93] See for instance R. A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8(1) The Journal of Legal Studies 103 134.
[94] Pettit (n 22) 54, 62.
[95] ibid 19, 37.
[96] Like Roman republican thinkers, Machiavelli clearly perceived liberty as antonym to servitude N. Machiavelli, *Discourses on Livy* (University of Chicago Press 1998) I, 16; I, 13; II, 27; III, 7-9; Pettit (n 22) 28; Skinner (n 22) 10–11; (1981) 48–77.
[97] Skinner (n 34) 248; Pettit (n 22) 5, 10, 19-20.
[98] For a rich collection of the writings and pamphlets of the English Levellers movement A. Sharp (ed), *The English Levellers* (Cambridge University Press 2004).
[99] J. Lilburne, 'Postscript to The freeman's freedom vindicated [1646]' in A. Sharp (ed), *The English Levellers* (Cambridge University Press 2004) 31. R. Overton and W. Walwyn, 'A remonstrance of many thousand citizens [1646]' in A. Sharp (ed), *The English Levellers* (Cambridge University Press 2004) 34–52. R. Overton, 'An arrow against all tyrants [1646]' 55–65. Skinner (n 34) 247, 250 - 255; Skinner (n 78), 160–164.

challenge the very idea of republican freedom and defend the prerogatives of the British crown.[100] Despite the subsequent ascent of the concept of negative liberty, the republican notion of liberty continued to have important bearing on the late 17th century and 18th century political thinkers and, in particular, the thought of Locke, Montesquieu and Harrington.[101]

With the English Settlers, the idea of republican liberty as non-domination also found its way across the Atlantic. The ideal of liberty as non-domination served the colonists to decry their subjugation to the arbitrary rule of and taxation by the English motherland without any form of representation as a state of unfreedom and to legitimise their quest for independence.[102] In the attempt to draw on the lessons of the Roman Republic in designing the institutions of the nascent American polity, it was eventually the framers of the US constitution, in particular, Jefferson, Madison and Paine who married the ideal of republican freedom with the principles and institutions of a liberal constitutional and representative democracy. It is at this critical juncture that the ideal of the republic and republican freedom eventually became closely tied to our contemporary understanding of liberal democracy.[103]

4.3 The Implications of Republican Liberty

The concept of republican liberty as non-domination has a number of important implications that demarcate this third concept of liberty from the predominant concept of negative liberty. Liberty as non-domination fundamentally differs from negative liberty in the type of preventing conditions which it perceives as restriction of freedom (1), its attitude towards the legal rules, republican laws and legitimate state intervention (2), and its egalitarian dimension (3).

4.3.1 The Absence of a Probabilistic Logic

The first difference between negative and republican liberty pertains to the specific types of acts, constraints and restrictions – the so-called 'preventing conditions'[104] – which can legitimately be considered an abrogation of liberty. Unlike the negative concept of freedom, republican freedom does not only perceive actual interference or the threat of likely interference

[100] Skinner (n 78), 247.
[101] Pettit (n 22) 10.
[102] ibid 33–35. See
[103] Pettit (n 22) 19-20, 29-30; Kalyvas and Katznelson (n 23) 88–117; J. G. A. Pocock and R. Whatmore, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition [1975]* (Princeton University Press 2016) 506–552.
[104] MacCallum (n 36), 314; Carter (n 35) 9.

as a source of unfreedom. It is rather concerned about the capacity of one party to arbitrarily interfere with another party at its whim without accounting for the other's interest.

Republican liberty hence fundamentally differs from the probabilistic logic[105] of negative liberty. Negative liberty requires the presence of actual interference or at least some plausible degree of likelihood of interference for an agent to be unfree. Accordingly, negative liberty is maximised if the probability of interference is minimised.[106] By contrast, republican freedom is frustrated even in the absence of any likelihood or probability of interference, as long as one party nonetheless has the power and capacity to interfere with the choices of another party.[107] Republican freedom, therefore, goes beyond being merely a 'resilient' form of non-interference. It does not only ensure a high probability of non-interference but presupposes the inaccessibility of the capacity of other parties to interfere with someone on an arbitrary basis.[108] Republican liberty thus ensures not only the absence of, but immunity or security against, interference.[109] Unlike negative liberty, it guarantees a 'probabilistically unweighted'[110] protection against arbitrary interference.

To illustrate this fundamental difference between negative and republican liberty, consider, for instance, the relationship between the benevolent, non-interfering master and the slave. From the perspective of negative freedom, the slave is free, as long as the master does not interfere with his choices. Liberty as non-interference hence presupposes and ensures the absence of coercion in the actual world. In contrast, the republican concept of liberty accounts for the fact that it can nonetheless happen by accident or owing to a change in mood of the non-interfering master that the agent will be subject to interference. Liberty as non-domination is hence more resilient and robust than liberty as non-interference. It does not only seek to prevent any arbitrary interference in the actual world but across a range of all possible worlds.[111] Republican freedom is hence less subject to contingencies, such as the caprices of the powerful. It provides a higher degree of security than negative liberty as non-interference. For it ensures that individuals can enjoy their liberty without having to worry about a sudden change of mind of currently non-interfering, benevolent, but more powerful parties. This higher degree of security or resilience also has an important psychological dimension. Even if he is subordinate

[105] Pettit (n 22) 64; Pettit (n 24) 33–35; Pettit (n 83), 135-137, 145.
[106] Pettit (n 29), 600.
[107] Pettit (n 22) 22.
[108] Skinner (n 34) 255, 262; Pettit (n 22) 123.
[109] Pettit (n 22) 69.
[110] Pettit (n 83), 138.
[111] Pettit (n 22) 24–25; Pettit (n 24) 67.

to the dominion of a benevolent, non-interfering master, a slave will try to adopt any kind of cunning or servile behaviour in order to please and placate his master and, thus, avoid any future interference. By contrast, republican freedom allows agents to act independently without having to worry about the consequences of their conduct on the mood of the powerful.[112] It thus recognises that the mere awareness of being subject to the arbitrary will of someone else has the potential to constrain someone's liberty.[113]

4.3.2 The Legitimate Scope of State Intervention and the Law

Negative and republican liberty also significantly differ in a second way with respect to the preventing conditions. Republican liberty not only differs from negative liberty in so far as it assumes that freedom can be restricted even in the absence of actual or likely interference, for instance, by a situation of subjugation to a non-interfering master. Contrary to negative liberty as non-interference, liberty as non-domination does not see every form of interference with the choices of an agent as illegitimate restriction of their freedom. Rather, republican liberty recognises the possibility of non-mastering or non-arbitrary interference. Such non-arbitrary interference occurs in instances where the interferer is obliged to take into account the interests or ideas of the agent. Interference is non-arbitrary or non-dominating if the interferer intervenes with the agent's choices, not in order to enhance his own but the interests of the agent.[114] From the republican vantage point, interference, therefore, does not inevitably lead to a decrease or loss of someone's liberty, if institutional safeguards, such as constitutional bounds of power or the rule of law, prevent the interfering authority from exercising arbitrary power and compel it to track the interests of the agent.[115] Republican freedom thus is not only opposed to an agent being subject to the arbitrary will of a non-interfering master, but it also recognises the possibility of a non-mastering interferer.[116]

This two-fold difference between the preventing conditions of negative and republican liberty can be summarised in the following table.[117] There is an important overlap between both forms of freedom in so far as either concept perceives the combined absence of domination and interference as synonymous of liberty (scenario 1). Conversely, both also view the combined presence of domination and interference as an obstacle to liberty (scenario 2). Differences,

[112] Pettit (n 22) 24–25.
[113] Skinner (n 78), 256.
[114] Pettit (n 22) 22-23, 65-66.
[115] ibid 23, 26, 35.
[116] ibid 22–23.
[117]This table is largely based on the taxonomy proposed by ibid 23–24.

however, arise in the third scenario. Domination without interference does not adversely affect negative liberty but is considered a source of unfreedom by the republican tradition (scenario 3). In turn, for proponents of negative liberty non-dominating or non-arbitrary interference automatically leads to a loss of liberty, while the republican tradition views it as being in line or even enhancing liberty as non-domination (scenario 4).

Table 1 - The difference between republican and negative liberty

Concept of Liberty	Scenario 1	Scenario 2	Scenario 3	Scenario 4
	No domination No interference	Domination Interference	Domination No interference	No domination Interference
Negative	Yes	No	Yes	No
Republican	Yes	No	No	Yes

The importance of the difference between non-arbitrary and arbitrary interference (scenario 4) becomes apparent in the opposing attitudes that negative and republican freedom display towards the legal rules and the law. In the Roman Republic and, later on, in the small Italian and Dutch city states, liberty (*libertas*) was closely associated with the individual's status as citizen (*civitas*) of the Republic. Liberty was indeed perceived as the belonging to a specific form of government or polity which provided for specific public institutional safeguards against arbitrary power.[118] From a republican vantage point, it is the law and institutions of this specific republican form of government itself that creates and protects this civic liberty,[119] as it prevents the ruling authorities from using their power in an arbitrary way without accounting for and respecting the interests of the citizens. Republican liberty is hence understood as synonymous to the status of citizenship under the legal regime of a republic in which the law prevents the rulers and or any other powerful factions or individuals from exercising arbitrary power.[120] Based on the assumption that a republican form of government ensures laws in which both the individual and the people enjoy freedom, the republican regime and institutions themselves were perceived as a precondition for achieving a 'free body politick' or free state.[121]

[118] ibid 27.
[119] ibid 36.
[120] ibid.
[121] Pettit (n 22) 37; Skinner (n 22) 17–36.

In the run-up to and the direct aftermath of the English Civil War, this idea that the law itself is constitutive of civic liberty also became the target of sharp criticism by Hobbes and his followers in their counter-revolutionary attempt to defeat the republican critics of the Crown. In coining the idea that liberty can only be conceived in a negative sense as non-interference, Hobbes suggested that the law always interferes with agents' choices and hence is always a source of unfreedom. Liberty in the negative sense is hence nothing else than the absence of the law.[122] On this basis, Hobbes could argue that people living under an authoritarian ruler are not more or less free than people living in a republic because both have to comply with the laws.[123] Republican thinkers, such as Harrington and Locke, countered this argument asserting that living under the rule of law is not incompatible with liberty as non-domination.[124] They instead pointed out that there is a difference between freedom *from* the laws and freedom *by* the laws. To proponents of republican liberty, it is 'lawless'[125] unrestrained power rather than the presence of the law, which leads to despotism and the annihilation of personal freedom.[126] Claiming that without law there is no liberty, the proponents of republican freedom cast the law and, in particular, the rule of law as a precondition of liberty.[127] The republican tradition thus repeatedly stressed the importance of the rule of law in ensuring an 'empire of law and not of men'. [128] Only under the republican form of government there are laws which actually create and guarantee the freedom of their citizens and hence ensure civic liberty *by*, rather than *from* the laws.[129]

These diverging views about when interference and law actually reduce freedom also crucially shape the attitudes of the proponents of negative and republican liberty towards government intervention. For classical liberals who adhere to the ideal of negative freedom, any kind of state intervention and law, which interferes with private choices, reduces liberty. By contrast, if freedom is no longer perceived as non-interference but non-domination, not

[122] Berlin (n 30) 195. Hobbes framed liberty as 'an exemption from Lawes' Hobbes (n 49) 264; see also 262 - 268; Pettit (n 22) 37–40. Later, Jeremy Bentham entrenched the idea that any legal rule by definition diminishes (negative) liberty J. Bentham, 'Anarchical Fallacies' in J. Bowring (ed), *The Works of Jeremy Bentham* (William Tait 1843) 503; J. Bentham, *Theory of Legislation* (London 1873) 94; Berlin (n 40) 195; Pettit (n 29), 596; Skinner (n 22) 4–5.
[123] Pettit (n 22) 37–38.
[124] Skinner (n 78), 157.
[125] See for the pedigree of this idea in ancient Greek and Roman thought Polybius (n 41) Book VI, 7.7, p. 291. See also Montesquieu '[L]e déspote n'a aucune règle, et ses caprices détruisent tous les autres.' Montesquieu, Charles-Louis de Secondat, *De l'Esprit Des Lois [1748]* (Garnier-Flammarion 1979) Book III, Chapter 8, p. 150.
[126] Herodotus, *The History* § 80; Cicero (n 41) Book I, § 68; Locke (n 45) Chapter XI, §§ 134 - 142, pp. 214 - 234.
[127] Pettit (n 22) 39–40.
[128] ibid 20. This idea can be traced back to the ancient Greek though Polybius (n 41) Book VI, 10.2, p. 291; Aristotle (n 66) Book III, Chapter 11, page 85.
[129] Pettit (n 22) 39.

every form of interference into private autonomy through legislation also automatically obstructs individual freedom. [130] Laws and regulations adopted through processes which ensure their non-arbitrary character by tracking citizens' interest and complying with the rule of law and constitutional safeguards do not inevitably reduce the citizens' freedom because they do not subjugate them to arbitrary interference or domination.[131] Proponents of freedom as non-domination, hence, claim that 'non-arbitrary' state interference, unlike private interference,[132] does not necessarily undermine liberty, even if it restricts individuals' sphere of autonomy.[133]

This difference in the perception of non-arbitrary interference has important implications for the attitude of the proponents of either form of freedom towards the legitimate scope of state interference. As we have seen, negative liberty only envisages two forms of legitimate state interference. Either it is legitimised through unanimous consent by the parties with whom the state interferes, or it seeks to prevent a private party from encroaching upon the sphere of autonomy of another individual. In contrast, republican freedom recognises a broader set of restrictive conditions or constraints which compromise freedom and which can and should be addressed by state regulation than its negative counterpart does. State interference is not only perceived legitimate in the presence of actual or likely undue interference by one party with the choices of another. Rather, from a republican perspective, state interference is also necessary and justified to eliminate instances of domination arising from asymmetries of power and to reduce the capacity of powerful players to engage in arbitrary domination in the absence of any form of actual or likely interference.[134]

The recognition of the possibility of non-arbitrary interference by proponents of republican liberty also reshapes the calculus of the balancing of rights in case of state intervention. From the vantage point of negative freedom, any state interference entails a reduction in liberty for the party with which the state interferes. This is the case even if state intervention aims at preventing the party from unduly interfering with the choices of another individual. Legitimate state interference, therefore, involves a delicate balancing exercise.[135] The state may only intervene when the entailing loss in freedom of the individual with whose choices it interferes is compensated by increases in freedom for other individuals, for instance,

[130] ibid 23–24, 36-40. Pettit (n 83), 147.
[131] Pettit (n 29), 586–587.
[132] Pettit (n 83), 146.
[133] Pettit (n 29), 586, 597; Pettit (n 22); Pettit (n 83), 135. E. Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination?' (2017) 9(2) European Journal of Legal Studies 103 105–109.
[134] Pettit (n 29), 579, 597 - 598.
[135] Pettit (n 83), 145.

as the result of reduced danger. State intervention thus requires some form of balancing of freedoms or a cost-benefit analysis which shows that state interference maximises the overall level of liberty in society. Such is the case if the gains in liberty achieved by preventing an agent from unduly interfering with the choices of others compensate for the reduction of liberty created by the state intervention to prevent this interference.[136] Conversely, this means that the state may only intervene to prevent one private party from interfering with the liberty of another party if the private interference is unreasonable; that is if the loss in liberty for the other party is so disproportionately high that it outweighs the cost in terms of loss of liberty for the interfering party as a consequence of state intervention.

By contrast, for proponents of republican freedom, non-arbitrary state interference does not necessarily compromise freedom and hence creates much less or no cost (in terms of reduction of freedom) at all. At the same time, in the eyes of proponents of republican liberty, state intervention may also generate higher benefits. State intervention does not only prevent isolated occurrences of arbitrary interference at a given point in time. By making certain forms of arbitrary interference inaccessible to private parties, state interference may also reduce the capacity and ability of powerful agents to engage in interference in the future. It is, hence, capable of decreasing the 'level of domination overall'.[137] In a world of republican liberty, state interference is, therefore, much easier to justify than in a world of negative liberty.

4.4 The Egalitarian Dimension of Republican Liberty

Another specific feature of the republican concept of liberty is its strong egalitarian impetus.[138] Defining freedom as non-mastery,[139] republican liberty focuses on the vulnerability or dependence of the agent, rather than interference as an obstacle to freedom. The republican concept of liberty thus pertains to the independent status or standing of the individual as citizen of the republic.[140] An individual can be said to be free if it has the capacity of acting independently on his or her behalf rather than being subject to the dominion of somebody else.[141] Although republican liberty has a primarily negative dimension as it presupposes the absence of domination by a master,[142] it nonetheless displays interesting similarities with positive liberty. Akin to positive liberty, it turns upon the idea of 'self-mastery' or self-

[136] Pettit (n 22) 35; Pettit (n 29), 596.
[137] Pettit (n 83), 146.
[138] Pettit (n 22) 110–111.
[139] ibid 22.
[140] ibid 32–33.
[141] Skinner (n 78), 159.
[142] Pettit (n 22) 21–22, 27.

ownership in the sense of 'being your own man' or woman.[143] Subjugation to hierarchical relationships of dependence is hence deemed incompatible with the standing of a citizen as free-man having his independent will and self-ownership.[144]

For the republican tradition, liberty, therefore, always means equal liberty.[145] This egalitarian dimension derives directly from the principle of the rule of law and the equal status of the citizens of the republic before the law. [146] Equal freedom, the republican tradition assumes, presupposes equality before the law.[147] By ensuring the equal status of all citizens before the law, the principle of the rule of law guarantees interaction between individuals on equal, heterarchical terms,[148] rather than being subject to the arbitrary whim of a single or a few powerful men.

Whereas proponents of negative liberty do not object to imbalances of power,[149] the republican tradition displayed a fervent hostility against power asymmetries. Proponents of republican liberty opposed social hierarchies as being incompatible with the ideal of a society and polity of free and equals. As it aims at maximising non-domination of all members of the society, the republican notion of liberty thus has an inbuilt commitment towards 'structural egalitarianism'.[150] It seeks to promote 'equally intense non-domination'.[151] The intensity of non-domination that an individual enjoys depends on the relative power of the individual in the society as a whole. This means that its liberty as non-domination depends on its own power as compared to the power of others. To guard the equal liberty of all citizens, republican freedom is, therefore, committed to promoting an equal structure and distribution of power amongst citizens.

While the republican tradition assumed that large inequalities in power and wealth are difficult to sustain in a republic,[152] the egalitarian dimension of liberty as non-domination was not necessarily linked to any form of material egalitarianism in terms of equal distribution of wealth.[153] Stressing the equal status of individuals as citizens, republican liberty is hence clearly

[143] Skinner (n 78), 164.
[144] ibid 160–164. Skinner (n 34) 251-252, 263.
[145] Cicero (n 41) I, 47; Pettit (n 24) 5.
[146] Pettit (n 22) 117, 110–111; Pettit (n 29), 590.
[147] Cicero (n 41) Book I, § 22 and Book III, § 44. Locke (n 45) Chapter VII, § 94, p. 154. In the same sense
[148] M. Polanyi, *The Logic of Liberty* (Routledge 1951) 157–159.
[149] Pettit (n 24) 11.
[150] Pettit (n 22) 113.
[151] Pettit (n 22) 116; Pettit (n 29), 595.
[152] Montesquieu, Charles-Louis de Secondat (n 125) V, 3-6.
[153] Pettit (n 22) 119.

committed to 'civic-political equality', but does not necessarily require 'socio-economic equality' in terms of distribution of wealth.[154] The variable of equality in our model, thus, pertains to 'equal status' or 'civic-political equality' rather than socio-economic equality.

4.5 The Institutional Operationalisation of Liberty and Equality

We have seen so far that the republican concept of liberty is made up of two essential ingredients: the absence of domination and equality of status. But how can this ideal of liberty as non-domination be secured? One strategy to achieve and ensure liberty as non-domination consists of structuring and distributing power in an egalitarian, decentralised way. Such decentralised distribution of power creates a system or balance of reciprocal power in which individuals impose checks on each other's capacity of interfering and, thus, prevent each other from exercising arbitrary interference.[155]

The republican tradition, however, acknowledged that liberty as non-domination could not be merely ensured through such spontaneous balances of power grounded in individual self-help and self-defence. Since the Roman Republic, the proponents of republican freedom instead devised protective institutions to preserve liberty as non-domination by creating and sustaining institutional balances of reciprocal power.[156] The republican tradition, thus assumed, that liberty as non-domination presupposes a specific political and institutional regime which counterbalances power-structures.[157]

Proponents of republican liberty, therefore, highlight the importance of what Philp Pettit calls institutions of 'antipower'[158] which actively contribute to the reduction or elimination of domination without creating new forms of domination.[159] These institutions of antipower aim at strengthening the status or standing of the individual as a self-determinant person by counter-balancing existing patterns of power and domination. Instead of merely shielding individuals from any form of actual or potential coercion, antipower also promotes individual empowerment by equalising power relationships.[160] Institutions of antipower thus promote the

[154] I rely here on three different dimensions of egalitarianism identified by S. Fleischacker, 'Adam Smith on Equality' in C. J. Berry, M. P. Paganelli and C. Smith (eds), *The Oxford Handbook of Adam Smith* (Oxford University Press 2013) 497.
[155] Pettit (n 22) 93.
[156] For a discussion of the republican institutions in ancient Rome and their influence on the Italian republics Mc Cormick, John P. 'Machiavellian Democracy: Controlling Elites with Ferocious Populism' (2001) 95(2) American Political Science Review 297.
[157] Pettit (n 29), 601.
[158] ibid 588.
[159] ibid.
[160] ibid 591, 595.

equalisation of and emancipation from patterns of hierarchical dependence and domination within and outside the political sphere.[161].

While taking various forms, those institutions of antipower share as a common denominator or design the insight that the preservation of equal republican freedom presupposes a certain mode of structuring power which brings about some form of checks-and-balances between reciprocal powers. This mode of structuring political power is perhaps best described by the concept of 'polycentricity'. Michael Polanyi,[162] as well as Elinor Ostrom and Vincent Ostrom,[163] identify polycentricity as the fundamental feature and organising principle of spontaneous or self-governing orders. Polycentricity describes the coordination and organisation of social tasks through a process of mutual adjustments driven by the decentralised coordination between multiple, independent and autonomous decision-making centres within the framework of predefined, impersonal rules.[164]

For the republican tradition, institutions that structure power in a polycentric way were primordial for promoting liberty as non-domination. In a similar way as classical liberalism proponents of liberty as non-domination, for instance, stressed the importance of constitutional constraints[165] in protecting individuals against abuses of power.[166] Liberty as non-domination is thereby guaranteed through the drawing up of constitutional catalogues, which impose formal constraints upon governmental power and guarantee fundamental rights.[167] Constitutional bounds of power, thus, rely on formal rules which channel the exercise of political power and distribute it amongst a number of veto players[168] to counteract potential abuses. Far from perceiving constitutional rights merely as counter-majoritarian devices, republicans stress their role in dispersing and dissipating power. Constitutional and fundamental rights, from this

[161] ibid 602.
[162] Polanyi (n 148) Chapters 2 - 6. Hayek, Friedrich A. von (n 19) 230.
[163] V. Ostrom, 'Polycentricity: The Structural Basis of Self-Governing Systems' in F. Sabetti and P. Dragos Aligica (eds), *Choice, Rules and Collective Action: The Ostroms on the Study of Institutions and Governance* (ECPR Press 2014) 46.
[164] ibid 46–47. The use of the concept of polycentricity in this study differs from how the concept is used in other competition law scholarship. See in this respect, I. Lianos, 'Polycentric Competition Law' (2018) 71(1) Current Legal Problems 161. Unlike recent scholarship which draws upon polycentricity to underscore the need to accommodate various interests within the framework of competition policy, this study focuses on the substantive features of polycentricity and polycentric competition in the market.
[165] Aristotle (n 66) Book III, Chapter 12, p. 85. Locke (n 45) Chapter XI, §§ 135, 137 and 142, pp. 216-220, 222-226, 232-234.
[166] ibid Chapter IX, § 131, p. 208 and Chapter XI, § 135, p. 218. A. Hamilton, J. Madison and John Jay, *The Federalist Papers: ed. Lawrence Goldman* (Oxford University Press 2008) Federalist N° 14, p. 70; Montesquieu, Charles-Louis de Secondat (n 125) Book VIII.
[167] Locke (n 45) Chapter V, § 44, p. 74 and Chapter IX, § 123, p. 198.
[168] This idea of 'multiplication of veto points' is also formulated by Fritz Scharpf Scharpf (n 17) 14. and Ian Shapiro in Shapiro (n 27) 56.

perspective, constitute institutions of antipower which empower individuals against potential domination and subjugation.[169] Constitutional bounds of power institutionalise and recreate balances of reciprocal power, which allow citizens to impose check upon others' capacity to interfere arbitrarily and exert domination. Citizens, thus, become themselves polycentric veto points able to contest (or whose agreement is required for) decisions to change the *status quo*[170] in a manner that is likely to abrogate their individual freedom.[171] Going beyond the liberal perception of fundamental and constitutional rights as merely formal constraints of power, the republican tradition insists on their role of strengthening the incentives and agency of individual citizens to counteract abuses of power and, thus, increase the costs of exercising domination.[172]

The role of polycentricity as the organising principle of republican institutions of antipower most clearly epitomises in the principle of separation of powers and checks-and-balances. The republican tradition advocated institutional settings ensuring the horizontal separation of power.[173] This principle hinges on the structural assumption that excessive concentration of power constitutes the greatest threat to liberty as it nourishes conflicts of interests and gives rise to an incentive structure which makes power holders more prone to abuse their power in 'their own interest'.[174] To address this skewed incentive structure, the principle of separation of power hence relies on a polycentric institutional design that brings about a balance of reciprocal powers. Polycentric separation of power pits the power holders' incentives to maximise power against each other in a way that the power of each player checks and cancels out that of the other ('*le pouvoir arrête le pouvoir*').[175]

Montesquieu and the founding fathers of the US constitution also complemented the concept of horizontal separation of power and checks-and-balances with its vertical

[169] Pettit (n 29), 590–592.
[170] I use the term veto points or players here in accordance with the definition originally coined by G. Tsebelis, 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism' (1995) 25(3) British Journal of Political Science 289 293; G. Tsebelis, 'Veto Players and Institutional Analysis' (2000) 13(4) Governance: An International Jounral of Policy and Administration 441 442 - 446, 469-470.
[171] T. Paine, *Political Writings* (Cambridge University Press 2000) The Common Sense, p. 28.
[172] Shapiro (n 27) 58.
[173] See in particular Locke (n 45) Chapters XI, XII and XIII. Montesquieu, Charles-Louis de Secondat (n 125) Book XI, Chapter 6, p. 294.
[174] Locke (n 45) Chapter XII, § 143, p. 236. Montesquieu, Charles-Louis de Secondat (n 125) Book XI, Chapter 4 and 6, in particular 294. See for a categorical rejection of the idea of separation of power based on the indivisible nature of popular sovereignty Rousseau (n 25) Book II, Chapter 2, 67. See for the role of horizontal separation of powers in the political thought of the US Founding Fathers Hamilton, Madison and John Jay (n 166) Federalist N° 47 - 50.
[175] Montesquieu, Charles-Louis de Secondat (n 125) Book XI, Chapter 4. Hamilton, Madison and John Jay (n 166) Federalist N° 47-49, N° 51, p. 257.

decentralisation in the form of federalism.[176] They assumed that excessive concentration of power could be averted not only by splitting it between the branches of government but also by allocating it to different levels of government. The empowerment of lower levels of government, such as states and local municipalities, as independent and autonomous decision-making centres,[177] not only deconcentrates power but also enhances local self-government. Each local political entity becomes a 'small republic within itself'.[178] The polycentric features of federalism thus enable local communities to operate as 'laboratories of democracy' where decentralised experimentalism and learning can take place.[179]

Along with the separation of power and constitutional safeguards against arbitrary power, the republican tradition perceives political participation and contestation by citizens as the perhaps most important mechanism to preserve liberty as non-domination.[180] There is hence an important overlap between republican freedom and the concept of positive freedom that understood liberty primarily as collective exercise of self-mastery through democratic participation. The republican tradition, in fact, bridges the tension between liberty and democracy, which proponents of negative freedom like to evoke. Whereas from the perspective of negative liberty democracy has little to nothing to do with liberty, which can thrive under any form of limited government,[181] the proponents of republican freedom pointed out that liberty as non-domination cannot materialise under any form of autocracy. Even in the absence of any actual or threat of interference, individual freedom would be compromised by the continuous domination of the benign king or dictator who remains capable of interfering with the citizens' freedom at any time.[182] To materialise, freedom as non-domination, therefore, 'requires a specific sort of law and polity'.[183] Conceiving liberty as 'civil liberty', the republican tradition associated liberty consistently with the republican form of self-government or 'free government'.[184] Liberty in its republican sense, thus, presupposes a specific form of political and legal regime, which ensures the continuous possibility for citizens to contest power and

[176] Montesquieu, Charles-Louis de Secondat (n 125) Book IX, Chapters 1-3. Hamilton, Madison and John Jay (n 166) Federalist 10, 39, 43, 46, 51.
[177] ibid Federalist 39, p. 191-192, Federalist N° 46, pp. 234 ff.
[178] T. Jefferson, *Political Writings* (Cambridge University Press 2004) Letter To Major John Cartwright, 385.
[179] See Justice Brandeis' dissent in *New State Ice Co. v. Liebmann* 285 U.S. 262 (1932) 311.'
[180] Pettit (n 29), 591. For Machiavelli see for instance Mc Cormick, John P. (n 156), 298; Paine (n 171) Common Sense, 44; Rights of Man, 177; Jefferson (n 178) Declaration of Independence, p. 102; Letter to James Madison, p. 108.
[181] Berlin (n 40) 177. Pettit (n 24) 22; Hayek, Friedrich A. von (n 19) 72–74.
[182] Pettit (n 29), 600–602; Pettit (n 83), 136; Skinner (n 34) 257.
[183] Pettit (n 29), 602. Pettit (n 22) 36.
[184] Skinner (n 22) 23–36.

which promotes the equalisation and elimination of patterns of hierarchical dependence and domination both within and outside the political sphere.[185]

Yet, the republican tradition advocates democratic participation for a different reason than the proponents of positive liberty. Whereas popular[186] and communitarian[187][188] advocates of positive liberty see democratic participation and direct democracy as a way of self-realisation and value in itself, republicans espoused democratic participation and representation as a disciplinary mechanism allowing the constituents to control and prevent the exercise of arbitrary power by political elites.[189] To republicans, democratic participation constitutes an instrument to secure the contestability, accountability and responsiveness of political power. They perceived it as an institutional framework that forces decision-makers to seek the consent of and, thus, to track the interests and ideas of all citizens when adopting legislation. [190] Along with the rule of law and constitutional safeguards, democratic accountability thus enables the non-arbitrary exercise of political power and hence non-arbitrary interference.[191]

It was eventually the achievement of the founding fathers of the US constitution to closely tie the ideal of the republic and republican freedom with the political regime of representative democracy.[192] The founding fathers indeed recognised the fundamental role of representative democracy as an institutional arrangement of antipower. Democratic participation as the rule by the many or, in other words, polyarchy, [193] presupposes political power to be vested in an equal, polycentric manner in the hands of the citizens, rather than in an absolutist ruler or a political elite. Representative government thus ensures a decentralised distribution of political power by splitting it amongst each member of the polity, which obtains an equal standing and share in the exercise of political power. [194]

Being geared towards safeguarding liberty as non-domination, political and social institutions of antipower have hence an instrumental rather than deontological value, as they are merely a device to preserve the ultimate value of liberty as non-domination. Yet republican

[185] Pettit (n 29), 602.
[186] Rousseau (n 25).
[187] Arendt (n 25); Arendt (n 25).
[188] Arendt (n 25).
[189] Scharpf (n 17) 14; Pettit (n 29), 591.
[190] Skinner (n 22) 26–31; Pettit (n 22) 28–30. Paine (n 171) Rights of Man, 180.
[191] Pettit (n 22) 28-30, 56, 65-66.
[192] Skinner (n 22) 36. Kalyvas and Katznelson (n 23) 98–103. Pocock and Whatmore (n 103) 515–526. For the sceptical stance of earlier republican thinkers toward direct democracy Skinner (n 22) 32–35.
[193] Dahl (n 21) 8.
[194] Ostrom (n 163) 47–49.

liberty, as Philip Pettit notes, is not an accidental or random outcome of those institutions of antipower. Rather, republican thought underscores that liberty as non-domination is institutionally created or constituted.[195] Institutions of antipower thus are themselves constitutive of non-domination and cannot be easily severed from the ideal of republican liberty. As liberty as non-domination itself is an 'institutional reality'[196] and defined with respect to the existence of certain civic institutions, those institutions themselves become synonymous of republican liberty and thus have some intrinsic value.

5 Republican Liberty: The Missing Link of the Competition-Democracy Nexus

The previous section has clarified the role of liberty as non-domination and equality of status as variables of our 'democratic model'. It identifies liberty and equality of status as central values of republican thought. It also describes how both values can be operationalised through institutional design. A central feature of the idea of liberty as non-domination and equal status is that it is directly linked with the republican form of government. Its realisation requires institutions of antipower that structure power in a polycentric manner to bring about some form of balance of reciprocal power.

But why and how does this third concept of liberty and its connection with republican institutions matter for our inquiry into the nature of the competition-democracy nexus? What is the relationship between the ideal of republican freedom and competition? In short, how do the liberty and equality of status as the two variables of our democratic model allow us to explain the tacit dimension underpinning the link between competition and democracy? In the following section, I discuss how our model allows us to develop a better understanding of the intellectual pedigree of the idea of a competition-democracy nexus by tracing it back to the intellectual origins of competitive markets. Early proponents of free markets valued commerce and competition not only for its welfare-enhancing characteristics but saw it as the harbinger of a republican society and polity of free and equals (Subsection 5.1). The capacity of competition to promote liberty as non-domination (5.2) and equality (5.3) indeed lay at the heart of the growing perception that there is a positive relationship between competition and a republican form of government. In line with the republican tradition, this ancient understanding of

[195] Pettit (n 22) 106.
[196] ibid 108.

competition – or what I shall call in the following the 'Smithian model of competition' – emphasised the role of competitive markets in ensuring a polycentric distribution of economic power to explain how competition enhances liberty and equality (5.4). The Smithian model of competition hence perceived competition as an institution of antipower and solution to the problem of domination resulting from instances of 'private government', which we shall call in the following the 'Behemoth problem' (5.5). It, thereby, also influenced the institutional design of republican institutions by the framers of the US constitution. This institutional design lies at the core of our contemporary understanding of republican democracy (5.6).

5.1 Competitive Markets as the Harbinger of a Republican Society and Polity

To understand the link between republican liberty and competition, it is important to recall that the republican tradition does not see arbitrary political and public power as the exclusive threat to liberty. Associating unfreedom and domination with the situation of defenceless subjugation and dependence that are characteristic for the slave-master relationship, the proponents of republican liberty also opposed to social and economic instances of domination and subordination in the private sphere.[197] The republican tradition, therefore, also advocates additional institutions of antipower that prevent the capacity of the dominant players to subjugate others in the social and economic sphere.[198] The central argument and insight of this study is that it is this republican concern about domination and subjugation in the social and economic sphere, which lies at the heart of the idea of the competition-democracy nexus. The republican ideal of liberty of non-domination is the connecting piece that underpins the relationship between competition and the ideal of a republican democracy.

This central role of republican liberty for the early proponents of competitive markets emerges perhaps most clearly in the writings of the English Levellers movement in the run-up and during the English Civil War (1642-1651). The Levellers were fierce opponents to the political despotism and oppression by the British Crown and eloquent advocates of democratic constitutional reforms.[199] They, however, not only took issue with political despotism and privileges, but their critique also targeted other social and economic forms of domination and subordination. The Levellers movement, therefore, also took aim at economic privileges,

[197] ibid 64.
[198] Pettit (n 29), 590–591.
[199] E. Anderson, 'Liberty, Equality and Private Government' in M. Matheson (ed), *The Tanner Lectures on Human Values* (vol 35. Cambridge University Press 2016) 67.

monopolies, patents and other restraints of trade,[200] which they viewed as private manifestations of arbitrary, unaccountable power.[201] The Levellers perceived such private forms of arbitrary power or 'private government'[202] to the same extent as arbitrary public power as a source of 'oppression'[203] incompatible with a free society of equals.[204]

Perceiving monopoly, privileges and other restraints of competition as an assault on liberty as non-domination, the Levellers became part of the earliest advocates of competitive markets. They underlined that competition by promoting economic freedom harboured an emancipatory and empowering promise. Competitive markets, in their eyes, ensured economic opportunities, emancipation and personal independence from domination.[205] The Levellers perceived economic freedom as a precondition for becoming 'self-employed, independent, masterless men'.[206] They were, therefore, amongst the first who advocated polycentric competitive markets as 'institutional components of a free society of equals'.[207]

The notion that competitive markets further liberty as non-domination and therefore constitute an important element of a republic society and polity of free and equals also found its way into one of the earliest works in political economy published by James Steuart, an early member of the Scottish Enlightenment, in 1768. Steuart was even more articulate than the Levellers one century before in portraying the far-reaching social and political consequences resulting from the emergence of a competitive market economy.[208] He was amongst the first who clearly articulated the idea of a competition-democracy nexus.[209] Steuart argued there is a direct link between the degrees of economic dependence, social subordination, and political form of government. [210] On this account, Steuart asserted that competitive markets are more

[200] Anderson (n 199) 68; W. Walwyn, 'Gold tried in the fire: [1647]' 76, 78-79; Overton and Walwyn (n 99) 46; Overton (n 99) 62; J. Lilburne and others, 'The petition of 11 September 1648: [1648]' 136–137; J. Lilburne, 'England's new chains discovered: [1649]' 144.
[201] Anderson (n 199) 72–73.
[202] ibid 66.
[203] Overton and Walwyn (n 99) 46. See also, for the criticism of the 'oppressive monopoly' as 'great abridgement of the liberties of the people' Walwyn (n 200) 79; Lilburne and others (n 200) 136; Lilburne (n 200) 144.
[204] Anderson (n 199) 67–68.
[205] ibid 68.
[206] ibid 72.
[207] ibid 67–68.
[208] P. Rosanvallon, *Le libéralisme économique: Histoire de l'idée de marché* (Seuil 1989) 48.
[209] Some years before Steuart, Montesquieu already argued that there is a link between the political constitution and the form of commerce ('Le commerce a du rapport avec la constitution.') He also anticipated Steuart's claim that the republican form of government is most conducive to commerce. See most prominently Montesquieu, Charles-Louis de Secondat (n 125) XX, iv - xxii.
[210] J. Steuart, *An Inquiry into the Principles of Political Oeconomy: Being An Essay on the Science of Domestic Policy in Free Nations* (A. Millar and T. Cadell 1768) Book II, Chapter XIII, 238-239. Rosanvallon (n 208) 48–49.

likely to lead to a republican government than feudal or mercantilist economic orders.[211] He sustained this claim by describing how competitive markets tore down the patterns of economic dependence and social subordination that characterised the feudal economic and social order. By levelling these structures of economic dependence and arbitrary domination, competitive markets lead to an equal subordination of all members of society to general laws, which ensure equal freedom.[212] By equalising economic relationships, competition ultimately paves the way toward a republican or democratic political order and society, because it promotes a more equal distribution of wealth and political power.[213] Steuart, therefore, postulated that the emergence of competitive markets promotes an 'extension of public liberty, by extinguishing every subordination, other than that due to established laws.'[214]

Not more than seven years later, yet without mentioning Steuart's work, Adam Smith provided a very similar account of the levelling impact of the advent of competitive markets on social and economic hierarchies and structures of subjugation in his *Wealth of Nations* (1776). Adam Smith, indeed, celebrated the ushering in of competitive markets as 'great revolution'[215] which dismantled the social order of feudalism. In a similar vein as the Levellers and Steuart, Smith identified the economic subordination and dependence of lower classes to a feudal elite as the central feature of the feudal society.[216] Under the feudal system, the largest part of the population lived in 'servile dependency'[217], a 'state of war' [218] and 'subordination'[219] under the arbitrary rule and domination of the feudal elite.[220] The emergence of competitive markets unravelled these structures of social subordination and domination by diminishing the economic dependence of the lower classes upon the feudal seigniors. By transforming relationships of economic dependence into more equalised forms of economic exchanges, the advent of competitive markets thus promoted the emancipation and empowerment of the lower classes.[221]

These equalising dynamics of the nascent competitive markets were not only felt in the realm of the economy but also had immediate repercussions on the social and political sphere.

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[211] Steuart (n 210).
[212] Steuart (n 210) Book II, Chapter XIII, 237 and 242; Montesquieu, Charles-Louis de Secondat (n 125) XX, xxi.
[213] Steuart (n 210) Book II, Chapter XIII, p. 245.
[214] ibid Book II, Chapter XIII, p. 248.
[215] Smith (n 1) III, iv, § 17, p. 422.
[216] Steuart (n 210) Book II, Chapter XIII, p. 240, 245; Smith (n 1) III, iii -iv.
[217] Smith (n 1) III, iv, § 4, p. 412.
[218] ibid.
[219] ibid III, iv, § 9, p. 417-418.
[220] ibid III, iv, §§ 4-11, pp. 412-420.
[221] ibid III, iv, § 11-12, pp. 419-420. See for a similar argument Steuart (n 210) Book II, Chapter XIII, pp. 238-240.

Eroding relationships of economic dependence, the emerging competitive markets also tore down structures of social and political subordination. Adam Smith colourfully described how, with the advent of competitive markets, the feudal seigniors started to lose their 'whole power and authority' over the people by trading with more productive classes.[222] With the rise of 'independent' tradesmen, the 'great proprietors were no longer capable of interrupting the regular execution of justice, or disturbing the peace of the country.'[223] As a consequence, '[a] regular government was established in the country as well as in the city, nobody having sufficient power to disturb its operations in the one, any more than in the other.'[224] Adam Smith underscored the importance of these broader political and societal implications of the rise of competitive markets observing that

> *[...] commerce and manufactures gradually introduced order and good government, and with them, the liberty and security of individuals, among the inhabitants of the country, who had before lived almost in a continual state of war with their neighbours, and of servile dependency upon their superiors. This, though it has been the least observed, is by far the most important of all their effects.*[225]

5.2 The Ideal of Republican Liberty at the Heart of the First Articulations of a Competition-Democracy Nexus

The most striking feature of these early accounts of the link between the emergence of competitive markets and 'good government' is that they hinge on the republican notion of liberty as non-domination rather than negative freedom as non-interference. The English Levellers did not conceive liberty in the negative sense, in opposition to interference. In line with the republican tradition, they defined civil and economic liberty as the antonym to subjugation to dominion,[226] servitude,[227] bondage[228] and oppression.[229]

The specific republican character of this early concept of economic liberty becomes even more apparent in the work of John Steuart. Like Hayek and other liberal thinkers after

[222] Smith (n 1) III, iv, § 10, p. 418-419.
[223] ibid III, iv, § 15, p. 421.
[224] ibid.
[225] ibid III, iv, § 4, p. 412.
[226] J. Lilburne, 'Postscript to The freeman's freedom vindicated' in A. Sharp (ed), *The English Levellers* (Cambridge University Press 2004) 31.
[227] Overton and Walwyn (n 99) 38.
[228] ibid 34.
[229] Overton and Walwyn (n 99) 46; Lilburne and others (n 200) 136–137.

him,[230] John Steuart observed that economic liberty in its negative sense as non-interference could also thrive in autocratic regimes, as long as the political power of the monarch is subject to constitutional constraints.[231] Steuart, however, questioned this narrow understanding of liberty as non-interference. He observed that even if 'liberty is equally compatible with monarchy as with democracy', it does not follow that the 'enjoyment of it is equally secure under both; because under the first it is much more liable to be destroyed.'[232] Only a republican democracy, through the elimination of structures of domination and the reduction of arbitrary interference,[233] secures what Steuart calls 'modern liberty'[234] or 'liberty [...] *actually* [...] enjoyed'[235].

On the basis of this republican notion of 'modern liberty', Steuart postulated some form of symbiosis between republican democracy and competition. He claimed that republican or democratic regimes by guaranteeing equal social and political rights ensure economic liberty and the equal status of economic agents without which competition cannot thrive.[236] In contrast, monarchic or autocratic regimes, being characterised by the largest possible degree of inequality,[237] can only ensure a precarious form of liberty which faces the continuous risk of 'arbitrary and undetermined subordination'.[238] This arbitrary subordination destroys trade or competition because it subjects market participants to unequal laws and thus leads to 'unequal competition among those of the same class'.[239] In line with the republican tradition, Steuart, thus, directly linked the principle of the rule of law with republican liberty as non-domination and equal status, pointing out that republican democracies ensure equality before the laws[240] and political equality.[241] Competition and trade, Steuart claimed, thus can only flourish where

[230] Hayek, Friedrich A. von (n 19) 74.
[231] Steuart (n 210) Book II, Chapter XIII, p. 237 - 238.
[232] ibid Book II, Chapter XIII, p .242.
[233] ibid Book II, Chapter XIII, 242 - 243.
[234] ibid 240.
[235] ibid Book II, Chapter XIII, p .242. Montesquieu also adhered to a republican notion of economic freedom (liberté de commerce) as antonym of servitude Montesquieu, Charles-Louis de Secondat (n 125) XX, xii. Montesquieu also clearly rejects a negative understanding of economic liberty.
[236] Steuart (n 210) Book II, Chapter XIII, p. 242. See along similar lines, Montesquieu, Charles-Louis de Secondat (n 125) V, iii and vi and XX, iv and XX, x, xi and xix.
[237] Steuart (n 210) Book II, Chapter XIII, p. 242.
[238] ibid Book II, Chapter XIII, p. 243.
[239] ibid Book II, Chapter XIII, p. 244 - 245.
[240] ibid Book II, Chapter XIII, p. 242.
[241] ibid.

the ‘equality of the democracy secures liberty’[242] and the subjugation to ‘arbitrary power’ is limited.[243]

Along similar lines, Smith’s account of the transition from a hierarchical, feudal society towards a competitive economy is firmly grounded in a republican understanding of liberty as non-domination.[244] Smith, indeed, construed the liberty brought about by the competitive markets in opposition to the ‘subordination’,[245] ‘dependence’[246] and ‘slavery’[247] prevailing in the feudal society. In line with the republican tradition, Smith not only referred to ‘liberty’ as the absence of interference but associated it with the more resilient form of the ‘security’ of the individual.[248] Smith’s work indeed perceived competition as institution constitutive of liberty and security, which liberates individuals from the feudal order and empowers them against both arbitrary public and private power.

5.3 The Egalitarian Dimension of Economic Liberty as Non-Domination

The republican pedigree of the understanding of economic liberty cultivated by those early proponents of competitive markets also surfaces in its profoundly egalitarian dimension. Their support of competitive markets was indeed grounded in an awareness of the levelling impact of competition on social hierarchies and its capacity to enhance economic independence and opportunity.

The equalising effect of competitive markets on social relations is most figuratively articulated by Adam Smith when he famously writes ‘[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest‘.[249] This passage, often misunderstood as an eulogy in praise of the self-interested or egoistic traits of the *homo oeconomicus*, serves Smith as a rhetorical device to contrast the heterarchical social relationships in a market society with the hierarchies prevailing under the

[242] ibid.
[243] Steuart (n 210) Book II, Chapter XIII, p .243; Montesquieu, Charles-Louis de Secondat (n 125) XX, iv, x, and xi.
[244] See for a similar interpretation D. Winch, *Adam Smith's politics: An essay in historiographic revision* (Cambridge University Press 1978) 75–80; Pettit (n 83), 142; E. Rothschild, ‘Adam Smith and Conservative Economics’ (1992) 45(1) The Economic History Review 74 93.
[245] Steuart (n 210) 238.
[246] ibid.
[247] Smith (n 1) I, x, c. § 22, pp. 142-143; III, iii, § 5, p. 400; III, iv, § 15, p. 421.
[248] ibid III, iv, § 4, p. 412.
[249] ibid I, ii, § 2, pp. 25 - 27.

feudal order.[250] The economic relationships in the feudal society are characterised by subjugation and unequal bargaining because they are exclusively determined by the arbitrary power and benevolence of the feudal seigniors.[251] In contrast, in competitive markets, they are more equalised because they depend upon what has been independently and autonomously defined as 'adequate equivalent'[252] by each of the parties. Implying some form of mutual recognition of the trading partners' self-interest, competitive exchanges thus have an 'egalitarian'[253] dimension because they presuppose that each market player has equal 'standing in the eyes of the other'.[254] By equalising economic exchanges, the emergence of competitive markets thus creates the framework of 'social relations between free and equal persons'.[255]

Competition, Smith tells us in this famous passage, requires economic agents to set aside the pursuit of their mere self-interest. Instead, they have to put themselves in a position where they account for and trace the interests of other market participants who have equal status. This insight might also explain why Adam Smith reverted to competition to illustrate his notion of procedural fairness, famously articulated in his allegory of the ‚impartial spectator' in the *Theory of Moral Sentiments*.[256] Smith argued that in order to determine the validity and justness of our moral judgements and acts we have to look beyond the exclusive pursuit of our 'self-love'. Rather, we have to position ourselves in the role of an 'impartial spectator'.[257] This position of impartiality requires us to ask ourselves whether others would countenance our judgments or conduct.[258] Smith then illustrates this point by drawing a distinction between what one could call 'competition on the merits' and unfair competition:

> *In the race for wealth, and honours, and preferments, he may run as hard as he can, and strain every nerve and every muscle, in order to outstrip all his competitors. But if he should jostle, or throw down any of them, the indulgence of the spectators is entirely at an end. It is a violation of fair play, which they cannot admit.*[259]

In stressing the role of competitive markets in levelling hierarchies and furthering 'fair play', Smith also echoed the republican critique of monopolies, privileges and restraints of trade

[250] This interpretation is largely based on Anderson (n 199) 63–65.
[251] Smith (n 1) I, ii, § 2, pp. 25 - 27.
[252] Steuart (n 210) 238.
[253] Anderson (n 199) 64.
[254] Anderson (n 199) 65; Steuart (n 210) Book II, Chapter XIII, p. 239.
[255] Anderson (n 199) 65; Rosanvallon (n 208) 71.
[256] For the proposition that this allegory stands for a commitment to human equality lying at the core of Smith's moral thought Fleischacker (n 154) 487.
[257] A. Smith, *The Theory of Moral Sentiments: [1759]* (Penguin 2009) II. ii, 101.
[258] ibid.
[259] ibid.

coined by the English Leveller movement. The English Levellers lambasted restraints to competition and economic privileges as a source of poverty and an obstacle that hinders individuals from becoming economically independent 'masterless men'.[260] Along similar lines,[261] Adam Smith criticised the negative impact of public and private restraints on trade as a hurdle to individuals' equal opportunity to engage in economic activity.[262] Smith stressed that these restraints prevented above all the poorest from empowering themselves by becoming economically active.[263] Smith, therefore, aired particularly fervent criticism against restrictions of the free movement of labour. [264] In the same way as the Levellers, Smith criticised exclusive rights and other forms of privileges as undue forms of state favouritism being at odds with the principles of the rule of law and 'evidently contrary to that justice and equality of treatment which the sovereign owes to all the different orders of his subjects.'[265]

Comprehending equality primarily as equality of opportunity and equality of conditions, the early proponents of competition endorsed a procedural notion of equality which does not necessarily presuppose an equal distribution of wealth.[266] This, however, does not mean that the idea of material equality and distributive justice[267] is completely alien to their arguments in favour of competitive markets. Rather, they assumed that competitive markets, by promoting the economic independence and opportunity of small, independent tradesmen and proprietors, will also bring about a more equal and merit-based distribution of wealth and political power.[268]

The early proponents of competitive markets cast the independent and small proprietor, yeoman or tradesman as the epitome of the republican independent 'freeman'. The Levellers and Smith alike praised the virtue of the small proprietor as being 'of all improvers the most industrious, the most intelligent, and the most successful'[269] and stressed the virtue and productivity of independent tradesmen, manufacturers and English yeomanry.[270] Smith also

[260] Lilburne (n 200) 144. Anderson (n 199) 72.
[261] Fleischacker (n 154) 489. Fleischacker provides a comprehensive overview on the academic discussion as to whether Adam Smith can be considered as egalitarian. See in particular ibid 486–487.
[262] See Book I, Chapter X entitled ‚Inequalities occasioned by the policy of Europe' , Smith (n 1) I, x, c; see in particular §§ 1-18, pp.135 - 139; Rothschild (n 244), 92–93.
[263] Smith (n 1) I, xi, c. § 1 and § 12, p. 135 and 138, § 31 and § 32, p. 146.
[264] ibid I.x.c. § 41 ff. pp. 151 ff.
[265] ibid IV, viii, § 30, p. 654.
[266] Anderson (n 199) 67.
[267] Fleischacker (n 154) 498. 'No society can surely be flourishing and happy, of which the greater part of the members are poor and miserable. It is but equity, besides, that they who feed, cloath and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, cloathed and lodged.' Smith (n 1) I, viii, § 36, p. 96.
[268] Steuart (n 210) Book II, Chapter XIII, p. 245.
[269] Smith (n 1) III, iii, § 19, pp. 423-424.
[270] Rosanvallon (n 208) 77–81.

waged criticism against the law of primogeniture and other 'perpetuities' which 'prevent the division of great estates, and thereby hinder the multiplication of small proprietors.'[271] Smith, therefore, called for an abolition of the primogeniture and other restraints upon alienation of land as a structural tool to deconcentrate property and disperse it in the hands of a multitude of small proprietors with a view to furthering economic opportunity.[272] Freeing up the access to property, these reforms would expand the opportunity for people to become small proprietors and independent free men. Smith, thus, assumed that competition, by dispersing and bringing about a more equal distribution of wealth and property, will promote equality of opportunity and allow individuals to emancipate themselves by becoming independent economic agents.[273]

5.4 Polycentric Competition as an Institution of Antipower

By virtue of its propensity to equalise economic hierarchies and enhance republican liberty, early proponents of competitive markets perceived competition as an institution of antipower which ensures the economic and social preconditions of a republican society and polity of independent free and equals. But how then does competition secure republican liberty? The answer to this question is again directly linked with the concept of polycentricity that we have identified in the previous section as a common feature of the design of other republican institutions of antipower.

The early proponents of free markets explained the transition from the hierarchical feudal system to a heterarchical market society by the centrifugal dynamics of competition dispersing economic power in a decentralised, polycentric way. Adam Smith most prominently underscored the central role of an increase in polycentricity of economic relationships in promoting the independence and liberty of market agents. In the feudal society, the lower classes of serfs were dependent upon a single feudal seignior to ensure their economic subsistence. This situation changes dramatically when the former serfs become tradesmen in a market society. In a competitive economy, their subsistence no longer depends on 'one, but of a hundred or a thousand different customers.'[274] Being no more dependent upon one, but a multitude of economic parties, the former serfs are no longer subject to the whims and passions of a single man. Instead, they become trading partners of equal and independent standing to the feudal seignior. Smith, thus, described the economic independence and liberty market agents

[271] Smith (n 1) III, iv, § 19, pp. 423-424.
[272] ibid III, iii, § 19, pp. 423-424.
[273] Anderson (n 199) 76–77.
[274] Smith (n 1) III, iv, § 11 - 12, pp. 419-420.

gain with the emergence of competitive markets as the direct consequence of the multiplication and diversification of economic relationships.

Polycentricity also plays an important role in Smith's explanation of how the power of the feudal elite is suddenly dispersed amongst the emerging independent tradesmen. Smith described in vivid terms that, despite the rise of competitive markets, the unproductive feudal elites continued to indulge themselves in their luxury lifestyle. Whereas under the feudal order, the seigniors could simply exploit their serfs at will to finance their extravagant lifestyle, in a market society, they can no longer have recourse to arbitrary coercion to satisfy their needs. On the contrary, they suddenly have to enter into economic exchanges that account for the interests of both parties. The advent of competitive markets hence compels the feudal elite to engage in economic transactions with independent traders, to satisfy their fancy lifestyle and passion for the 'most childish vanity'. [275] The feudal elite, thus, gradually barters away their power to more productive tradesmen who pursue 'their own interest'. [276] Smith hence portrayed the diffusion of economic power of the feudal elite as nothing more than the spontaneous outcome of polycentric self-interested interaction of individual market players. This account echoes, as Albert Hirschman points out,[277] the idea that the interplay and pitting against each other of conflicting passions and interests will restrict the human lust for power.[278] The rivalrous, polycentric interaction of self-interested players will thus bring about a balance of interests and power that ensures peaceful coexistence within a society of free and equals. [279]

The Smithian model of competition, hence, posits that polycentric competitive markets channel individuals' self-interest in a way that compels each player to integrate the needs and self-interest of the other players into his or her maximisation calculus.[280] Each economic bargain takes the form of 'Give me that which I want and you shall have this which you want'.[281] Polycentric coordination of economic exchanges, thereby, brings about a balance or equilibrium

[275] ibid III, iv, § 17, p. 422.
[276] ibid.
[277] Hirschman (n 2) 103, 110 - 112.
[278] Smith (n 1) III, iv, § 10, pp. 418-419.
[279] Hirschman (n 2) 9–48. In this respect, the Smithian account follows a similar logic as the argument that free trade or commerce will lead to peace between nations. Montesquieu, Charles-Louis de Secondat (n 125) Book XX, Chapter 2-3. I. Kant, 'Perpetual Peace [1795]' in I. Kant (ed), *Political Writings* (Cambridge University Press 1970) 118. See for an earlier formulation of this idea (*T]he whole World* as *to Trade,* is *but as one Nation or People, and therein Nations are* as *Persons)*D. North, *Discourses Upon Trade* [1691] (Johns Hopkins Press 1907) 13. Rosanvallon (n 208) 28-29, 43-44. R. Howse, 'Montesquieu on Commerce, Conquest, War and Peace' (2006) 31(3) Brooklyn Journal of International Law 1.
[280] Smith (n 1) I, ii, § 2, 25-27.
[281] ibid.

of countervailing interests[282] and reciprocal power[283] that requires and enables individuals to engage in a continuous interaction of mutual adjustment and re-adjustment.[284] The Smithian model of competition, thus, perceives polycentric interaction and rivalry between independent, self-interested players as an institutional arrangement that ensures liberty as non-domination by guaranteeing some form of balance of power between equal market participants. Competition and polycentric rivalry operate as an accountability mechanism. They oblige firms to mutually adapt themselves to the choices made by consumers and other competitors without having recourse to domination.[285]

This balance of power amongst heterarchical players is, however, unsettled if a single or a number of players succeed in concentrating economic power in their hands. Such asymmetric concentration of economic power enables them to unilaterally or collectively exercise domination because they cease to be exposed to the constraints of competition. The English Levellers[286] and Adam Smith alike therefore perceived privileges, monopolies or collusive guilds as instances of concentrated economic power which were incompatible with a society of free and equals. Smith, for instance, did not confine himself to criticising monopolies and other restraints of competition merely for their adverse impact on prices and unfair exploitative effects.[287] He rather condemned them more broadly as an outright attack against the general interest or the public at large, [288] for they sacrifice the interests of consumers and other market participants in the pursuit of their own goals.[289] From this perspective, cartels and monopolies amount to private government and domination as they allow producers to impose their particular, idiosyncratic interest upon other market participants and the rest of the society.[290] The concentration of economic power in the hands of a single or a few players, thus, undermines the ability of the polycentric competitive process to guarantee economic interaction as non-oppressive, non-hierarchical mutual self-adjustment.

The Smithian model of competition, hence, forged a link between polycentric market structure, firm behaviour and domination. It assumed that the absence or elimination of polycentric market structures would put economic agents automatically into a situation of

[282] Rosanvallon (n 208) 60, 76.
[283] Pettit (n 22) 67.
[284] Polanyi (n 148) 114–122.
[285] Smith (n 1) I. x. c, § 31, p. 146; I, xi, b, § 5, p. 163; and V, i, e. § 30, pp. 754-755.
[286] Lilburne and others (n 200) 136–137; Lilburne (n 200) 144.
[287] Smith (n 1) V, i, e. § 30, pp. 754-755.
[288] ibid I, x, c, § 27, p. 145.
[289] ibid IV, vii, § 50, p. 661.
[290] Rosanvallon (n 208) 78–79.

conflict of interest where they have the ability and incentive to impose their self-interests on others. This structure-conduct assumption is most clearly encapsulated in Adam Smith's famous adage that '[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices.'[291]

The Smithian model of competition thus stipulates that the elimination of polycentric competitive market structures and industry concentration are more likely to generate domination, for instance, in the form of restraints in trade and collusion.[292] This structure-conduct assumption put forth by the Smithian model somewhat presages Mancur Olson's theory of collective action.[293] It assumes that a concentrated market structure composed by a small group of players having a narrow set of minoritarian interests and low organisation costs[294] are more capable of exercising domination through anticompetitive coordination. Industry concentration thus enables minoritarian interest groups to exercise disproportionate power. For they fare much better than the large, unorganised majority groups of consumers or other competitors with diffused costs in furthering their interests.[295]

This structure-conduct assumption underpinning the Smithian model of competition also hints towards the institutional solution through which domination by minoritarian interests can be averted. Smith envisaged the promotion of polycentric markets, in which economic power is dispersed among a multitude of small, independent players as the remedy to address the structural factors that vest economic agents with the capacity of exercising dominating economic power. Deconcentrated market structures, Smith claimed, ensure that economic agents are 'dispersed in distant places [and] cannot easily combine together'.[296] Smith, therefore, advocated the preservation of a society of small, independent proprietors not only to promote equal economic opportunity, but also to counteract market structures which facilitate coordination and collusion by minoritarian vested interests.[297] The Smithian model thus asserts that the polycentric decentralisation of economic power amongst small proprietors prevents domination ensuing from the concentration of economic power.[298] The Smithian model of

[291] Smith (n 1) I, x, c, § 27, p. 145; see also I, x, c, § 5 pp. 135-136.
[292] ibid I, x, c, §22, (pp. 142-143) and IV, viii, § 34, (pp. 654-655).
[293] M. Olson, *The logic of collective action : public goods and the theory of groups [1965]* (Harvard University Press 1971).
[294] ibid 46–47.
[295] ibid 52 and 128.
[296] Smith (n 1) I, x, c. § 23, p. 143.
[297] ibid IV, viii, § 34, pp. 654-655.
[298] ibid I, x, c. § 23, p. 143.

competition, thus, champions a polycentric market structure as an institution of antipower. A polycentric market structure safeguards liberty as non-domination by raising the costs of coordination and domination through the multiplication of players.[299] Accordingly, Smith observed that

> *[i]f this capital is divided between two different grocers, their competition will end to make both of them sell cheaper, than if it were in the hands of one only; and if it were divided among twenty, their competition would be just so much the greater, and the chance of their combining together, in order to raise price, just so much the less.*[300]

The early proponents of competitive markets and, in particular, Adam Smith, thus envisaged rivalrous, polycentric competitive markets as an institution of antipower whose centrifugal forces increase the costs of domination by diffusing economic power between independent self-interested agents.

This Smithian understanding of polycentric competition as an institution of antipower also sheds new light on the Smithian allegory of the 'invisible hand'.[301] Smith's concept of the invisible stands for the proposition that the interaction between free and self-interested individuals in competitive markets will automatically generate unintended outcomes that are in the public good.[302] Modern economic theory still likes to invoke Smith's invisible hand in support of the proposition that the self-interested exchanges between economic agents will automatically bring about a competitive equilibrium generating welfare maximisation.

Smith, too, stressed this output-oriented dimension of polycentric competition and emphasised its superior capacity to generate welfare and efficiencies as compared to centralised planning by the state or monopolies.[303] By reducing the Smithian imaginary of the invisible hand to the output-oriented value of economic welfare, modern economic theory, however, misses out on its important procedural dimension. Adam Smith's imaginary of the invisible hand and his account of how polycentric competition promotes equal liberty as non-domination

[299] Olson (n 293) 48.
[300] Smith (n 1) II, v, § 7, pp. 361-362.
[301] ibid IV, ii, §9, pp. 455-456.
[302] ibid.
[303] See also Smith (n 1) IV, ix, § 51, 687; Hayek, Friedrich A. von (n 19) 36,42, 51-52; Polanyi (n 148) 111–126. In a system of polycentric competition the 'sovereign is completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interest of the society.' Smith (n 1) IV, ix, § 51, 687; Hayek, Friedrich A. von (n 19) 36,42, 51-52; Polanyi (n 148) 111–126.

by diffusing economic power in a decentralised manner follow a similar blueprint.[304] The allegory of the 'invisible hands' highlights the capacity of polycentric competitive markets to ensure a self-governing order in which individuals coordinate their economic activity and exchanges through mutual self-adjustment as equal, free and autonomous decision-makers. The Smithian model of competition and the allegory of the invisible hand thus not only advocate polycentric economic ordering because it leads to outcomes which are in the general interest, but they put particular emphasis on the specific manner in which these outcomes are achieved.[305]The idea of an 'invisible hand' thus illustrates the role of polycentricity as a key feature of the input-legitimacy of markets. Polycentricity ensures economic coordination as a 'self-governing system',[306] which guarantees individual equal liberty as non-domination. The Smithian model of polycentric competition, thus, presages the idea that competitive markets the mode of economic coordination which is most conducive to and most compatible with a free society of equals.[307]

5.5 Polycentricity as an Institutional Solution for the 'Behemoth Problem'

Early political economists, thus, championed competitive markets not only because of their economic but, more importantly, because of their political virtues. In light of the advent of competitive markets, Smith's concept of the 'invisible hand' allegorised the idea that the decentralised and free interaction between self-interested independent decision-makers will advance the common good and ensure a self-governing, stable social order without the need of any intervention by an external authority.[308] The forerunner of this idea that the polycentric self-coordination amongst self-interested individuals may bring about advantageous outcomes and form the basis of a flourishing society in the absence of a central planner or ruler was Bernard Mandeville. In his satiric pamphlet 'The Fable of the Bees'[309] and its central poem, 'The Grumbling Hive' (1714), Mandeville compared the English society of his time with a buzzing beehive to describe an apparent paradox: although the individual members of the society pursue 'private vices' by acting in a self-interested, selfish, cunning or even fraudulent way, their interaction nonetheless generates 'publick benefits' in the form of thriving trade and

[304] Smith (n 1) IV, ii, § 9, pp. 455-456.
[305] ibid IV, ii, § 10, p. 456.
[306] Ostrom (n 163) 45.
[307] Smith (n 1) III, iv, § 4, p. 412.
[308] ibid IV, ii, § 10, p. 456.
[309] Rosanvallon (n 208) 37.

prosperity. All this happens in the absence of a clearly identifiable ordering plan or authority. Instead of being subject to a central planner or autocratic ruler, the beehive in Mandeville's account is subject to a limited government.[310] Adam Smith, while distancing himself from some of what he considered Mandeville's extreme propositions,[311] drew inspiration from Mandeville's Fable of the Bees when he forged the allegory of the invisible hand to describe how the interaction of self-interested individuals contributes to a harmonious self-governing social order without them being subject to any centralised authority or overall plan.[312]

The revolutionary character of this idea that polycentric, rivalrous interaction between free and equal individuals may form the basis of a harmonious social and political order can hardly be exaggerated. Its far-reaching implications can only be grasped if we compare it with the diametrically opposed vision of society coined by Thomas Hobbes[313] a few decades prior to the writings of Mandeville. The idea that polycentric competitive markets could form the basis of a self-governing, harmonious and free social order, encapsulated in Mandeville's allegory of the beehive and Smith's concept of the 'invisible hand', was a direct assault and counterproject to Hobbes' much bleaker and pessimistic vision of society.[314] In the wake of the English Civil War (1642-1651), Hobbes had influentially advanced the view that in the absence of any ordering by a 'common Power to keep them all in awe', the free, rivalrous interaction of self-interested players will end up in a state of lawlessness and chaos: a state of 'warre […] of every man, against every man.'[315] Hobbes observed that if individuals were left free to follow their passions and self-interest, violent clashes and eventually anarchy and civil war would be inevitable. In such a state of anarchy or war, neither society nor industry can thrive. Life is miserable, and domination is omnipresent.[316] Even if another person does not currently interfere with your liberty, you are unfree because you live under the constant fear that another person might at any moment turn upon you.[317]

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[310] B. Mandeville, *The Fable of the Bees [1714]* (Penguin Classics 1989) 63–76. See also for discussion ibid Introduction 15-16.
[311] Smith (n 257) Part VII, Section II, Chapter 4.
[312] Rosanvallon (n 208) 37. F. Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (Nomos 1980) 37. See for a discussion of the role of Mandeville's thought on Adam Smith T. A. Horne, 'Envy and Commercial Society' (1981) 9(4) Political Theory 551 559–560. E. Heath, 'Adam Smith and Self-Interest' in C. J. Berry, M. P. Paganelli and C. Smith (eds), *The Oxford Handbook of Adam Smith* (Oxford University Press 2013) 243–254.
[313] Hobbes (n 49).
[314] Rosanvallon (n 208) 15.
[315] Hobbes (n 49) Chapter 13, p. 185. Interestingly, Hobbes referred to ‚competition' as one of the three main sources of violence and ‚quarrel' ibid 185.
[316] ibid Chapter 13, p. 186.
[317] For the argument, that Hobbes' state of war is tantamount to the concept of domination coined or rediscovered by Pettit D. Acemoglu and J. A. Robinson, *The Narrow Corridor* (Viking-Penguin 2019) 9.

Hobbes, in his narrative of the English Civil War, captured this state of lawlessness and violent conflicts between various political and religious factions in the metaphor of the biblical beast Behemoth.[318] The Book of Job[319] of the Old Testament uses the gigantic animal Behemoth, often depicted as an elephant, hippopotamus or rhinoceros, as an allegory for the almighty power of God. Yet, this imaginary of Behemoth as a colossal, powerful beast, which dominates over all animals of the land and spends most of its time lying around and eating, soon became a synonym for sloth, greed, and the devil.[320] Alongside with Behemoth, the Book of Job is populated by a second beast: Leviathan.[321] While Behemoth rules over the land, Leviathan, often depicted as a gigantic whale-fish or serpent, governs as an omnipotent sea monster over all animals of the sea.[322] Later, Jewish and Christian writings repeatedly recount a final, apocalyptic combat between Behemoth and Leviathan, which marks the beginning of the Messianic Age.[323]

In his most influential political writing, *Leviathan* (1651), Hobbes harnessed the imaginary and iconography of the biblical monster of Leviathan to lay out a radical solution to put an end to the lawless infighting between antagonising social and religious factions with a view to making any new outbreak of civil war impossible. In *Leviathan*, Hobbes put forward the prominent claim that a stable societal and political order could only be guaranteed by the rule and authority of a single, omnipotent sovereign or 'Common-Wealth', which Hobbes referred to as 'Mortall God' or 'LEVIATHAN'.[324] Only if this autocratic sovereign sees 'so much Power and Strength conferred upon him, that by terror' he can put an end to the liberty and lawlessness of the state of nature, a commonwealth could ensure that its members live under the rule of law, security and peace rather than in a state of war.[325] In other words, only if Leviathan is strong enough to eventually defeat Behemoth, life in a peaceful and stable society is possible.

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[318] T. Hobbes (ed), *Behemoth, or the Long Parliament [1697/1889]* (2010); F. Neumann, *Behemoth: The structure and practice of National Socialism, 1933-1944* (Octagon 1963 [1942]) 459. For alternative interpretations P. Seaward, 'General Introduction' in T. Hobbes (ed), *Behemoth, or the Long Parliament [1697/1889]* (2010) 64.
[319] *The Bible: Authorized King James Version* (Oxford University Press 2008) Job 40:15-20.
[320] Seaward (n 318) 59–60.
[321] (n 319) 41:24.
[322] P. Springborg, 'Hobbes's Biblical Beasts: Leviathan and Behemoth' (1995) 23(2) Political Theory 353 358–361; Acemoglu and Robinson (n 317) 10.
[323] L. Drewer, 'Leviathan, Behemoth and Ziz: A Christian Adaptation' (1981) 44 Journal of the Warburg and Courtauld Institutes 148 151–155. Seaward (n 318) 58–64; 'Behemoth' in A. Uterman (ed), *Dictionary of Jewish Lore and Legend* (Thames & Hudson 1997).
[324] Hobbes (n 49) Chapter 17, p. 227.
[325] Hobbes (n 49) Chapter 17, p. 227-228; Rosanvallon (n 208) 17.

The contrast between the two visions of a societal and political order encoded in the imaginary of the Leviathan on the one hand, and Mandeville's 'Grumbling Beehive' or Smith's 'invisible hand', on the other, could have hardly been more blatant. Hobbes argued that a stable social order was only possible if all power was concentrated in the hands of an authoritarian ruler or state, which suppresses all forms of liberty as the source of licentiousness and lawlessness. Some decades later, the early proponents of competitive markets argued that the decentralised interaction of independent and free, self-interested individuals would not end up in chaos, but in spontaneous, domination-free self-coordination which ensures a stable and peaceful society and political order characterised by liberty and equality.

Many economists, amongst them prominent members of the Chicago School, such as George Stigler,[326] have misread the accounts of early political economists as a hymn in praise of self-interest and *laissez-faire*.[327] This interpretation, however, ignores that early political economists, such as Smith, were still confronted with the problem of preventing self-interested individuals from exerting domination by imposing their will upon others, annihilating their liberty and thereby transforming the state of liberty into a state of lawlessness. In short, they were very much aware of the risk that the unbridled pursuit of self-interest might easily transform bees into dominating Behemoths. Adam Smith's work offers a panoply of examples where monopolies and traders conspire with each other to impose their arbitrary and selfish interests upon the rest of society.[328]

Early proponents of competitive markets, thus, grappled in a similar vein as Hobbes with the 'Behemoth problem' that arises if self-interested individuals gain the power to exert private government and domination. Yet, the solution for the 'Behemoth problem' they envisaged radically differed from Hobbes' endorsement of authoritarianism. They opposed the conferral and centralisation of all power in the hands of an all-powerful, monstrous Leviathan that defeats Behemoth by the rule of fear. Instead, they argued that liberty as non-domination could only be preserved by splitting up and decentralising power amongst many, independent players. As long as power is roughly equally dispersed, the polycentric interaction of these independent players will channel their self-interest towards the common interest and impose a check on each other's power to exert domination and private government. Early proponents of

[326] Stigler for instance claimed that ‚[the] *Wealth* of *Nations* is a stupendous palace erected upon the granite of self-interest.' G. J. Stigler, 'Smith's Travels on the Ship of State' (1971) 3(2) History of Political Economy 265 265.
[327] For a critical rejection of this reading of Adam Smith S. Fleischacker, *On Adam Smith's Wealth of Nations: A Philosophical Companion* (Princeton University Press 2004) 85–86.
[328] Smith (n 1) I, x, c, § 27, p. 145; see also I, x, c, § 5 pp. 135-136.

competitive markets perceived the centrifugal forces of competition between roughly equally sized players and factions as a system of antipower. Instead of building up a gigantic Leviathan, they championed the preservation of the polycentric Grumbling Beehive as a system of antipower that prevents and imposes checks on Behemoth. They assumed that the separation, division, and decentralization of power through institutional rules would ensure that the interaction between self-interested individuals will take the form of Mandeville's Grumbling Beehive instead of morphing into a monstrous Behemoth.

Unlike the 19th century and modern *laissez-faire* liberals, these early political economists and republican thinkers recognised the crucial role of legal rules and laws in guaranteeing the polycentric functioning of markets as systems of antipower. To them, free and competitive markets could not be maintained through the absence of laws and regulations. On the contrary, they underscored that the preservation of economic liberty and markets was a question of institutional and legal design. Legal rules were not viewed as an antonym but as a source of economic liberty as non-domination and as the basis for the polycentric functioning of competition.

The importance of legal rules in preserving polycentric competition as self-governing order becomes apparent in the work of Adam Smith. Though Smith referred to competitive markets as 'spontaneous' or 'natural order' to stress their liberty-enhancing character, he acknowledged that competition could not be preserved through the free play of market forces alone. Rather, he perceived competition as an institution that is based on a set of rules which ensure its polycentric functioning. Far from being a 'dogmatic *laissez-faire*' liberal, Smith underscored that the institutional preconditions of the self-governing functioning of competitive markets must be created and guaranteed by the state. Smith, therefore, acknowledged the need for state intervention to provide public goods (e.g. military defence[329] or public utilities [330)] and to address market failures.[331] He also stressed the importance of a specific legal framework within which polycentric economic coordination through self-adjustment can operate.[332] Smith, therefore, advocated legal reforms, such as the abolition of primogeniture, that promote a more equalised distribution of property and the emergence of a polycentric societal and market structure of small and independent tradesmen. Most importantly, he underscored the importance of the state in preserving the rule of law for ensuring equal economic freedom as a structural

[329] ibid IV, ix, § 51, p. 687.
[330] Rosanvallon (n 208) 86.
[331] Hayek, Friedrich A. von (n 19) 40.
[332] Smith (n 1) IV, ix, § 51, p. 687.

precondition[333] of competition. In line with the republican tradition, the Smithian model of competition, thus, assumed that economic liberty is constituted by legal rules and institutional design that create and enhance the polycentric functioning of markets.[334]

5.6 The Impact of the Smithian Model of Polycentric Competition on Republican Thought

The analysis of how the understanding of early proponents of competition relates to the values of liberty and equality shows that their normative endorsement of competitive markets does not only ground in purely economic considerations. Unlike contemporary economic theories of competition, the pre-industrialist understanding of competition testifies to a more holistic perspective on the socio-economic and political implications of competitive markets. The Smithian model of competition thus does not confine itself to the economic sphere in the strict sense but rather proposes a theory of political economy which identifies polycentric competition as a central element of a society of free and equals and institutional solution to the 'Behemoth problem'.

The close link between the political economy of the Smithian model of competition and the political ideal of republican liberty becomes palpable if one considers its influence on the political thought of the American founding fathers.[335] This influence, for instance, crystallises in Jefferson's ideal of a 'yeoman republic' and his arguments in favour of the abolition of primogeniture.[336] Like the English Levellers and Smith, Jefferson praised the virtue of small proprietors and perceived economic independence as a precondition of republican virtue and freedom. Jefferson, therefore, coined the imaginary of an agrarian society fragmented into a

[333] Smith explicitly identified ‚perfect liberty' as precondition for economic exchanges bringing about the competitive ‚natural price'. ibid I, vii, § 6 and 30, pp. 73 and 79.
[334] This point has also been stressed by Montesquieu who pointed out that economic liberty is created by the law rather than by the absence of the law. Accordingly, economic liberty does not simply mean that the economic participant can act as she sees fit. Instead, Montesquieu observed that '[l]iberty of commerce is not a faculty granted to traders to do what they want; this would instead be the servitude of commerce. That which hampers those who engage in commerce does not, for all that, hamper commerce. It is in countries of liberty that the trader finds innumerable obstacles; the laws never thwart him less than in countries of servitude.' For this English translation see C. L. d. S. d. Montesquieu and others (eds), *The spirit of the laws* (Cambridge University Press 1989) XX, xxii, p. 345.
[335] See in this regard for instance S. Fleischacker, 'Adam Smith's Reception among the American Founders, 1776-1790' (2002) 59(4) The William and Mary Quarterly 897.
[336] Jefferson was indeed familiar both with the work of the Physiocrats and Adam Smith S. Elkins and E. McKitrick, *The Age of Federalism* (Oxford University Press 1993) 200; R. Hofstadter, *The American Political Tradition and the Men who Made It* (Vintage Books 1948) 37. See also Fleischacker (n 335), 899.

multitude of independent masterless men as basis of a virtuous citizenry and as a central societal pillar of the nascent American republican democracy.[337]

Most importantly, the Smithian model of competition had an important bearing on how the framers of the US constitution designed political and social institutions to preserve liberty as non-domination within the nascent American democratic republic. The US founding fathers, indeed, drew upon the Smithian concept of polycentric competition as a solution to the 'Behemoth problem'. This influence emerges most clearly in James Madison's essays Federalist N° 10 and 51. Just as Adam Smith warned against the domination by colluding producers who try to impose their minoritarian interests on the rest of the economy, so, too, identified Madison the power of interest groups and factions as the most important vice in a democratic society.[338] These interest groups, Madison warned, pose a threat to the freedom of other individuals in so far as they are willing to annihilate their rights to impose their world view and political interests on the rest of the society. Factions, thus, evoke the spectre of domination or tyranny by a majority or minority.[339] Madison feared that under the guise of liberty of expression and faith, social factions might cast the seed of chaos and civil war by annihilating the liberty of all other citizens and imposing their self-interest upon the rest of the society. In a similar vein as Hobbes, the American founders continued to struggle with the problem of Behemoth: that is, the state of domination and unfreedom that emerges when the intemperate pursuit of individual self-interest suddenly degenerates into greed, the lust for power and private government.

Instead of revering to the Hobbesian solution of centralising all power in the hands of an autocratic ruler, Madison envisaged, in the same way as the early political economists, polycentric competition as the institutional solution to the 'Behemoth problem' arising from the potential of domination by factions. Madison suggested that polycentric competition amongst those factions would prevent them from imposing their particular interests upon the rest of the society and from capturing the political process. Madison thereby reverted to the idea that a polycentric dispersal of powers and rivalry will create a system of checks-and-balances between reciprocal powers or rivalrous interests. [340] To safeguard liberty as non-domination, he, therefore, recommended that

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[338] Hamilton, Madison and John Jay (n 166) Federalist N° 10, p. 49.
[339] ibid Federalist N° 10, p. 49 and 52.
[340] ibid Federalist N° 51, p. 257.

> *[t]he society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.*[341]

Accordingly, the only way to prevent one faction from exerting domination by gaining the upper hand over all other factions consists of pitting all factions against each other. Competition between factions will, thus, disperse the power of each societal group. The centrifugal forces of polycentric competition will generate a situation where each faction imposes checks on the others' power. It, thereby, ensures that none of these groups becomes dominant or majoritarian. Polycentric dispersal of power amongst various civil groups, hence, creates a balance of reciprocal powers that prevents domination by making coordination and collusion more difficult.[342] Observing that '[t]his policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public',[343] Madison pointed out that polycentricity is not only an organising principle of political, but also of social and economic institutions of antipower.

The examples of the Jeffersonian ideal of a 'yeoman republic' and Madison's competitive pluralism illustrate the feedback loops and cross-fertilisation between economic and political thought that the Smithian idea of polycentric competition as a safeguard of republican liberty has generated. The pre-industrial proponents of competitive markets assumed that the republican ideal of liberty as non-domination could not only be achieved in the political but must also be ensured in the social and economic sphere. In line with the ideal of republican liberty, those early supporters of free markets also perceived economic subjugation, dependence and hierarchies as a source of unfreedom. They thus presaged the idea of the competition-democracy nexus underscoring the interdependence between the republic or democracy as political regime and competition as market structure, or 'market regime'. In continuity with the republican tradition, they viewed the polyarchic or polycentric structuring of power as an essential institutional safeguard of equality and liberty.[344] By virtue of its tendency to diffuse economic power amongst many players and thus to the costs of domination, they advocated polycentric competition as an economic and social institution of antipower which ensures a society of free and equals. They thus recognised what Philip Pettit has identified as a common

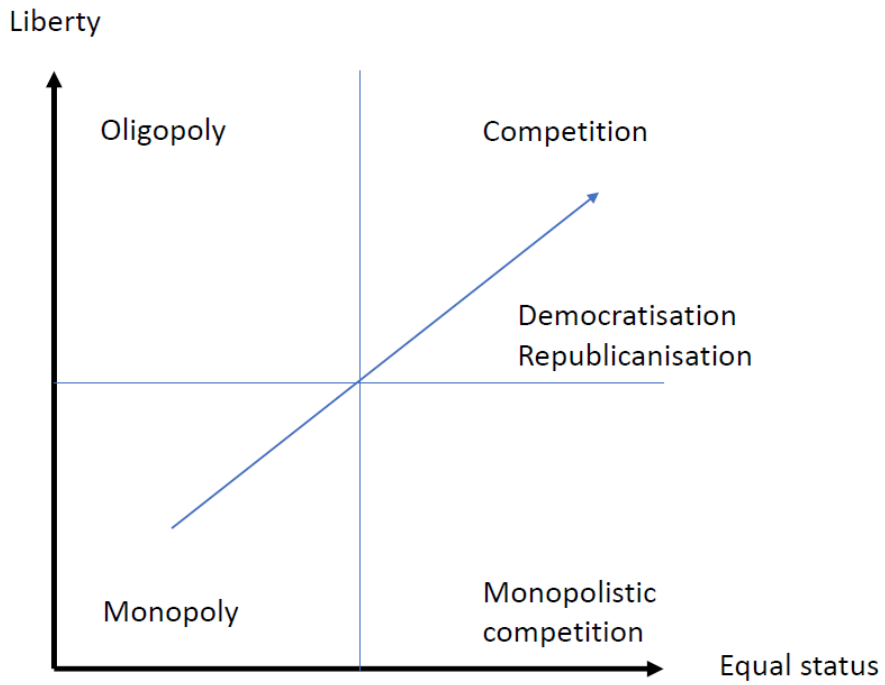
[341] ibid Federalist N° 51, pp. 258 - 259.
[342] ibid Federalist N° 10, pp. 52 and 54.
[343] ibid Federalist N° 51, p. 257.
[344] Ian Shapiro points out the role of polyarchy as mechanism to manage power relationships Shapiro (n 27) 51.

feature of social and economic institutions of antipower: they preserve liberty as non-domination 'by ensuring competition between those who are powerful'.[345]

This insight about the tendency of polycentric competition to decentralise power and generate balances of reciprocal power, in turn, influenced the American Founding Fathers in designing republican institutions. By choosing the regime of a representative democracy to give shape to their ideal of a republic and republican liberty, the authors of the US constitution thus the ideal of republican freedom with the concept of democracy. At the same time, the Jeffersonian and Madisonian ideal of a society and economy structured by small, independent decision-making centres as the safeguard of republican virtue and liberty closely followed the Smithian model which perceived polycentric competition as a guard of economic independence and virtue. It thus illustrates how the link between competition and democracy took shape in republican thought and how polycentric competition has been perceived as a protective institution of a society of free and equals by economic and political thinkers alike.

The Smithian model of competition, thus, is built upon a set of hypotheses as to how different market structures perform with regard to the preservation of equality and liberty by ensuring different degrees of polycentric distribution of economic power. The graph below provides a taxonomy which depicts the basic hypothesis upon which this idea of a competition-democracy nexus hinges: namely, competition outperforms other forms of market structure in ensuring the equality and liberty of market participants.

[345] Pettit (n 29), 591.



Graph 3 - The competition-democracy hypothesis

The Smithian model indeed posited that polycentric competition fares better than concentrated market structures, such as monopoly and oligopolistic collusion amongst guilds or tradesmen (lower left quadrant), in preserving liberty and equality. It suggested that polycentric or what we call nowadays perfect competition is the most 'democratized' market regime and is most prone to facilitate the emergence of a republican or democratic political regime. By structuring and dispersing economic power amongst a multitude of independent players and encouraging the polycentric mutual adaptation between them, competition makes domination more difficult, if not impossible, and thus safeguards the liberty as non-domination and equal status of all market participants. Competition is, therefore, considered the economic regime or market structure which is most in line with the ideal of a republican society and a polity of free and equals. The above taxonomy thus depicts the 'tacit dimension' resonating with the idea of a link between competition and democracy that had been coined by the pre-industrialised Smithian model of competition.

This stylised model of the idea of competition-democracy nexus, depicted in Graph 3, can arguably also be extended to forms of imperfect competition. The first type of market structure it can be applied to is a non-cooperative oligopoly (upper left quadrant). The central feature of oligopolistic markets is the presence of very few, but more than one, identical firms

and barriers to entry.[346] Firms in oligopolistic markets typically face a downward-sloping demand curve which is more elastic than in the case of a monopoly, but less elastic than the infinitely elastic horizontal demand curve faced by firms in a perfectly competitive market.[347] Oligopolistic firms thus possess at least some degree of market power.[348]

Oligopolistic market structures are by definition less inclusive than competitive markets because the number of market players is limited by the presence of entry barriers. They, therefore, perform less well with respect to the equality dimension than competitive markets. Despite this limited degree of inclusiveness, oligopolistic players are constrained in their power arbitrarily to set prices by their strategic interaction and interdependence. As long as they do not collude, their rivalrous interaction prevents them from exercising arbitrary power and, hence, domination. This assumption tallies with economic theory. Indeed, the theory of Cournot competition suggests that strategic interaction between oligopolists leads to an equilibrium where prices are higher than under perfect competition, but lower than in the case of monopoly.[349] The theory of Bertrand competition goes even one step further, as it predicts that strategic interaction between oligopolists will drive prices down to the same level as in a perfectly competitive equilibrium.[350]

As the strategic interaction between oligopolistic firms hinders them from exercising arbitrary power to the same extent as a monopoly, in our model oligopolistic market structures score higher in terms of liberty than a monopoly. So long as the oligopolists do not collude, the level of liberty in oligopolistic markets may theoretically reach even a similar level as under perfect competition. The higher the number of players in an oligopoly, the more it morphs into a (perfectly) competitive market structure in the upper right quadrant. Such an increase in the number of players does not only increase the inclusiveness of the market structure but may also further reduce the ability of each player to exert arbitrary power. [351] This is consistent with the economic insight that the elasticity of the residual demand each oligopolist faces increases with the number of players. Accordingly, the power of each oligopolist decreases, the more the

[346] J. M. Perloff, *Microeconomics: Theory & Applications with Calculus* (Pearson 2008) 443–444.
[347] G. J. Stigler, 'The Kinky Oligopoly Demand Curve and Rigid Prices' in G. J. Stigler (ed), *The Organization of Industry* (1968) 212–215. Bishop and Walker (n 8) 36.
[348] Perloff (n 346) 445.
[349] Bishop and Walker (n 8) 33–37; Perloff (n 346) 453–460.
[350] Bishop and Walker (n 8) 38–39.
[351] This is, however, only the case for Cournot and Stackelberg (leader-follower) oligopolistic models, whilst the outcome of the basic, yet less plausible, Bertrand competition does not change with the number of players Perloff (n 346) 452, 467. For further discussion of the strong assumptions of the Bertrand model see Bishop and Walker (n 8) 39. J. W. Friedman, *Oligopoly theory* (Cambridge University Press 1983) 3.

market structure converges towards competition.[352] With a growing number of players, the oligopolistic market structure guarantees more liberty but also more equality. Conversely, in the case oligopolistic players start tacitly colluding or enter a cartel, they will act in the same way as a monopoly. In our model, we would thus move towards the lower left quadrant of monopoly: both the liberty and equality ensured by the market structure would be reduced.

The competition-democracy nexus model can also be extended to monopolistic competition. This second form of imperfect competition has been first analysed by Harold Hotelling,[353] Edward Chamberlin[354] and Joan Robinson[355] in the 1930s. Contrary to oligopoly, the concept of monopolistic competition is characterised by the absence of entry barriers. It thus can accommodate a greater variety of market structures, ranging from a few large players to a very high number of small players.[356] Each single firm, however, produces differentiated or imperfectly substitutable products which at least some consumers perceive as superior to others. Firms in monopolistic competition, therefore, face a downward-sloping demand curve for their particular product and can exert at least some monopoly power.[357] It follows that firms in monopolistic competition are not necessarily constrained by their strategic interaction to the same extent as oligopolistic players are. In other words, players in monopolistic competition may be able to exert more arbitrary power than oligopolists, because they are either not strategically interacting at all, or their interaction does not necessarily impose constraints on each other.[358]

Owing to its greater degree of inclusiveness, monopolistic competition in our models performs better in terms of equality than monopoly or oligopoly, which by definition presuppose the presence of only one or a few players. By contrast, it scores less high with respect to liberty than oligopolistic or competitive market structures, because due to the limited strategic interaction between the monopolistic competitors their ability to exert power is more akin to that of a monopoly.[359] As the number of players increases, monopolistic competition,

[352] Perloff (n 346) 457–458. In case of product differentiation, the residual demand curve is less elastic and firm can therefore charge different and higher prices ibid 459–461.
[353] H. Hotelling, 'Stability in Competition' (1929) 39(153) The Economic Journal 41.
[354] E. Chamberlin, *Theory of Monopolistic Competition* (Harvard University Press 1933).
[355] J. Robinson, *The Economics of Imperfect Competition* (Macmillan 1933).
[356] Friedman (n 351) 51. A. K. Dixit, *Microeconomics: A very short introduction* (Oxford Univ. Press 2014) 169. The number of firms is determined by the fixed costs of the industry and, hence, their minimum efficient scale Perloff (n 346) 483; Dixit (n 356) 171.
[357] Perloff (n 346) 484.
[358] Friedman (n 351) 71–72.
[359] F. Machlup, 'Monopoly and Competition: A Classification of Market Positions' (1937) 27(3) The American Economic Review 445 448–449.

however, may converge, in a similar way as oligopoly, towards what we call polycentric or perfect competition. The more players, the more elastic becomes their residual demand and the less influence each of the players can exert over prices or other competitive parameters. If there is a multitude of players in markets characterised by monopolistic competition, each of them would increasingly become a price taker. As their power will wane, we would move upward along the liberty axis and towards perfect competition (upper right quadrant).

Like in the case of oligopoly, the distinction between monopolistic competition, monopoly and competition is one of degree. In some cases, the transformation of a more monopolistic towards a more competitive market regime will occur over time. Monopolistic competition is hence consistent with there being a single or a few players with considerable market power in the short run, and dynamic entry by additional players – lured by monopolistic profits – entering in the long-run.[360] This transition is contingent on the extent to which the assumption of the absence of entry barriers holds. The distinction between monopolistic and perfect competition may also be difficult because monopolistic competition is consistent with a multitude of small monopolistically competitive firms such as restaurants or corner shops.[361]

The model depicted in Graph 3 thus captures the tacit dimension of the idea of a competition-democracy nexus first articulated by the early proponents of competitive markets: the more players in the market, the less domination each of them can exert and the more conducive the market structure is to liberty as non-domination, equality and ultimately republican democracy. This model can be extended to forms of imperfect competition such as oligopolistic market structures and monopolistic competition. This extension suggests that oligopolistic market structures, owing to the constraints the players exert on each other, outperform monopoly in terms of liberty, but are less inclusive and, hence, less conducive to equality than perfectly competitive markets or monopolistic competition. By contrast, monopolistic competition is more inclusive and hence more conducive towards equality than a pure monopoly or oligopoly. As it presupposes that firms impose fewer constraints on each other than in oligopolistic or perfectly competitive markets, monopolistic competition is however scoring less high in terms of liberty. With a growing number of players, both oligopolies and monopolistic competition converge towards competition, thereby moving either

[360] Dixit (n 356) 170–172.
[361] ibid 169, 172.

towards more equality (oligopoly) or liberty (monopolistic competition) and, hence, a more 'republican' or 'democratic' regime.

6 How Did the Smithian Understanding of Competition Go Astray?

Even if it is still common practice to refer to Adam Smith as the founding father of modern economic theory, the Smithian model of competition has become largely obsolete as a theoretical framework for the contemporary understanding of competition. Instead, the neoclassical model of perfect competition, which we have discussed as a textbook example in the first section of this chapter, has become the starting point of the contemporary competition analysis. Not only has the output-oriented focus of modern economic theory superseded the idea underlying the Smithian model that competition promotes republican liberty and equality; there is also a consensus amongst competition economists that even in the absence of a polycentric market structure, competition can yield the same or similar benefits as perfect competition. Modern economics assume that market structures with a limited number of players (i.e. oligopolistic or monopolistic competition) may nonetheless remain competitive because the market incumbents are constrained by potential competition from firms that might enter the market in response to supra-competitive price increases.[362] Accordingly, the presence of effective competition does not depend on the particular form of the competitive process or market structure, but on its outcomes: that is, whether or not it enhances social or consumer welfare and allocative efficiency.[363]

Firm size and industry concentration are hence no longer seen as an antonym of competition and a source of potential domination. On the contrary, modern economic theory tells us that it is equally plausible that firm size and concentration are the endogenous results of firms' greater economic efficiency and performance. [364] This feedback effect[365] between performance and structure also suggests that greater firm size has the potential to generate economies of scale and scope. Size and industry concentration are hence not necessarily

[362] Bishop and Walker (n 8) 27–35.
[363] ibid 16.
[364] H. Demsetz, 'Industry Structure, Market Rivalry, and Public Policy' (1973) 16(1) Journal of Law and Economics 1 1–4; S. Peltzman, 'The Gains and Losses from Industrial Concentration' (1977) 20 Journal of Law and Economics 229 262–263; H. Demsetz, 'Two Systems of Belief About Monopoly' in Goldschmid, Mann, Weston (ed), *Industrial Concentration: The New Learning* (Little Brown 1974) 166–174.
[365] W. Evans, L. M. Froeb and G. J. Werden, 'Endogeneity in the Concentration-Price Relationship: Causes, Consequences, and Cures' (1993) XLI(4) The Journal of Industrial Economics 432 432–433.

considered obstacles to competition but may yield productive efficiency and innovation.[366] The economist Joseph Alois Schumpeter even suggested that the power to charge monopoly prices may constitute a crucial incentive for entrepreneurs to invest in innovation. Firm size and concentrated economic power may thus even become the driving force of dynamic competition and disruptive innovation.[367] It is, therefore, no exaggeration to say that the contemporary understanding of competition has widely discarded the distrust of the Smithian model against the concentration of economic power. As a consequence, the idea of competition as a safeguard of republican liberty as non-domination and, hence, the concept of a competition-democracy nexus have largely disappeared from the normative landscape of contemporary economics and competition law. How can we explain that the Smithian model of competition and with it the underpinning ideal of republican liberty went astray?

6.1 The Decline of Republican Liberty

The first explanation for the dwindling role of the Smithian model of competition lies in the decline of the ideal of republican liberty itself. During the 18th and 19th century, republican liberty has been dethroned by the more recent concept of negative liberty, which became the normative cornerstone of political and economic liberalism. Paradoxically, the rise of the concept of negative liberty can, at least in part, be explained by the success of the ideal of republican liberty during the American revolution. Liberty in its negative sense first gained traction in 18th century England where it was increasingly mobilised by the opponents to the independence movement in the American colonies. In a similar vein as Hobbes in the aftermath of the English Civil War, Jeremy Bentham, William Paley and other utilitarian critics of the US revolution reverted to the argument that liberty can only exist in its negative sense. This counter-revolutionary camp, for instance, discredited the ideal of republican freedom championed by the American revolutionists as a quest for security rather than liberty.[368]

Bentham and Paley also entrenched the view that the law inevitably abrogates liberty[369] Drawing on the Hobbesian argument that any form of law constitutes a restriction of freedom, they fiercely disputed the republican idea of non-arbitrary interference. They instead coined the idea of a balancing of rights that became the litmus test of proponents of negative liberty to distinguish between legitimate and illegitimate forms of state interference. Under this test, any

[366] J. S. McGee, 'Efficiency and Economies of Size' in Goldschmid, Mann, Weston (ed), *Industrial Concentration: The New Learning* (Little Brown 1974) 88–97.
[367] Bishop and Walker (n 8) 36–39.
[368] Pettit (n 22) 42–45.
[369] Pettit (n 22) 37–40; Bentham (n 122) 503; Bentham (n 122) 94.

form of state interference is an illegitimate restriction of liberty, unless the state can proffer some form of proof that the restriction of liberty caused by state intervention is outweighed by some form of public good achieved by means of the state interference.[370]

Another reason for the decline of the republican ideal of liberty as non-domination and the triumph of the negative concept of liberty as non-interference lies in the demanding nature of republican liberty. The ideal of republican liberty had been coined in the pre-industrial setting of the Roman Republic and the Renaissance Italian city-states. Historically, the ideal of liberty as non-domination and independent status has thus only been accessible to a small elite of male, white, property-owning citizenry.[371] This pre-industrial pedigree also explains the demanding, 'thick' scope of republican liberty, which presupposes not only the absence of interference but also the absence of socio-economic dependence and subjugation as a precondition of liberty. This demanding threshold for liberty entailed that large parts of the population, for instance, employed workers or women, were excluded from liberty as non-domination. From the republican vantage point, large parts of the population would, thus, have to be considered as living in a state of unfreedom or even servitude.[372] Despite its egalitarian impetus, this exclusive version of liberty was hence increasingly difficult to square with the principle of human equality.[373] Utilitarian thinkers, such as Paley, therefore, pointed out that the understanding of liberty as non-domination was too demanding a concept to be realised as a universal ideal by the political institutions of large-scale polities.[374] During the 19th century, the republican concept of liberty has thus been displaced by the 'thin[ed] out'[375] concept of negative liberty, which could more realistically be achieved in a large-scale polity and industrialised mass society.

6.2 The Smithian Model of Competition as an Ideal of a Pre-Industrialised Economy

To understand why the Smithian concept of competition has been stripped of its republican content and has given way to the modern, output-oriented understanding of competition, it is important to recall that the Smithian model is in the same way as the concept of republican liberty the product of a pre-industrialised world. Writing in the wake of the

[370] Pettit (n 22) 46.
[371] ibid 48.
[372] ibid 47–48.
[373] ibid 49.
[374] ibid 47–49.
[375] ibid 49.

industrial revolution, early supporters of competitive markets were largely unaware of the capacity of large corporations to generate efficiencies by harnessing economies of scale and scope.[376] Smith, for instance, used the idealised example of a pin factory, that employed not more than ten workers, [377] to describe how nascent industrialisation harnesses the efficiency-enhancing nature of the division of labour and economies of scale. The transition from a pre-industrialised to an industrialised economy of mass production and mass employment fundamentally called into question the ideal of the self-employed free man and of the 'universal self-government in the realm of production'[378] championed by the Smithian model of competition. In other words, '[e]conomies of scale overwhelmed the economy of small proprietors'.[379]

With the rise of the large-scale factory and mass-employment, the republican understanding of economic liberty underpinning the Smithian concept of competition that presupposed economic independence and absence of subordination also became too demanding. Early proponents of competitive markets who adhered to a republican understanding of economic liberty would have viewed workers who were economically dependent on and subordinate to the orders of an employer as unfree, even when their status was the outcome of a voluntary concluded employment contract and the employer did not constantly interfere with their choices. Owing to the ascent of the large-scale corporation and mass production, the republican concept of economic liberty increasingly appeared to exclude growing parts of the population who were in a dependent employment relationship and, hence, subordinated to the orders of their employer. The republican ideal of economic liberty thus shared the same destiny of its political counterpart and gave way to the ideal of negative liberty and wealth maximisation that were easier attainable for all market participants irrespective of their degree of economic dependence. From the vantage point of this less demanding, negative understanding of economic liberty the subordination of workers to the orders of the employer was perfectly compatible with their being free because it was the outcome of a voluntary contract.

The newly discovered efficiencies of large corporations also undermined the credibility of the economic and political mistrust of the Smithian model against industry concentration and

[376] Anderson (n 199) 77.
[377] A. Smith, *The Wealth of Nations [1776]* (Penguin Classics 2000) Book I, p. 110.
[378] Anderson (n 199) 85.
[379] ibid. See for a similar claim T. Goebel, 'The Political Economy of American Populism from Jackson to the New Deal' (1997) 11(Spring) Studies in American Political Development 109 111.

big business[380] Market power and monopolistic positions could no longer be exclusively explained by state-granted privileges and interest capture. [381] Rather, internal growth, driven by economies of scale and scope and the ensuing productive superiority constituted an alternative, merit-based and efficiency-driven explanation for the power of large corporations.[382] Consequently, the large-scale corporation and its power could no more in and of itself be considered as a source of arbitrary domination and unfreedom, but instead appeared as the endogenous creature of negative contractual freedom and the use of property rights. From the vantage point of negative liberty, state intervention to tame its power would only be legitimate if the ensuing decrease in economic liberty of the entrepreneur is outweighed by social benefits in terms of overall higher net freedom or welfare. With the substitution of the republican by a negative concept of liberty, market power, firm size and industry concentration could no longer be considered as an obstacle to freedom in the absence of any conduct leading to an actual or likely interference with the choices of other businesses or consumers.

6.3 The Transformation of Economics as a Discipline

The fading of the political dimension of the Smithian concept of competition is not only the result of the radical structural changes brought about by several waves of industrialisation, but also reflects a fundamental transformation of economics as a discipline.[383] The rise of neoclassical economics and price theory transformed the Smithian allegory of the invisible hand into a formalised, mathematical model of perfect competition. Leaving aside the political, republican impetus of the pre-industrialised concept of competition, the neoclassical model of perfect competition analyses and describes in purely economic terms how and when competitive markets maximise welfare.[384]

The ascent of neoclassical economics triggered a 'positivist turn' that shifted the self-understanding of economics as a discipline away from political economy towards the positivist model of natural science. To enhance, the robustness and analytical parsimony of their models, ‚positivist economics'[385] increasingly excluded ethical values other than efficiency and wealth

[380] Smith (n 1) I, xi, b, § 5, p. 163; L. Zingales, 'Towards a Political Theory of the Firm' (2017) 31(3) Journal of Economic Perspectives 113 115.
[381] A. A. Berle and Means. Gardiner C. *The Modern Corporation and Private Property* (Transaction Publishers 1932).
[382] Thomas Goebel for instance points out how this insight weakened the case of the populist anti-monopolist movement in the US in the late 19th and early 20th century. Goebel (n 379), 111, 117, 132.
[383] For an account of how already the early reception by economists has severed Smith's economic from its political content, see Rothschild (n 244).
[384] Schumpeter (n 18) 75–78.
[385] A. Sen, *On ethics and economics* (B. Blackwell 1987) 7.

maximisation from the realm of its quasi-scientific inquiry. As a result, the 'engineering' dimension of economics, being exclusively concerned about how to achieve specific ends with limited means, took the upper hand over the 'normative' dimension of the political economy in which the Smithian model of competition was grounded. Positivist economics hence 'purified' the notion of competition from ethical considerations.[386] In other words, output-oriented concerns about competition entirely crowded out the Smithian concern about the input-legitimacy of competition. By reducing competition to mere wealth maximisation, neoclassical economics has thus considerably thinned out what was originally a normatively dense concept that held out the promise of liberty, equal status, fairness and wealth. Whereas modern economic theory highlights the welfare-enhancing features of competition, it has turned a blind eye to the republican idea of polycentric competition as an institution of antipower.

This thinning out of the notion of competition by positivist economics had important implications on how economist would henceforth consider firm size, market power and market structure. Reflecting the increasing awareness of the role of economies of scale and scope and efficiencies for an industrialised economy, Edward Chamberlin[387] and Joan Robinson[388] shook up in their ground-breaking studies of imperfect competition the basic assumptions underlying the model of perfect competition. They showed that the basic assumptions of the model of perfect competition hold true for only a handful of markets.[389] Chamberlin and Robinson demonstrated that while not complying with the conditions of perfect competition, most imperfectly competitive markets were nonetheless operating in a competitive manner. They showed that competition amongst oligopolies or even monopolies could generate outcomes similar to that of perfect competition. They were thus the first to cast doubt upon the structure-conduct assumption underpinning the Smithian model by showing that a concentrated or even monopolistic market structure is not necessarily detrimental to efficiency and economic welfare. Focusing exclusively on the capacity of oligopolistic and monopolistic markets to generate welfare, the theories of imperfect competition, however, did not account for any political concerns about the adverse impact of concentrated economic power on liberty as non-domination and equality of opportunity. Non-welfarist concerns about market power played no longer a role for this increasingly depoliticised and agnostic vision of firm size, market power and industry structure.

[386] ibid.
[387] Chamberlin (n 354).
[388] Robinson (n 355).
[389] Bishop and Walker (n 8) 17.

This increasingly agnostic stance of economics towards firm size and market power emerges most clearly in Joseph Schumpeter's work which revolutionised economic thinking about competition, monopoly and innovation. Drawing upon the theories of imperfect competition,[390] Schumpeter criticised the model of perfect competition not only for being based on unrealistic hypotheses,[391] but he also reprobated its static, short-term analysis of markets. Schumpeter criticised that this static frame, which unduly focuses on the impact of competition on short-term prices and market structures[392] glosses over the dynamic characteristics of capitalism as an evolutionary process driven by innovation.[393] Schumpeter understood innovation as a quasi-biological process of industrial mutation 'that incessantly revolutionises the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one.'[394] This evolutionary 'process of Creative Destruction'[395] constituted, in Schumpeter's view, the dynamic driving force of capitalism and competition.

This shift of the analytical focal point from static to dynamic features of competition had a number of far-reaching repercussions. Schumpeter argued that economic theory and competition policy should cease to pay much attention to static outcomes of the competitive process and market structure. Instead, they should focus on how firms compete in the long run in order to gain through technological or product innovation a cost or quality advantage over their competitors.[396] From this dynamic perspective, industry concentration and restraints of competition appear in a more positive light.[397] Schumpeter indeed argued that contractual restraints of trade and the exercise of market power allow entrepreneurs to stabilise markets and shield their returns on investment in innovation against the recurrent waves of creative destruction. Restraints of competition, from this perspective, just constitute another method for companies to hedge the risks of their long-term investments into innovation and protect it against potential free-riders.[398] Even if they lead to higher prices in the short run, they may have positive long-term effects on innovation.[399] The Schumpeterian model thus naturalised the possession and exercise of market power by casting them as normal elements of the organic

[390] Chamberlin (n 354); Robinson (n 355).
[391] In this regard, Schumpeter makes explicit reference to work of Chamberlin and Robinson. See Schumpeter (n 18) 79.
[392] ibid 84.
[393] ibid 82.
[394] ibid 83.
[395] ibid 82.
[396] ibid 84.
[397] ibid 85.
[398] ibid 86.
[399] ibid 88 and entire chapter VIII.

process of innovation competition, which, as some kind of natural force, overthrows existing market structures. Any detrimental impact of economic concentration and exercise of market power on equality and liberty are merely perceived as collateral damage caused by the dynamic process of creative destruction.

For Schumpeter, it thus 'becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly.' [400] Rather, he affirmed that firms are disciplined by the 'ever present threat' of potential (dynamic) competitors,[401] even if actual competition in the market is weak or inexistent.[402] Accordingly, the actual market structure becomes less relevant for competition analysis, since the threat of dynamic competition and innovation continuously affects and constrains the business behaviour of incumbents. Schumpeter, thus, presaged the theory of potential competition or contestable markets according to which firms' pricing decisions are not only constrained by competition *in* the market, but also by the threat of entry by potential competitors and hence, competition *for* the market.[403] The Schumpeterian dynamic model and the theory of potential competition thus dealt the structure-conduct assumption which underpins the Smithian model a final blow, as it let to the conclusion that '*we have no theory that allows us to deduce from the observable degree of concentration in a particular market whether or not price and output are competitive*.' [404]

Lastly, the decline of the Smithian model of competition was also driven by the profound transformation of how economic theory perceives the corporation or the 'firm'. In his pioneering article '*The nature of the firm*', Ronald H. Coase pointed out that the hierarchical or vertical direction of the allocation of resources within a firm may minimise transaction costs[405] that horizontal market transactions involve.[406] The modern theory of the firm and transaction costs economics, thus, identify the reduction of transaction cost as powerful economic justification for an organisation of economic relationships based on hierarchies and authority, which have been perceived by the Smithian model as a source of domination incompatible with a free society of equals. While Berle and Means still cast the corporation as 'great concentration

[400] ibid 85.
[401] ibid.
[402] ibid.
[403] H. Demsetz, 'Why Regulate Utilities?' (1968) 11 Journal of Law and Economics 55; W. J. Baumol, J. C. Panzar and R. D. Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt College 1982).
[404] Demsetz (n 403), 59–60 (italicised in the original).
[405] Coase, R. H. 'The nature of the firm' (1937) 4(16) Economica 386 390–393.
[406] ibid 388.

of power'[407] that called into doubt the Smithian understanding of the competitive economy,[408] the modern theory of the firm has widely discarded the idea that corporations can exercise economic power as 'delusion'. It, instead, affirms that '[t]he firm [...] has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people.'[409] By dissociating the phenomenon of the corporation from the notion of power and justifying its existence by merely economic considerations about transaction costs, the modern theory of the firm entirely depoliticised economic and social hierarchies created through internal and contractual forms of integration.[410] Hierarchies are hence no longer considered as an antipode of heterarchical markets but a tool to internalise the costs of market transactions and market failures.[411]

The decline of the Smithian model of competition thus constitutes the outcome of a much broader and deeper transformation that the understanding of liberty, the economic analysis of competition and industry concentration, as well as the concept of the firm underwent throughout the 19th and 20th century. This evolution widely stymied the political thrust of the Smithian model perceiving industry concentration and large-scale firms as a source of domination incompatible with republican liberty. Modern competition economics instead adopted a depoliticised understanding of competition which naturalises structures of economic power and industry concentration by legitimising them on the mere basis of output-oriented considerations, such as innovation or reduced transaction costs. The demise of the Smithian model and its political implications thus increasingly obfuscated the role of economic power of large corporations and severed modern law and economics from concerns about republican liberty and 'private government'.[412]

7 Conclusion

This chapter provides a theoretical and analytical framework to analyse the link between competition and democracy. It starts with the observation that the traditional economic model of perfect competition, which focuses exclusively on the propensity of competitive markets to

[407] Berle and Means. Gardiner C. (n 381) 353, see also 18-46.
[408] ibid 349–357.
[409] A. A. Alchian and H. Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62(5) The American Economic Review 777 777.
[410] Zingales (n 380), 118–120; Anderson (n 199) 105–108.
[411] O. E. Williamson, 'Markets and Hierarchies: Some Elementary Considerations' (1973) 63(2) The American Economic Review 316. O. E. Williamson, *Markets and hierarchies, analysis and antitrust implications: A study in the economics of internal organization* (Free Press 1975).
[412] Anderson (n 199) 97.

promote economic welfare, is inapt to grasp the relationship between competition and democracy. Instead of being exclusively concerned about the output-oriented legitimacy of competition, the idea that there is a link between competition and democracy pertains to its procedural characteristics, which ensure the input-oriented legitimacy of competition. The idea of a competition-democracy nexus thus suggests that we are not only valuing competition because it is the method of economic organisation which is most likely to maximise economic welfare and efficiency; but, instead, we also consider competition socially desirable, because it guarantees a process of coordinating economic activities which is most in line with a democratic society and polity.

This methodological insight suggests that in order to gain an understanding of how competition and democracy related to each other, we have to substitute or, at least, complement the predominant economic model by other alternative ways of thinking about competition. To this end, the chapter proposes an alternative analytical framework which is capable of grasping the input-oriented legitimacy dimension of competition. This alternative 'republican' or 'democratic model' of competition proposes to replace the output-oriented variables of price and quantity by the input-oriented variables of liberty and equality of status to inquire into the procedural features of competition that underlie the assumption that there is a link between competition and democracy. The choice of liberty and equality of status as the proxies for democracy reflects the central claim of this study that the idea of a competition-democracy nexus is grounded in the concern about republican liberty as non-domination. The chapter describes how the values of republican liberty as non-domination and equality constituted the normative core of the ideal of republican democracy and how they are preserved through institutional safeguards which structure power in a polycentric way.

In a third step, the chapter traces the idea of a 'competition-democracy' nexus back to the intellectual origins of competitive markets in the thought of early political economists. It shows that the republican concern about liberty as non-domination and equal status lay at the heart of the understanding of competition coined by the early proponents of competitive markets, such as the English Levellers movement, Montesquieu, James Steuart and Adam Smith. These thinkers heralded competitive markets has the harbinger of a new socio-economic order which levelled hierarchies of the feudal society by equalising and liberating economic transactions between henceforth equal, free and independent individuals. Competition was, therefore, considered as a bulwark against the 'Behemoth problem' of domination and 'private government', because it ensures a polycentric market structure which dissipates economic

power amongst a multitude of players. By operating as an institution of antipower that ensures republican liberty in the social and economic sphere, polycentric competition was perceived as conducive to a republican society and form of government.

Fourthly, the chapter explains why this republican dimension of the Smithian model has been superseded by an understating of competition which is largely agnostic towards the impact of market structure on the values of liberty and equality. This transformation of the understanding of competition is the consequence of the rise of the concept of negative liberty as predominant value of modern liberalism, the structural change of our economy triggered by the industrial revolution and the transformation of the economic theory itself.

The remaining chapters of this study will trace the rise and fall of republican liberty and the idea of a competition-democracy nexus throughout the history of US and EU competition law. The next two chapters will describe how the concern about liberty as non-domination and the attempt to preserve the Smithian understanding of competition as a polycentric process against the disruptive economic and societal effects of rampant industrialisation and market concentration prompted the adoption of competition law in the US and in Europe. Chapters IV and V will, then, describe how the ideal of republican liberty as non-domination and the idea of a competition-democracy nexus shaped the application of competition law and were operationalised through competition policy on both sides of the Atlantic. Chapters VI and VII will track the decline of republican liberty and the idea of a competition-democracy nexus as guiding principles of competition law on both sides of the Atlantic. They will explore how the concern about republican liberty and the Smithian model of polycentric competition gave way to our contemporary welfarist understanding of competition that is grounded in the modern notion of negative liberty.

CHAPTER II – REPUBLICAN LIBERTY AND THE COMPETITION-DEMOCRACY NEXUS IN US ANTITRUST

> *If the concentrated power of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government* […].[1]

1 Introduction

The idea coined by the early proponents of competitive markets that competition promotes republican freedom as non-domination and, thus, republican democracy was the product of a pre-industrialised vision of the society and economy. Towards the end of the 19th century, this vision came increasingly under stress. Technological innovation and the industrial revolution changed the face of Western economies and societies. This transformation was particularly felt in the United States ('US'). In the aftermath of the Civil War, the US economy underwent a profound structural change, which came close to what Joseph Schumpeter had in mind when he cast innovation as a process of 'creative destruction'.[2]

Rampant industrialisation, mechanisation and technological innovation ushered in a profound structural transformation of the US economy and society. Epitome of this transformation was the emergence and consolidation of new forms of large-scale firms. Unlike small-scale economic units, these new corporations were capable of harnessing economies of scale and network effects.[3] This ascent of the corporation and large-scale firm unraveled the capitalist model of small local businesses and farmers prevailing in the US during the 19th century.[4] The atomistic market structure characterising the pre-industrialised economy was gradually swept away by the 'gale of creative destruction' of new production methods. As a consequence, the ideal image of the self-employed, independent[5] entrepreneur, heralded by

[1] Senator Sherman 20 Cong Rec 2455 (1890) 1890 2457.
[2] H. B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Johns Hopkins Press 1955) 54–57; 63-66; E. M. Fox and L. A. Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming from-Where Are We Going' (1987) 62 N.Y.U. L. Rev. 936 936 937.
[3] Thorelli (n 2) 64–65.
[4] Thorelli (n 2) 58–62; P. H. Brietzke, 'Constitutionalization of Antitrust: Jefferson, Madison, Hamilton, and Thomas C. Arthur, The' (1987) 22 Val. U. L. Rev. 275 282–283.
[5] Thorelli (n 2) 55.

early proponents of competitive markets and the US founding fathers, was increasingly marginalised by the rise of 'managerial capitalism'.[6] The growing importance of economies of scale and network effects also increasingly confronted small businesses with high barriers to entry and expansion, while, at the same time, contributing to the consolidation of large-scale corporate Behemoths.[7]

The ascent and expansion of large-scale companies was not merely the outcome of internal growth but was wheeled by industry consolidation through vertical integration, mergers and less institutionalised forms of combination.[8] To cope with the changing economic conditions and further promote market consolidation,[9] large-scale corporations started entering in various forms of coordination and collusion – ranging from 'loose' gentlemen's agreements to 'tight' combinations such as 'pools' and 'trusts'.[10] After the creation of the Standard Oil Company by John D. Rockefeller in 1879, the so-called 'trusts' began to mushroom soon in almost all important industries.[11] The term 'trust' was increasingly used as a generic term to refer to all sorts of methods of cartelistic combination that industry members used to coordinate their business strategies.[12] These trusts allowed large-scale corporations to combine their power and consolidate their control over an ever-growing number of industries.

The disruptive effects of growing industry consolidation compounded by the proliferation of the new trust phenomenon provoked widespread popular discontent.[13] In particular, small local businesses and farmers who depended upon large corporations both for the purchase of their inputs and the sale of their produce increasingly felt marginalised by the market power and strategies of large corporations and powerful trusts.[14] Small businesses and farmers, therefore, started to organise themselves in cooperatives to strengthen their bargaining power in the face of powerful trusts and corporations. The 'Granger movement' and other

[6] A. A. Berle and Means. Gardiner C. 'The Modern Corporation and Private Property' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 180–184.
[7] Berle and Means. Gardiner C. (n 6) 170-171; 180-182; Thorelli (n 2) 64–65.
[8] Thorelli (n 2) 67-72; 83.
[9] ibid 72; 83.
[10] ibid 72.
[11] Thorelli (n 2) 73, 77–96; T. Arnold, 'Fair Fights and Foul: Chapter XIV - The Sherman Act as Charter of Economic Freedom' (1965) 10 Antitrust Bull. 655 658; Fox and Sullivan (n 2), 939–941; G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) 8.
[12] Thorelli (n 2) 75.
[13] Fox and Sullivan (n 2), 940–941.
[14] Thorelli (n 2) 58-60, 67-68, 72-96. T. Goebel, 'The Political Economy of American Populism from Jackson to the New Deal' (1997) 11(Spring) Studies in American Political Development 109 122–124.

grassroots ‘antimonopoly’ movements soon gained traction and also lent a political voice to the increasing popular discontent over the growing industry concentration and trust phenomenon.[15]

The enactment of a federal antitrust statute in the form of the Sherman Act in 1890 constituted in the first place a legal and political response to this popular discontent. Yet, the question of which goals the Congress had in mind when adopting the Sherman Act has given rise to one of the most prolific debates in antitrust literature. This debate has been fundamentally shaped by Robert Bork’s famous claim that the legislative intent of the Sherman Act was primarily motivated by the protection of efficiency and consumer welfare. Drawing upon this historical account, Bork and the Chicago School claimed that consumer welfare should be considered the exclusive objective of antitrust policy.[16]

This claim has been subsequently criticised by numerous antitrust scholars.[17] Critics of the Chicago School showed that Congress, through the enactment of the Sherman Act, sought to address a number of social ills, which were loosely subsumed under the generic terms of the ‘trust’ or ‘monopoly problem’. Nowadays, most scholars would agree that, alongside with considerations about efficiency and welfare, the adoption of the Sherman Act was also driven by socio-economic and political concerns about the adverse effects of a hitherto unprecedented level of concentration of economic power on economic opportunities, liberty, equality and distributive justice.[18] To some, the Sherman Act and subsequent antitrust statutes embodied even the legislative recognition that the excessive concentration of market power constitutes a danger for a democratic society and polity.[19] Whilst this claim that the preservation of democracy constituted a central goal of the Sherman Act and subsequent antitrust statutes has

[15] Thorelli (n 2) 58- 62, 90; T. Wu, *The Curse of Bigness: Antitrust in the new gilded age* (Columbia Global Reports 2018) 30.
[16] R. H. Bork, ‘Legislative Intent and the Policy of the Sherman Act’ (1966) 9(1) Journal of Law&Economics 7. R. H. Bork, ‘The Goals of Antitrust Policy’ (1967) 57(2) The American Economic Review 242; R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 15–71.
[17] R. Pitofsky, ‘The Political Content of Antitrust’ (1979) 127(4) University of Pennsylvania Law Review 1051 1051.
[18] ibid.Fox and Sullivan (n 2), 937–939. J. May, ‘Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918’ (1989) 50 Ohio St. L.J. 257 258; 280-283; Arnold (n 11), 655–656; Brietzke (n 4), 283–286. R. H. Lande, ‘Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged’ (1982) 34 Hastings L.J. 65; R. J. Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2000) 9–26.For more recent scholarship Stucke, Maurice E. ‘Reconsidering Antitrust's Goals’ (2012) 53 B.C. L. Rev. 551 555–565; B. Orbach, ‘How Antitrust Lost Its Goal’ [2013] Fordham Law Review 2252, 2256–2268; Wu (n 15) 29–32.
[19] Pitofsky (n 17), 1051. E. M. Fox, ‘Modernization of Antitrust: A New Equilibrium’ (1980) 66 Cornell L. Rev. 1140 1150; Amato (n 11) 2–4. E. M. Fox, ‘The Symbiosis of Democracy and Markets: OECD - Directorate for Financial and Enterprise Affairs Competition Committee - Global Competition Forum - Competition and Democracy’ (2017) <https://www.oecd.org/daf/competition/democracy-and-competition.htm>; S. Weber Waller, ‘Antitrust and Democracy’ (2019) 45((forthcoming)) Florida State University Law Review 3 accessed 20 February 2019.Wu (n 15) 16.

been repeatedly aired, antitrust scholarship, however, has never fully explained this view. What was the link between competition and democracy that the drafters of the Sherman Act had in mind? Why did the proponents of antitrust law perceive the trust problem and concentrated economic power as a threat to a democratic society and polity? Which features of a democratic society was and is antitrust law supposed to protect?

The answer to these questions, I contend, lies with the republican concept of liberty as non-domination. We have seen in the previous chapter that the republican ideal of liberty as non-domination played a central role in the understanding of competition by early proponents of competitive markets, such as Adam Smith, James Steuart and the English Levellers movement. The value of republican liberty had also profoundly shaped the ideal of a democratic society and polity of the founding fathers of the American republic. In this chapter, I argue that the idea that the protection of competition through antitrust rules plays a pivotal role in the preservation of democracy can be traced back to this concern about republican liberty. This chapter shows that the central, if not primary, goal of the adoption of the Sherman Act and subsequent antitrust statutes was to preserve competition as an institution of antipower, which guards the republican liberty and equal status of all market participants against domination resulting from the concentration of economic power in the hands of a few corporate Behemoths.

This republican idea that excessive concentration of economic power leads to domination, which is incompatible with a republican form of government and society of free and equals, was a central leitmotif of the legislative debate leading to the adoption of the Sherman Act. The ideal of republican liberty as non-domination also informed the adoption of subsequent antitrust statutes and importantly shaped US antitrust policy throughout more than a half a century. The adoption of antitrust rules indeed constituted in the first place a political response to the disruptive effect of the rise of powerful large-scale corporations on the socio-economic order of the US economy and society. The ascent of the large-scale firm and the concentration of economic power in the hands of 'big business' raised the Behemoth problem in a new form. Rampant industry concentration and centralisation of economic power posed a fundamental challenge to the Jeffersonian ideal of a yeoman republic,[20] which was deeply encoded in the American conception of a republican democracy.[21] The enactment of US

[20] R. J. Peritz, 'A Counter-History of Antitrust Law' (1990) 39(2) Duke Law Journal 263 273–275; Fox (n 19), 1148–1150; R. Hofstadter, 'What Happened to the Antitrust Movement' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 249.
[21] Hofstadter (n 20) 227–228, 233. Brietzke (n 4), 276–278. D. A. Crane, 'Federalism, Antifederalism, and Jacksoniansim: Introduction' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 41; H. Hovenkamp, 'Antitrust After Populism -

antitrust laws thus constituted a heroic attempt to preserve the Smithian model of competition and its political and societal implications in the face of growing asymmetries of economic power and new forms of domination fueled by the rise of industrial capitalism and the large-scale corporate Behemoths.

In support of the claim that the value of republican liberty as non-domination was a central goal of US antitrust law and policy and shaped the idea of a competition-democracy nexus, I will first discuss the role of republican liberty during the Congressional debates leading to the adoption of the Sherman Act in 1890 (Section 2). On this basis, I will trace how the concept of republican liberty as the fundamental tenet of the competition-democracy nexus emerged as a recurrent theme at various critical junctures of the history of US antitrust until the 1960s (Section 3). In a fourth step, I will discuss how this notion of republican liberty and its operationalisation through a Smithian understanding of competition have been increasingly challenged by new theories of competition and how the Harvard School made the last and most concrete attempt to translate the idea of a competition-democracy nexus into a concrete antitrust policy (Section 4).

2 Republican Liberty as Non-Domination at the Centre of the Congressional Intent underpinning the Sherman Act

The claim that the adoption of the Sherman Act and subsequent antitrust statutes has been influenced by the goal of preserving liberty is certainly not new. The preeminent importance of the value of economic liberty for US antitrust is well-documented in the antitrust scholarship.[22] The prominent role that US antitrust policy attributes to the protection of economic freedom may also explain why it has been often referred to as a 'characteristically American', expressing a specific 'way of life and creed' and embodying values that are deeply enrooted in the American political and social culture.[23] Yet, few antitrust scholars have actually made an attempt to clarify what they mean by ‚freedom' or 'liberty'. Nor have they explained why antitrust law's concern about liberty is related to a concern about democracy. This lack of

Introduction' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 222.

[22] Fox (n 19), 1149–1152; J. J. Flynn, 'Antitrust Policy and the Concept of a Competitive Process' (1990) 35 N. Y. L. Sch. L. Rev. 893 902; Peritz (n 18) 3. For a comprehensive account of the legislative history of the Sherman Act Thorelli (n 2) 164–232. W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago University Press 1981 [1959]) 53–99.

[23] Hofstadter (n 20) 227, 249.

conceptual clarity, however, obfuscates that the legislative debate leading to the adoption of the Sherman Act and the antitrust rhetoric celebrating 'free competition' throughout the first half of the 20th century was not primarily concerned about the protection of economic liberty in the negative sense of classical liberalism as the absence of interference by the State or by private players.[24] Rather, the concept of economic liberty animating the Sherman Act and the antitrust policy until the late 1960s followed a 'thicker', republican understanding of liberty as non-domination that underpinned the Smithian understanding of competition.

2.1 Economic Liberty as a Counterpart of Political Freedom

The concern about the adverse effect of the trust phenomenon on economic liberty lay, indeed, at the centre of the legislative debate of the proposed Sherman bill. The proposed antitrust bill was first and foremost perceived as a tool to preserve 'free and fair competition'.[25] The idea that the preservation of liberty constitutes a central objective of the Sherman Act was perhaps most prominently articulated by Senator Sherman himself. He suggested that the Sherman Act should not be interpreted as ordinary statutory legislation, but like the US constitution as a 'remedial statute, a bill of rights, a charter of liberty.'[26] The proposed antitrust bill was thus viewed as an attempt to 'preserve […]the rights of individuals against associated and corporate wealth and power.'[27]

The Congressmen thus repeatedly likened the role of antitrust rules in preserving economic liberty with that of the political constitution in protecting political liberty.[28] Just as the political constitution preserves liberty by imposing checks and balances on the power of the state, so too does antitrust law safeguard economic liberty, by imposing bounds on private economic power to hold it accountable.[29] The proponents of the proposed antitrust legislation thus perceived economic freedom as the corollary of constitutionally protected fundamental

[24] See for a distinction between those concepts of liberty the previous chapter. For the definition of negative liberty see I. Berlin, *Four Essays on Liberty* (Oxford University Press 1969) 173–174.
[25] Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2457; 19th Cong. Rec. 6041 (1888) 6041.
[26] 20 Cong Rec 2455 (1890) (n 1) 2461.
[27] Senator Sherman ibid 2460.
[28] Arnold (n 11), 657.
[29] Brietzke (n 4), 290; 292; 299-300.

rights, civil liberties,[30] and pluralism.[31] Congressmen cast the protection of economic liberty as the economic counterpart of the guarantee of political freedom in a constitutional democracy.[32]

2.2 A Republican Notion of Economic Liberty as Non-Domination

Yet, the imaginary of the Sherman Act as a quasi-constitutional safeguard of liberty was not rooted in a purely negative concept of liberty as non-interference. Senator Sherman and the supporters of his bill were not exclusively concerned about concrete abuses of private economic power and actual or likely instances where trusts interfered with other market participants. Rather, their calls for an antitrust bill were animated by a more diffuse concern about domination flowing from the mere existence of concentrated private economic power. Numerous Congressmen, indeed, perceived the mere aggregation of economic power as a source of a broad range of social 'evils'[33], 'great wrongs'[34] and 'danger' to the people.[35] Large corporations and trusts were disparaged as 'giants'[36] 'commercial sharks',[37] 'monsters'[38] and 'enemies of the people'.[39]

This strong condemnation of trusts and other amalgamations of economic power illustrates the extent to which the legislative history of the Sherman Act turned on the pivotal concern that the excessive concentration of private economic posed a threat to a republican society and polity. The Congressional debates were testimony to the fear that the excessive concentration of economic power might easily degenerate into the 'tyranny' of the few.[40] This republican concern was most clearly articulated by Senator Sherman who famously observed that

> *If the concentrated power of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and*

[30] See Senator Sherman's reference to the Supreme Court of the State of Michigan's holding in *David M Richardson v Russel* that monopoly is 'destructive of free institutions' and 'contrary to the whole scope and spirit of the Federal Constitution' 20 Cong Rec 2455 (1890) (n 1) 2458.
[31] L. B. Schwartz, 'Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness' (1960) 55 Northwestern University Law Review 4 11–12; May (n 18), 296; Stucke, Maurice E. (n 18), 562.
[32] T. W. Arnold, 'The Bottlenecks of Business [1940]' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 209; Brietzke (n 4), 294; Fox and Sullivan (n 2), 936; Hofstadter (n 20) 233.
[33] Senator Sherman 19 Cong. Rec. 7512 (1890) 7513; 19 Cong. Rec. 8519 (1888) 8521. Senator Jones 20 Cong Rec 1457 (1890) 1457.Senator George ibid 1458. Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2456.
[34] 20 Cong. Rec. 1765 (1890) 1768.
[35] Senator Platt 19 Cong. Rec. 8559 (1890) 8559.
[36] 20 Cong Rec 2455 (1890) (n 1) 2460.
[37] 20 Cong Rec 1457 (1890) (n 33) 1457.
[38] ibid.
[39] Senator George 19 Cong. Rec. 8519 (1888) (n 33) 8520.
[40] Hofstadter (n 20) 228. W. C. Wells, *Antitrust and the formation of the postwar world* (Columbia University Press 2002) 27–28.

> *should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.*[41]

Senator Sherman's warning that economic concentration and size are incompatible with or pose a threat to democracy cannot be explained by a negative conception of economic freedom. Market concentration is only an obstacle to negative economic freedom, in so far as it gives rise to abuses of power. Only if concentrated market power leads to actual interference, or at least poses a threat of likely interference with the actions or choices of another market participant, the latter's negative liberty could be said to be frustrated. As we have seen in the previous chapter, negative freedom, moreover, is not inextricably linked with a democratic or republican form of government. On the contrary, negative liberty as non-interference can also be guaranteed under a constitutional monarchy or autocracy. The concept of negative liberty, therefore, fails to explain Senator Sherman's claim that the concept of concentrated economic power was incompatible with a democratic form of government.

Senator Sherman and other Congressmen speaking in support of the antitrust bill did not view the actual or likely threat of interference with economic freedom as the principal reason why concentrated economic power is at odds with a democratic government. What Senator Sherman was actually decrying was that excessive concentration of economic power brings about a state of subjugation to the 'kingly prerogative' of an 'autocrat' of trade. It is exactly this relationship of subordination and dependence, which the framers of the Sherman Act deemed incompatible with the ideal of a society and polity of free and equals. Instead of the actual interference with other market players' actions and choices, it is the 'capacity' of powerful firms to exercise arbitrary power and to interfere with other market participants at will, which Sherman and his fellow Congressmen perceived as a source of unfreedom.

It thus comes as little surprise that the Congressional debate repeatedly invoked the republican imaginary of the master-slave relationship to decry the domination resulting from the presence of concentrated economic power. Congressmen, indeed, likened the fact of being

[41] Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2457. See also Sherman's reference to the case *David M Richardson v Russel* decided by the Supreme Sherman Court of Michigan which held that '[m]onopoly in trade [...] is odious to our form of government', 'destructive of free institutions', 'repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution'. He concluded that it is 'doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations'. ibid 2458.

subjected to the whim of a few powerful corporations with slavery.[42] This perceived state of economic dependence on and subordination to the caprice of a few powerful firms strongly clashed with the republican understanding of liberty as self-mastery and independent status. This republican concern about self-ownership prompted proponents of the Sherman Act to affirm that '[i]f the proceeds of the labour of our men and women are not to be their own we have no liberty and our Government is a farce and a fraud.'[43] In line with the republican tradition, the proponents of the Sherman Act thus perceived the concentration of economic power as such, rather than actual or likely interference as a source of unfreedom.

The framers of the Sherman Act identified at least two channels through which the concentration of economic power may give rise to domination and thus jeopardise a republican democracy. First, they were alerted that the combination and excessive concentration of economic power enabled a few players to 'regulate and control' markets 'at their will' and 'dictate' the terms of trade.[44] Even if these powerful firms would not exercise their power and interfere with the economic liberty other market participants, the latter remain subjugated to and dependent on their arbitrary will, as those powerful players could destroy competition and competitors whenever they saw fit.[45] The framers of the Sherman Act, thus, did not only view actual instances of abuse of economic power but the state of defenceless exposure of market participants to the whim and goodwill of a few mastery corporations as an abrogation of economic liberty.

Owing to their capacity to engage in private regulation or private government, big businesses appeared to be able to exercise a privilege that in a republican democracy was normally reserved to the elected legislator or government. The hostility against such forms of private government hinged on the republican distinction between arbitrary and non-arbitrary interference.[46] In line with the republican tradition, the proponents of the Sherman Act assumed that private government and interference inevitably degenerate into arbitrary domination because, unlike a non-arbitrary interference by a public government, they are not legitimised, held accountable and constrained by democratic processes and constitutional boundaries. By

[42] Senator Green 20 Cong. Rec. 1765 (1890) (n 34) 1768.
[43] Senator Jones 20 Cong Rec 1457 (1890) (n 33) 1457.
[44] Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2460.
[45] ibid 2457 and 2459.
[46] See the discussion of this distinction in Chapter 1. P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576 596–601.

adopting the Sherman Act, Congress sought to prevent big corporations from exercising government-like arbitrary power by privately regulating markets.

Second, the framers of the Sherman Act were also haunted by the spectre that powerful businesses would exercise political domination by transforming their market power into political power and undermine the non-arbitrariness of public republican government by capturing legislative and governmental processes. Industry concentration and monopolies were reprehended as a direct menace to the functioning of democratic government and to the soundness of republican institutions. The congressional debates leading to the adoption of the Sherman Act evoke the risk of corruption and the close ties, for instance, in terms of campaign financing, between trust owners and political elites.[47] The framers of the Sherman Act also cautioned that the power of some trusts and corporations might exceed that of the state and federal government.[48] The surge in economic concentration and the size of corporations raised the concern that powerful businesses would obtain undue influence over the legislative process and outpower the regulatory capacity of the government.[49] From this perspective, the adoption of antitrust law was also perceived as a crucial safeguard against the emergence of a plutocratic tyranny, which would corrode the republican polity.[50] By preventing the undue concentration of economic power in the market, antitrust rules were thus perceived as a rampart to prevent private economic power from being converted into political power. [51]

2.3 Equal Liberty and the Ideal of a Jeffersonian Society

The claim of this chapter that the proponents of the Sherman Act were concerned about preserving economic liberty in its republican sense as non-domination rather than in its negative sense as non-interference is also corroborated by the egalitarian dimension of their notion of economic freedom. In line with the republican tradition, the proponents of the antitrust bill conceptualised liberty as equal liberty and status, observing that 'industrial liberty [...] lies at the foundation of the equality of all rights and privileges'.[52] Just as the early proponents of

[47] See Senator Hoar alleging close ties between the trusts and the Democratic party 19 Cong. Rec. 8519 (1888) (n 33) 8521–8522. Pointing to the campaign contributions of several trusts to the Democratic party, Hoar also warned that the proposed bill did not adequately address the 'public trust ,which not merely takes possession of and wilds business instrumentalities' but which 'is undertaking to make the whole Government of the United States, its elections, its political affairs, the very life and strength and health of the Republic, one vast trust to be managed by the men who very recently were in arms against its life'. ibid 8563.
[48] Senator Hoard and Reagan 19 Cong. Rec. 8519 (1888) (n 33) 8521; Berle and Means. Gardiner C. (n 6) 184; Wells (n 40) 29; May (n 18), 297–298.
[49] 20 Cong Rec 2455 (1890) (n 1) 2459.
[50] May (n 18), 298.
[51] Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2460; Fox (n 19), 1150, 1182.
[52] 20 Cong Rec 2455 (1890) (n 1) 2457.

markets abhorred privileges and economic hierarchies, so too did the early proponents of antitrust law portray economic concentration as a relic of the social hierarchies and relationships of subjugation that shaped the feudal and absolutist order.[53] The concentration of economic power in the hands of a few large scale corporations and the ensuing forms of dependence and subjugation were indeed at odds with the Jeffersonian ideal of an egalitarian yeomen society, in which power and wealth are atomised amongst a multitude of independent and equal masterless men.[54]

The framers of the Sherman Act accounted for these concerns by casting the proposed antitrust rules as a safeguard of equality of opportunity of small, independent businessmen.[55] The enactment of the Sherman Act was an attempt to respond to the widespread popular discontent about practices by big businesses that stifled smaller competitors' ability and opportunity to compete [56] and, thereby, 'crush out the little men and little enterprises'.[57] The widespread practice by railway companies of charging discriminatory railway tariffs was, for instance, perceived as a direct assault against the 'right of every man to work, labor and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances.'[58] Numerous passages of the legislative debate reveal that the Sherman Act was adopted in an effort to set some basic ground rules that would ensure competition as a level playing field and to preserve the equality of opportunity of smaller competitors to compete at arm's length.[59]

The enactment of US antitrust rules thus also constituted an attempt to preserve a deconcentrated social structure of small businessmen and to protect their independent status against domination by concentrated capital and the vagaries of disruptive innovation. The Sherman Act thus did not only seek to regulate the disruptive effects of innovation on economic opportunities but also to manage the rent shifting from existing to new industries and within industries. The Sherman Act was also born out of the need to address the socio-economic impact

[53] Hofstadter (n 20) 227.See T. Roosevelt, 'The Trusts, the People, and the Square Deal' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 113; Arnold (n 32) 209.
[54] Hofstadter (n 20) 227; Brietzke (n 4), 276; Pitofsky (n 17), 1058–1059.
[55] Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2457 and 2460; I. M. Stelzer, 'Some Practical Thoughts About Entry' in R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008) 24.
[56] Senator George 19 Cong. Rec. 8559 (1890) (n 35) 8561. Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2457–2458.
[57] Senator George 19 Cong. Rec. 8559 (1890) (n 35) 8561.
[58] Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2457.
[59] Fox (n 19), 1151–1152; Pitofsky (n 17), 1059; Stucke, Maurice E. (n 18), 562; Flynn (n 22), 910.

of increasing industry concentration and to tame the process of creative destruction unleashed by the *post-bellum* wave of industrialisation during the second half of the 19th century. From this perspective, the Sherman Act operated as a 'social contract'[60] which rendered the 'creative destruction' politically and socially sustainable. The Sherman Act thus embodies an attempt to reconcile the advantages of a new form of large-scale production, on the one hand, with the preservation of the republican value of liberty as non-domination and, hence, republican democracy on the other.[61] Senator Sherman, for instance, prominently warned against the disruptive impact of economic concentration and economic innovation on equality and the social and political order:

> *Society is now disturbed by forces never felt before. The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.*[62]

The concern about equality aired during the legislative debates of the Sherman Act thus clearly went beyond a merely procedural understanding of equality, as equality of opportunity or fairness, but also focused on distributive inequality. Proponents of the Sherman Act, for instance, stressed the unfair redistributive effects of monopoly and cartelisation in particular on poorer classes.[63] Condemnations of trusts as 'robber barons' and 'plunderers'[64] clearly reflect that the framers of the Sherman Act disapproved the wealth transfer from consumers and competitors to monopolies and cartels as an unfair, coercive form of enrichment,[65] which is incompatible with the idea of distributive justice and equal freedom.[66] In line with the

[60] For the idea of competition as ‚social contract' to describe its role in ensuring equality M. S. Gal, 'The Social Contract at the Basis of Competition Law: Should We Recalibrate Competition Law to Limit Inequality' in D. Gerard, I. Lianos and E. M. Fox (eds), *Reconciling efficiency and equity: A global challenge for competition law?* (Cambridge University Press 2019) 88.
[61] May (n 18), 281–282.Arnold (n 11), 655–656; Wells (n 40) 29–30; T. A. Freyer, *Antitrust and global capitalism, 1930-2004* (Cambridge University Press 2006) 2.
[62] 20 Cong Rec 2455 (1890) (n 1) 2460.
[63] See resolution submitted by Senator Sherman directing the Committee on Finance to inquire into and report on the trust problem 19th Cong. Rec. 6041 (1888) (n 25) 6041. See also Senator Jones decrying how the Sugar trust extracts with its ‚"long fellonious fingers [...] the pennies from the pockets of the poor and the dollars from the pockets of the rich.' 20 Cong Rec 1457 (1890) (n 33) 1457–1458. See also Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2458 and 2460.
[64] Senator Jones 20 Cong Rec 1457 (1890) (n 33) 1458.
[65] Senator George 20 Cong. Rec. 1765 (1890) (n 34) 1768.
[66] Senator Jones 20 Cong Rec 1457 (1890) (n 33) 1458. The prevention of wealth transfer constitutes according to some scholars even the primary goal of US antitrust Lande (n 18); Peritz (n 20), 307; J. B. Kirkwood and R. H. Lande, 'The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency' in R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008).

republican tradition, Senator Sherman also alerted about the corrosive impact of excessive inequality of condition and wealth on the republican virtue of citizens, which would play into the hands of the 'socialist, the communist, and the nihilist'.[67]

2.4 Polycentric Competition and the Rejection of laissez-faire *and Evolutionist Theories of Competition*

This fear about domination flowing from the excessive concentration of economic power and its adverse consequences on republican liberty and equality tellingly reverberated the reasons why early proponents of competitive markets, amongst them most prominently Adam Smith, objected monopoly and concentrated economic power. The framers of the Sherman Act, however, did not only articulate their hostility against concentrated economic power in line with the republican rhetoric used by the early proponents of competitive markets. Most importantly, they also turned their attention to the Smithian account of competition to devise an institutional solution that addressed the threat concentrated economic power in the hands of corporate Behemoths posed to republican liberty and democracy. By adopting the Sherman Act, they sought to cast the Smithian idea of polycentric competition as an institution of antipower and safeguard of republican liberty into concrete legal rules.

The proponents of the antitrust bill, indeed, invoked the protection of the very specific form of competition as a polycentric market structure as the ultimate goal of the proposed legislation. Senator Sherman, for instance, observed that as long as economic power is more or less equally dispersed amongst a sufficient number of competing corporations, it cannot give rise to instances of domination.[68] In line with the Smithian understanding of competition, the framers of the Sherman Act cast competition as an accountability mechanism[69] that imposes constraints on the selfish self-interest of corporations and pushes them to account for the interests of consumers. The preservation of a polycentric market structure was thus conceived as an institutional mechanism of checks-and-balances that pits the antagonistic interests of the market players against each other and thus creates a balance of reciprocal powers. By

[67] May (n 18), 283, 289 footnote 279.
[68] 20 Cong Rec 2455 (1890) (n 1) 2457.
[69] Pitofsky (n 17), 1057–1058; Fox (n 19), 1140; 1051; 1182; Flynn (n 22), 902; Wells (n 40) 17; Wells (n 40) 17; Wells (n 40) 27; Freyer (n 61) 1–4.

decentralising power, competition was assumed to make the exercise of individual and collective arbitrary power or domination more difficult.[70]

This perception of polycentric competition as accountability and checks-and-balances mechanism heavily draws upon the insight coined by Adam Smith and James Madison that the dispersion of power and rivalry between self-interested actors tends to restrain their ability to exercise domination. It thus closely follows the republican precept that the preservation of a republican democracy and society does not only require the separation of power and the existence of checks-and-balances mechanism within the political sphere but also within the economy.[71] The Sherman Act encoded this republican understanding of a competition-democracy nexus for the first time in legal rules. It was animated by the idea that the preservation of competition as a polycentric market structure would eliminate instances of domination by ensuring that economic power is more or less equally dispersed amongst a sufficient number of competing players.[72]

The far-reaching implications and the distinctively republican rationale driving the adoption of the Sherman Act become obvious when one takes into account that the enactment of a federal antitrust statute was anything but uncontroversial.[73] Rather, the Sherman Act constituted a fundamental rupture with the ideology of *laissez-faire* liberalism, which perceived free, competitive markets as a natural order. This *laissez-faire* approach had shaped the English and American common law approach towards restraints of trade and monopolies throughout most of the 19th century.[74] Deeply rooted in a negative conception of economic liberty as non-interference, this *laissez-faire* doctrine underpinning the common law was driven by the goal of protecting contractual freedom and property rights as an expression of individual liberty, in particular against state interference. Perceiving restraints of trade and monopolistic practices as the result of contractual freedom, the common law approach therefore only tackled contracts or agreements which interfered with other market participants‘ economic liberty to an unreasonable degree, for instance by imposing excessive restraints on the parties’ contractual freedom or leaving third parties without any commercial alternatives.[75] Other restraints of trade,

[70] 20 Cong Rec 2455 (1890) (n 1) 2457–2460. See in particular Senator Sherman, quoting Judge Gibson in *Commonwealth of Pennsylvania v Carlisle* ibid 2459–2460. Arnold (n 11), 661-662, 666.
[71] Brietzke (n 4), 280–288.
[72] 20 Cong Rec 2455 (1890) (n 1) 2457.
[73] Thorelli (n 2) 190, 192, 198.
[74] May (n 18), 270–283.
[75] Peritz (n 18) 11–12.

which directly restricted competition or prevented market access, were, however, upheld as a reasonable and, hence, legitimate and legally enforceable emanation of contractual freedom.[76]

This *laissez-faire* attitude of the common law towards restraints of trade and monopoly found also support in influential economic theories about competition and industry concentration of the time. Numerous business leaders and economists expressed their firm opposition against any sorts of federal regulation of monopolies and restraints of competition.[77] Inspired by the tenets of the theory of Social Darwinism, developed by Herbert Spencer and William Graham Sumner, they portrayed industry concentration and monopoly as the natural outcome of competition as a rivalrous fight for the survival of the fittest[78]. Competition was in the first place conceived as a process of natural selection or rationalisation[79] that would eliminate all but a few very efficient and fit players.[80] Industry concentration and the rise of powerful companies, it was argued, were not so much illegitimate emanations of economic power as the natural outcome of a merciless process of natural selection and technological innovation.[81] Monopoly and large firm size were hence celebrated as the essence of competition and the natural outcome of superior economies of scale and efficiency.[82] Harm inflicted upon competitors, in turn, was perceived as the consequence of a natural selection process fueled by industrial and technological progress. Industry consolidation and private restraints of trade were, moreover, cast as necessary instruments for businesses to protect their property rights and hedge their investments against the risks of rapid economic change and innovation.[83]

This organic or evolutionist theory of competition gathered crucial support for a *laissez-faire* approach grounded in a negative conception of economic liberty that insulates freedom of contract and property rights against any form of state interference. Numerous economists and members of the business community warned that antitrust laws would deprive companies and consumers of the efficiencies flowing from large-scale production [84] and promote unhealthy 'cutthroat' competition.[85] Far from viewing concentrated economic power as a cause of alarm,

[76] For an analysis of the English and American common law approach towards restraints of trade and monopolies Thorelli (n 2) 9–50. Amato (n 11) 8–10.
[77] See for a recent discussion Wu (n 15) 24–28.
[78] Thorelli (n 2) 71, 109 - 132.
[79] ibid 114–115.
[80] ibid 71.
[81] ibid 116, 125.
[82] ibid 71.
[83] ibid 113. See for the striking resemblance with the Schumpeterian account of competition and restraints of trade J. A. Schumpeter, *Capitalism, Socialism and Democracy [1942]* (Harper & Row 1962) 86–88.
[84] H. Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84(2) Michigan Law Review 213 220.
[85] Brietzke (n 4), 277–278.

they pointed out that powerful firms remained constrained by the risk of potential competition, even if actual rivalry within the market is eliminated. To these proponents of evolutionist theories of competition, the Smithian ideal of competition as polycentric, rivalrous market structure constituted only one, albeit utterly outdated, concept among a wide range of possible forms of competition.[86]

This evolutionist theory confronted the framers of the Sherman Act and the Smithian model of competition with a fundamental challenge. Unlike Adam Smith and other early proponents of competitive markets, they could no more exclusively explain the market power of corporations, monopoly and industry concentration as the mere outcome of illegitimate interest capture and privileges granted through mercantilists policies and state favouritism.[87] Even though Congress debated the proposed antitrust bill 'without ever, insofar is known, calling on the advice of professional economists',[88] the framers of the Sherman Act acknowledged that large-scale production and corporations have a great potential to enhance economic efficiency and welfare.[89] Yet, in light of the surge in industry consolidation and the proliferation of the trust problem, the supporters of the Sherman Act viewed the common law approach towards restraints of trade as insufficient to cope with these new challenges of concentration and abuse of economic power.[90]

Unlike the *laissez-faire* proponents of negative liberty, they did not consider restraints of trade and monopolistic practices as a legitimate exercise of economic liberty. Rather, in line with the republican tradition, they acknowledged that certain forms of economic concentration and restraints of trade could give rise to domination and unfreedom, even if they emanated from the unrestricted exercise of contractual freedom or property rights and have the potential to generate efficiency and welfare. While pointing out that the antitrust bill was not outlawing the legal vehicle of the corporation as such, Congressmen nonetheless stressed the need to control and curb its power lest large-scale firms exert undue domination and undermine the republican goals of liberty and equality.[91] Even though common law concepts and language had an

[86] Thorelli (n 2) 116–117, 123, 130. See also Hovenkamp (n 84), 220-221 and notes 40-42.
[87] Goebel (n 14), 111. See exchange between Senators George and Hoar 19 Cong. Rec. 8519 (1888) (n 33) 8519, 8521. See also 20 Cong Rec 2455 (1890) (n 1) 2457.
[88] Thorelli (n 2) 120.
[89] Senator Sherman, for instance, referred to the 'corporation' as 'most useful agencies of modern civilization' and underlined the 'good results of corporate power' which he saw realised in the deployment of railroads and the 'enormous increase in business and production' 20 Cong Rec 2455 (1890) (n 1) 2457; 19th Cong. Rec. 6041 (1888) (n 25) 6041.
[90] May (n 18), 261–288.
[91] Fox (n 19), 1147, 1152-1154; Peritz (n 20), 272–276; May (n 18), 280.

important bearing on the legislative debate and the drafting of the Sherman Act,[92] the newly adopted antitrust reflected a clear rejection of the *laissez-faire* common law approach towards restraints of trade and monopoly grounded in the concept of negative liberty and a Darwinist understanding of competition. The authors of the Sherman Act, instead, endorsed the Smithian understanding of competition as a safeguard against the domination flowing from the excessive concentration of economic power, putting at risk not only individual rights but the 'rights of the American people' as a republican polity.[93]

The Congressional decision to adopt the Sherman Act to preserve competition as an institutional mechanism of antipower also echoes the emphasis the republican tradition put on the importance of the rule of law as being constitutive of liberty. The adoption of the Sherman Act indeed illustrates the republican distinction between arbitrary and non-arbitrary interference. Even though the Sherman Act imposed legal constraints on and, thus, interfered with the economic liberty of businesses, its proponents did not perceive antitrust law as being an obstruction of economic liberty. The contrary was the case. As the Sherman Act was adopted in compliance with democratic processes and constitutional principles, it had to be considered as non-arbitrary interference and was thus in line with liberty as non-domination. The imaginary of the Sherman Act as a 'charter'[94] of economic freedom indeed suggests that antitrust rules were perceived as constitutive of, rather than diminishing economic liberty by shielding it against the potential arbitrary interference by powerful private firms. The adoption of the federal antitrust law thus embodied the republican insight that polycentric competition as an institution of antipower cannot be maintained by self-help and private initiative alone. Rather, the Sherman Act stands for the legislative decision to empower the weaker parties and to ensure the non-contingent guarantee of their liberty through some form of quasi-constitutional rights and bounds of power.

[92] Peritz (n 18) 20–26.
[93] Senator Reagan 19 Cong. Rec. 8519 (1888) (n 33) 8521. Senator Sherman 20 Cong Rec 2455 (1890) (n 1) 2460. See also Senator Sherman ibid 2469.
[94] ibid 2461. *Northern Pacific RY. Co. v United States* 356 US 1 (1958) 4; *United States v. Topco Assocs. Inc.* 405 U.S. 596 (1972) 610.

3 Republican Liberty as a Recurrent Theme of the US Antitrust Movement

The legislative history of the Sherman Act hence shows that the drafters of the antitrust laws viewed the domination and subjugation resulting from an excessive level of concentration of economic power as obstruction of republican liberty as non-domination. This republican idea that the concentration of economic power undermines republican liberty and equality of opportunity and is, therefore, incompatible with a republican form of government fundamentally shaped the understanding of antitrust law in the US.

3.1 The Role of Republican Liberty for Progressivism during the Gilded Age

This concern about republican liberty as non-domination developed into a recurrent theme in the US antitrust policy throughout the first half of the 20th century. The quasi-constitutional role of antitrust law in curtailing private power became deeply ingrained in the democratic creed of the American republic. President Theodore Roosevelt, for instance, marshalled the notion of antitrust statutes as 'Magna Carta of free enterprise'[95] and safeguard of 'equality of opportunity'[96] in support of his policy of 'trust-busting'.

The political hostility against industry concentration and the perception of large-scale corporations as a source of domination reached their apex with the 'New Freedom'[97] programme of President Woodrow Wilson and his economic advisor and later Supreme Court Justice Louis Brandeis. During the 1912 presidential election, they called for a more heavy-handed antitrust enforcement against big business. Ardently contesting the notion that 'size is not a crime',[98] Wilson and Brandeis rejected Roosevelt's view that antitrust policy should confine itself to addressing anticompetitive conduct and only tackle 'bad' monopoly, while tolerating 'good' monopoly.[99] Brandeis and Wilson, instead, portrayed concentration of economic power as being incompatible with the basic principle of separation of powers that lies

[95] Brietzke (n 4), 295.
[96] T. Roosevelt, 'New Nationalism Speech [1910]' (15 September 2019) <https://teachingamericanhistory.org/library/document/new-nationalism-speech/>. For a vivid portray of Roosevelt's 'trust-busting' policy Roosevelt (n 53) 113–115; Wu (n 15) 45–52.
[97] W. Wilson, *The New Freedom* (Tauchnitz 1913).
[98] L. D. Brandeis, *Other People's Money: And How The Bankers Use It* (Frederick A. Stokes Company 1914) 163.
[99] Wilson (n 97) 182–195.

at the core of the US constitutional order and democracy.[100] They, therefore, campaigned for reinforced antitrust enforcement that would directly take on the power of big business through separation[101] and decentralisation.[102]

While Brandeis' and President Wilson have recently gained new attention amongst antitrust scholars for their role as fervent critics of industry concentration and the private power of big businesses,[103] only a few commentators have recognised the crucial role the republican notion of liberty as non-domination[104] played for their critique of bigness.[105] The concern about domination lay indeed at the heart of Wilson's and Brandeis' hostility against the concentration of economic in power in the hands of a few powerful corporations. [106] Concentration of economic power and firm size – or in Brandeis' terms the 'curse of bigness'[107] – amounted in their view to a new form of 'tyranny'[108] or 'political despotism',[109] which are impossible to reconcile with a republican society and polity.[110]

Reviving the ancient republican imaginary of the master-slave relationship as the epitome of unfreedom, Brandeis and Wilson identified the dependence of individuals 'upon the good-will of large allied capitalists' as the antonym of freedom[111] and source of domination. [112] The mere existence of concentrated economic power, they asserted, reduces liberty. Even if the powerful Behemoths show their goodwill and do not interfere with competitors, the latter's liberty will be frustrated because the powerful businesses remain capable of arbitrarily interfering with competitors at whim. [113] Brandeis thus clearly called for an antitrust policy that

[100] Brandeis (n 98) 6.
[101] ibid 161.
[102] ibid 188.
[103] Wu (n 15) 33–44. L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710 742; Z. Teachout and L. M. Kahn, 'Market Structure and Political Law: A Taxonomy of Power' (2016) 9(1) Duke Journal of Constitutional Law & Public Policy 37 58–59.
[104] See for instance Wilson's notion of 'new freedom' as 'self-mastery' Wilson (n 97).
[105] To my knowledge, K.S. Rahman is currently the only author who has made the link between Brandeis' thought and republican liberty explicit K. S. Rahman, 'Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?' (2016) 94 Tex. L. Rev. 1329 1339–1345; K. S. Rahman, 'From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age' (2016) 35 Yale Law & Policy Review 316 321; K. S. Rahman, *Democracy against Domination* (2017) 80–81. Rahman's work has however some influence on the recent writings of Lina Khan L. M. Khan, 'The Ideological Roots of America's Market Power Problem' [2018] Yale Law Journal Forum 960, 970.
[106] W. Wilson, 'The Tariff and the Trusts' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 121.
[107] Brandeis (n 98) 162.
[108] Wilson (n 97) 53.
[109] Brandeis (n 98) 6.
[110] ibid.
[111] Wilson (n 97) 22.
[112] Brandeis (n 98) 184.
[113] Wilson (n 97) 196.

goes beyond the protection of a negative concept of economic liberty as non-interference. He instead observed that the specific interference with competitors 'is not so important as the fact that such power exists and that it might be so used at any time.'[114] Such domination exerted by big companies is not confined to the economic sphere, but subjugates the society at large, if they capture the republican institutions. [115]

In accordance with the strong egalitarian dimension of republican liberty, Brandeis and Wilson also put at guard against the adverse effects of economic concentration on the equality of opportunity and the equal status of small, independent businesses.[116] They warned that large businesses disposed of and regularly made use of the power to 'crush the little man'.[117] Underscoring the role of antitrust laws to 'keep open the path of opportunity'[118] and 'look after the men who are on the make rather than the men who are already made',[119] Wilson and Brandeis revived the Jeffersonian ideal of a society of a yeomen republic and resonated Adam Smith's and the Levellers' praise of the virtues of small and independent businessmen as promoters of social and economic progress. [120]

3.2 The Re-emergence of the Competition-Democracy Nexus in the Aftermath of the Second World War

After the decline of competition policy during the New Deal era, the concern about economic concentration as a source of domination and threat to a republican democracy gained new momentum in the years during and in the direct aftermath of the Second World War. This renewed hostility against bigness was directly linked with the widely shared view that the high degree of concentration and cartelisation of the European and, in particular, of the German economy had enabled the rise of fascism and totalitarianism in Europe. [121] Leading politicians[122]

[114] Brandeis (n 98) 160.
[115] Wilson (n 97) 191.
[116] Brandeis (n 98) 152; Wilson (n 97) 23.
[117] Wilson (n 97) 190.
[118] Louis Brandeis, 'Shall we Abandon the Policy of Competition?: Reprinted from The Curse of Bigness [1934]' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 189.
[119] Wilson (n 97) 23–24.
[120] Wilson (n 106) 124, 208-209; Brandeis (n 98) 135, 150, 163.
[121] Arnold (n 32) 211–213; Stucke, Maurice E. (n 18), 559.
[122] The co-sponsor of the 1936 Robinson-Patman, Representative Wright Patman commissioned and directed a study which documented the role of big business and industry concentration in the rise of fascism in Germany and other parts of Europe. See with a specific focus on Germany Legislative Reference Service of the Library of Congress, 'Fascism in Action: A Documented Study and Analysis of Fascism in Europe Prepared at the Instance and under the Direction of Representative Wright Patman of Texas by Legislative Reference Service of the Library of Congress under the Direction of Ernest S. Griffith' (1947) 88 onwards.

and antitrust enforcers, such as Assistant Attorney General Thurman Arnold,[123] perceived the shift towards centrally planned economies and the rise of fascist totalitarianism in Germany and other parts of Europe as the 'inevitable result of the destruction of competitive domestic markets by, private combinations, cartels and trade associations.'[124] Along similar lines, President Roosevelt warned about the dangers of concentrated private power for liberty and democracy. In 1938, he told Congress:

> *Unhappy events abroad have retaught us two simple truths about the liberty of a democratic people. The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is Fascism—ownership of Government by an individual, by a group, or by any other controlling private power.*[125]

The role of cartels and big business in the rise of totalitarianism in Germany was indeed closely followed in the US. German emigrants, such as Heinrich Kronstein, who worked for the US Department of Justice Antitrust Division, and Franz Neumann, who worked with various US government agencies during the war, were amongst the first to document the roles big business and cartels for the Nazi economy in English.[126] This growing awareness of the link between cartelisation and fascism forged a renewed political and societal consensus in support of antitrust law and gave new impetus to antitrust enforcement.[127] During the war, the Department of Justice Antitrust Division increased its efforts to prosecute American enterprises that participated in international cartels, in particular with German cartels and corporations such as IG Farben, Krupp, AEG-Osram or Zeiss.[128] The role of big conglomerates and cartels for the successful rise of fascism in Germany and Japan also informed the Allies' policy to promote the de-cartelisation and de-concentration and the introduction of competition laws as essential elements of democratisation of Germany and Japan after World War II.[129]

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[123] For the primordial role of Thurman Arnold in reviving antitrust after the New Deal era see Hofstadter (n 20) 225. S. Weber Waller, 'The Antitrust Legacy of Thurman Arnold' (2004) 78(3) St. John's Law Review 569 569–594.

[124] Arnold (n 32) 211. See for a similar claim aired in 1913 W. H. Taft, 'We Must Get Back to Competition' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 118.

[125] F. D. Roosevelt, 'Message to Congress on Curbing Monopolies' (1938) <https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies> accessed 3 March 2019.

[126] Wells (n 40) 55–56; F. Neumann, *Behemoth: The structure and practice of National Socialism, 1933-1944* (Octagon 1963 [1942]); R. A. Brady, *The spirit and structure of German fascism* (Citadel Press 1971 [1937]).

[127] Arnold (n 11), 664–665.

[128] Wells (n 40) 17-26; 44-52.

[129] D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press; Oxford University Press 1998) 268–270. S. Vande Walle, 'Competition and Competition Law in Japan: between Scepticism and Embrace' in M. W. Dowdle, J. Gillespie and Maher Imelda (eds), *Asian Capitalism and the*

The perceived link between industry concentration and fascism also shaped the reform of US merger law, the Clayton Act by the Celler-Kefauver amendment in 1950. Most prominently, the co-sponsor of the reformed bill, Senator Celler, argued that the amendment of the merger law sought 'to preserve a society of small, independent, decentralized business in order to disperse economic and political power and to assure that a Hitler could never rise to power in the United States'.[130]

The experience of fascism and totalitarianism thus seemed to vindicate the republican concern about potential domination resulting from concentrated economic power and its adverse effects on a democratic society and polity. It also lent new support to the republican belief that there was a close 'interdependence' between the economic, social and political system.[131] The role of big business in the rise of fascism also revived the Jeffersonian ideal of an economy in which economic power is split amongst many small and independent businessmen.[132] Until the late 1960s, the belief that antitrust law, by preventing the excessive concentration of private economic power, importantly contributed to the preservation of democracy, formed an essential tenet of the self-understanding of the American democracy and economy.[133]

The influential role of republican liberty and the idea of a democracy-nexus for the identity of US antitrust policy of the time emerges most clearly from the 1955 Report by the Attorney General's National Committee to Study Antitrust. This committee brought together the leading antitrust experts and economists of the time, amongst them also future figureheads of the Chicago School such as George Stigler. The report described antitrust law as 'a distinctive American means for assuring the competitive economy on which our political and social freedom under representative government in part depend.'[134] Accordingly, competition is 'desirable on principle and for its own sake, like political liberty and because political liberty is jeopardized if economic power drifts into relatively few hands.'[135] The members of the

Regulation of Competition: Towards a Regulatory Geography of Global Competition Law (Cambridge University Press 2013) 123–126.

[130] Quotation of Representative Celler in Fox (n 19), 1151.

[131] May (n 18), 269.

[132] Fox (n 19), 1153; Fox and Sullivan (n 2), 1180.

[133] Arnold (n 32) 209. Freyer (n 61) 22; Fox (n 19), 1140; Fox (n 19), 1150; Pitofsky (n 17), 1151; Pitofsky (n 17), 1051, 1063.

[134] The Attorney General's National Committee to Study the Antitrust Laws, *1955 Report* 2. See however for a member of the Committee who rejected the idea that there is a ‚simple relation between the industrial structure of a society and its political and social pattern' M. A. Adelman, 'Effective Competition and the Antitrust Laws' (1948) 61(8) Harvard Law Review 1289 1289.

[135] The Attorney General's National Committee to Study the Antitrust Laws (n 134) 2.

Committee clearly endorsed the Smithian understanding of competition as a polycentric process in which market players acting independently and in a self-interested way 'keep [...] power in check'.[136] Under these circumstances, no player has the power to limit the economic freedom of other players.[137] Antitrust law, the report observed, aims at preventing private government by ensuring that the exercise of 'governing power' remains in the hands of the democratically elected government.'[138]

4 The Harvard School and Republican Antitrust

Despite this continuous influence of the concern about liberty as non-domination as a recurrent theme of US antitrust policy until the 1970s, the idea of competition-democracy nexus was, however, increasingly challenged.[139] The perceived complementarity between competition and democracy was predicated on a specific form of competition as a polycentric market structure in which power is dispersed amongst numerous players. This understanding originated from the pre-industrialised world of Adam Smith. This Smithian understanding of competition, however, came increasingly under pressure. While it had still survived the attempt of evolutionist theories of competition to justify a *laissez-faire* approach towards firm size and industry concentration, the Smithian understanding of competition was increasingly called into question by new insights in economic theory, which laid bare the limitations of the economic model of perfect competition.[140]

4.1 Economic Challenges of the Smithian Understanding of Competition

The pioneering studies by Chamberlin[141] and Robinson[142] on imperfect oligopolistic and monopolistic competition showed that the conditions of perfect competition are only exceptionally met by real-world markets. They also suggested that the number of existing competitors is not necessarily indicative of market power and the absence of competition.[143]

[136] ibid 320.
[137] ibid.
[138] ibid 2.
[139] Hofstadter (n 20) 233–245.
[140] E. S. Mason, 'Monopoly in Law and Economics' (1937) 47(1) The Yale Law Journal 34 35; E. S. Mason, 'The Current Status of the Monopoly Problem in the United States' (1949) 62(8) Harvard Law Review 1265 1271. J. A. Rahl, 'Conspiracy and the Anti-trust Laws' (1950) 44(6) Indiana Law Journal 743 747.
[141] E. Chamberlin, *Theory of Monopolistic Competition* (Harvard University Press 1933).
[142] J. Robinson, *The Economics of Imperfect Competition* (Macmillan 1933).
[143] Adelman (n 134), 1299.

Schumpeter, moreover, affirmed that potential competition might constrain powerful firms even in the absence of rivalry in the market.[144] By casting economic concentration and market power as the precondition of innovation and welfare, Schumpeter also forcefully discredited the traditional hostility of antitrust law against big business as misguided ideology.[145] These emerging theories of imperfect competition shook the economic foundations of the hostility against industry concentration. On the contrary, they instead suggested that concentrated markets may often yield outcomes similar or even superior to that of perfect competition.[146]

In this context of a growing gulf between antitrust law, its normative and political content and economics, an informal working group of lawyers[147] and economists[148] regularly convened at the University of Harvard to exchange their views on antitrust policy. This so-called 'Harvard School' of antitrust made the last attempt to operationalise the concern about republican liberty. While it continued to draw upon the Smithian idea that a polycentric market structure operates as a check upon economic power, the Harvard School sought to move beyond the outmoded model of perfect competition.[149] The Harvard School, instead, relied on the concept of ‚workable competition'[150] or ‚effective competition' initially developed by J.M. Clark as a middle ground between perfect competition on the one and monopolistic markets on the other end of the spectrum. [151] Clark's concept of workable competition was perceived as a 'second-best' model of competition that could, with a reasonable probability, materialise in everyday markets and be promoted through antitrust policy.[152] Based on this concept of workable competition, the Harvard School sought to root the Smithian understanding of competition as a polycentric market structure in a comprehensive economic framework, the so-

[144] Mason (n 140), 47–48. See in support of Schumpeter's understanding of competition Adelman (n 134), 1301, footnote 28.
[145] E. S. Mason, 'Schumpeter on Monopoly and the Large Firm' (1951) 33(2) The Review of Economics and Statistics 139 193, 141; Mason (n 140), 1271.
[146] For the impact of these theories on the curtailment of the antitrust policy during the new deal era Hovenkamp (n 84), 214, 221 and 224.
[147] Kingman Brewster, Lincoln Gordon, David Cavers, Albert Sacks, Donald Turner
[148] Joe Bain, Carl Kaysen, Morris Adelman, Robert Bishop, Kermit Gordon, John Lintner and chairman Edward Mason.
[149] Mason (n 140), 1267–1268.
[150] Clark defined 'workable competition' as 'rivalry in selling goods in which each selling unit normally seeks maximum net revenue, under conditions such that the price or prices each seller can charge are effectively limited by the free option of the buyer to buy from a rival seller or sellers of what they think of as ‚the same' product, necessitating an effort by each seller to equal or exceed the attractiveness of the others' offerings to a sufficient number of buyers to accomplish the end in view.' J. M. Clark, 'Toward A Concept of Workable Competition' (1940) 30(2) The American Economic Review 241 143.
[151] See for instance J. S. Bain, 'Workable Competition in Oligopoly: Theoretical Considerations and Some Empirical Evidence' (1950) 40(2) American Economic Review 35; The Attorney General's National Committee to Study the Antitrust Laws (n 134); C. Kaysen and D. F. Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959). Mason (n 140); Hovenkamp (n 84), 214 fn. 4.
[152] Hovenkamp (n 84), 221; Clark (n 150), 256.

called Structure-Conduct-Performance (S-C-P) paradigm. The Harvard School championed the S-C-P paradigm as a framework that would allow competition policy to deduce workable policy principles from the analysis of market structure.

4.2 The Goals of Antitrust Policy pursuant to the Harvard School

The Harvard School developed its antitrust programme on the basis of a clear set of political and economic assumptions about the goals of antitrust law and policy. This policy programme was most comprehensively set out by the leading Harvard scholars Turner and Kaysen in their influential antitrust treatise ‚*Antitrust Policy*' published in 1959. While it recognised the importance of efficiency[153] and innovation[154] as economic goals of antitrust policy, the Harvard School perceived the maintenance of the competitive process as the central goal of antitrust policy. [155]

It is noteworthy that Kaysen and Turner also clearly grounded this policy goal of protecting the competitive process in the republican concern about liberty as non-domination. They affirmed that '[c]ompetition as an end in itself draws its justification from the desirability of limiting business power'.[156] They also linked this concern about concentrated power with democracy, pointing out that in a 'democratic, egalitarian society large areas of uncontrolled private power are not tolerated'.[157] This republican concern about liberty as non-domination also prompted the Harvard School to recognise the limitation of the power of big business and its redistribution amongst small firms as a distinct goal of antitrust law. Kaysen and Turner observed that while the goal of protecting the competitive process is geared towards economic power, the goal of limiting the power of big business has a much broader focus as it is concerned about the societal and political power of big companies in the society at large.[158] Under this goal of limiting the power of big business, antitrust policy aims to create and ensure a 'desirable distribution of social power among business units'[159] by rearranging the relative distribution of power amongst small and large companies and curtailing the political power of large corporations. The Harvard School identified three ways of how this goal can be operationalised

[153] Kaysen and Turner refer in particular to allocative efficiency as a 'distributive or relational concept, which embraces the whole economy' and productive efficiency of ‚individual industries and firms'.
[154] Kaysen and Turner (n 151) 12–13. See also on the importance of economic goals The Attorney General's National Committee to Study the Antitrust Laws (n 134) 323.
[155] Kaysen and Turner (n 151) 14. Pointing out that this deontological notion of competition as end in itself is rooted in political, as opposed to economic grounds Mason (n 140), 1266 - 1267 and fn. 4.
[156] Kaysen and Turner (n 151) 14.
[157] ibid 5.
[158] ibid 14, 17.
[159] ibid 17.

through concrete policies: first, through the curtailing of the absolute and relative size and influence of large businesses; second, by imposing constraints on the conduct of large businesses that might affect small businesses; and third, by granting subsidies to small businesses.[160] While recognising the limitations of curtailing bigness as a separate antitrust goal, the Harvard School remained mindful of the Jeffersonian tradition,[161] which assumes that the 'political and social power of the independent proprietor is the foundation of democracy.'[162]

In line with this understanding of republican liberty as structural equality, the Harvard School also emphasised the role of the competitive process in guaranteeing equality of opportunity and procedural fairness because it ensures an impersonal process of economic coordination.[163] Although the Harvard Scholars assumed that the concern about equality of opportunity and fairness could be mostly addressed by protecting the competitive process and limiting market power,[164] they also recognised that 'fairness' or 'fair conduct' might constitute a distinct goal of antitrust law. [165]

While recognising with (i) the economic performance, (ii) the preservation of the competitive process, (iii) fairness and the (iv) limitation of the power of big business four distinct goals of antitrust policy, the Harvard School set out a clear hierarchy amongst these objectives. Amongst these four goals, the Harvard School clearly prioritised the protection of the competitive process, [166] while it considered economic performance, fairness and the limitation of big business as subsidiary and complementary goals of antitrust policy.[167] Kaysen and Turner, moreover, also established a hierarchy between those subsidiary goals and attached considerable importance to the goal of economic performance. By contrast, the goals of fairness and the redistribution of social power between large and small firms were considered of rather minor importance for antitrust policy, as it was assumed that they are at least in part attained under the umbrella objective of preserving a competitive process.[168]

This multi-value approach strikingly illustrates the attachment of the Harvard School to the republican tradition, which perceived an excessive concentration of economic power as

[160] ibid 18.
[161] ibid 17.
[162] ibid 17–18.
[163] ibid 14–15. See for the importance of equality of opportunity for the understanding of competition of the time The Attorney General's National Committee to Study the Antitrust Laws (n 134) 2.
[164] Kaysen and Turner (n 151) 17.
[165] ibid.
[166] ibid 44.
[167] ibid 45.
[168] ibid.

danger for republican liberty and democracy. The Harvard School, indeed, likened the role of antitrust laws with the environmental regulation of air pollution. The Harvard School assumed that antitrust law should address excessive levels of concentration of economic power as a negative externality.[169] Antitrust thus ensures that the level of economic power does not exceed the point where it can no longer be kept in check by the competitive process and where it becomes unbearable for a democratic society and polity. The Harvard School thus cast antitrust policy as part of a broader, political bargain according to which in a democratic society private power only remains shielded from state regulation as long as it remains subject to the 'control of market forces' and the degree of competition is sufficient to 'prevent at least the accumulation of visible, unchecked private power.'[170]

In adopting this multi-value approach, the Harvard School also maintained the assumption underpinning the republican tradition that in most cases the preservation of the competitive process, efficiency, fairness and the limitation of excessive power are complementary goals which can be achieved by a policy that seeks to preserve the overarching goal of preserving the competitive process. At the same time, the attempt made by the Harvard School to introduce some hierarchy between the various policy goals and the reservations it expressed with respect to antitrust policy pursuing the goals of fairness and limitation of concentrated economic power by going beyond the umbrella objective of protecting the competitive process also reveals emerging fault lines in the republican antitrust edifice. The hierarchisation of the various policy goals and the prioritisation of the protection of the competitive process and economic performance over the goals of fairness and curtailing the power of big business indeed displayed the growing awareness amongst the Harvard Scholars of the potential conflicts and trade-offs between those goals, which might at least in some cases require courts and competition authorities to engage in some form of balancing. In case of conflict, the hierarchy of goals advocated by the Harvard School clearly suggested that in case of conflict the goal of promoting the competitive process and economic performance trump considerations about fairness or the excessive concentration of economic power. [171]

[169] ibid 48–49.
[170] ibid 5. Kaysen and Turner pointed out that the 'politically tolerable minimum' level of competition may be 'less than the level which could be urged as desirable on economic grounds.' ibid.
[171] ibid 81.

4.3 The Model of Competition according to the Harvard School

The central importance of the preservation of the competitive process and the limitation of economic power for the Harvard School's conception of antitrust policy also had an immediate bearing on its concept of competition. In fact, the Harvard School understood 'workable competition' or effective competition primarily as the absence of unreasonable market power.[172] Accordingly, markets are effectively competitive as long as they keep market power and action of market players in check.[173] The Harvard School, thus, dismissed attempts to define workable competition exclusively in terms of outcome-oriented benchmarks that focus only on market performance in terms of efficiency and innovation.[174] On the contrary, Harvard Scholars adamantly underscored the process-dimension of competition.[175] This process-dimension largely tallied with the mainstream understanding of 'workable' or 'effective competition' of the time. The 1955 report by the Attorney General's National Committee, for instance, described 'effective competition' as the state of affairs where competition is capable of preventing a 'concern or group of concerns acting in concert from having effective monopoly power'.[176]

This procedural understanding of competition as a check upon economic power comes very close to the Smithian model, which perceives competition as polycentric process or market structure. In line with this structural Smithian understanding of competition, Kaysen and Turner asserted that 'competition requires the existence of competitors, in the plural'.[177] The Harvard School's understanding of workable competition hence reflects a clear preference for competition *in*, rather than potential competition *for* the market. Echoing the widespread view that '[c]ompetition among rivals within the industry is always important',[178] this understanding of workable competition discarded the idea that potential competition is normally sufficient to keep market incumbents on their toes. It instead embraces the Smithian and Madisonian presumption that the polycentric dispersion of economic power and the rivalrous, self-interested

[172] ibid.
[173] Mason (n 140), 1267.
[174] Kaysen and Turner (n 151) 82.
[175] Mason (n 140), 1266. See also as definition of a process-oriented definition of workable competition 'market condition in which rivalry of sellers, of itself, prevents the existence of discretionary market power of a monopoly [or a group of sellers acting in concert] over price and output.' The Attorney General's National Committee to Study the Antitrust Laws (n 134) 319.
[176] ibid 320.
[177] Kaysen and Turner (n 151) 7.
[178] The Attorney General's National Committee to Study the Antitrust Laws (n 134) 322.

interaction of independent individual players are indispensable to generate a balance of power, in which market players keep each other's power in check.[179]

The major contribution of the Harvard School lay in its attempt to translate the Smithian concept of competition into a straightforward economic theory, which allowed antitrust policy to operationalise the ideal of polycentric market structure through concrete legal rules. Based on empirical industry studies, the Harvard School assumed that there is a strong relationship, if not a causal link, between market structure, business conduct and economic performance.[180] It postulated that the business conduct of firms and the performance of markets are decisively shaped by the structure of the market. [181] On this basis, the Harvard School concluded that the analysis of market structure would allow antitrust authorities and courts to determine whether a certain market is conducive to compel firms to act competitively and, thus, to maximise the market's overall economic performance.[182] This assumption constituted the economic backbone of the so-called Structure-Conduct-Performance (S-C-P) paradigm coined by the Harvard School.[183]

This tenet of a close link between industry structure, firm conduct and performance grounded on two major empirical insights. First, industry studies carried out by members of the Harvard School, such as Joe Bain, indicated that high market concentration (i.e. 75%-80% of the market share held by four or less market players[184]) leads to higher profit margins than moderate or low seller concentration.[185] Assuming that these high profit margins are symptoms of monopolistic or oligopolistic behaviour and not the result of higher productive efficiency or innovation, the Harvard scholars concluded that high degrees of industry concentration

[179] Kaysen and Turner (n 151) 60, 71.
[180] Kaysen and Turner (n 151) 60; Bain (n 151), 38.
[181] 'Structure' is hereby understood as all the stable factors external to the firm which build up the environment in which firms take their decisions. Although being stable in the short run, the market structure might change in the long run and can only be altered through intrusive forms of industrial reorganisation. Kaysen and Turner (n 151) 59-60, 71. 'Conduct', by contrast, refers to market features which are the outcome of firms' decisions. ibid 59. Even though acknowledging the potential overlap between structure and conduct due to the fact that market conduct of the other firms becomes part of the market structure for an individual firm, the Harvard School generally assumed that conduct can be altered within a relatively short period of time, for instance through injunctions. ibid 59–60. 'Performance', in turn, encompasses three dimensions, namely allocative and productive efficiency, innovation ('progressiveness'), as well as the appropriateness of expenditures on selling and advertising. ibid 62–71.
[182] ibid 71.
[183] D. A. Crane, 'Structuralism - Introduction' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 318.
[184] J. S. Bain, 'Industrial Organization: Chapter 10 - The Relation of Market Structure to Market Performance' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 333–335.
[185] ibid 325.

generally result in lower economic performance.[186] Secondly, the empirical studies also showed a significant correlation between the conditions of entry, in terms of entry barriers, concentration and market performance, in terms of profit margins.[187] To proponents of the S-C-P paradigm, high levels of industry concentration were hence a clear indicator of the absence of effective competition.

From these empirical findings, the Harvard School drew some immediate policy insights. First, the Harvard School relied on the S-C-P theorem as theoretical support for a more hostile stance against oligopolistic markets than suggested by the new theories of oligopolistic and monopolistic competition.[188] The Harvard School perceived collusion in oligopolistic markets clearly as a structural problem. The S-C-P theorem indeed lent new support to the Smithian assumption that more concentrated markets are more prone to coordinated or collusive conduct. It rested upon the assumption that markets controlled by a few sellers with considerable firm size and characterised by high barriers to entry are operating less competitive because the costs of tacit or explicit coordination are reduced. By contrast, in industries with a higher number of players coordination is more difficult and can only be sustained through quite visible forms of coordination. [189]

Moreover, the Harvard School endorsed a very broad understanding of barriers to entry and expansion. It assumed that entry barriers are generally high and frequent.[190] The notion of entry barrier put forth by the Harvard School not only encompassed 'artificial' obstacles to entry resulting from state regulation or exclusionary practices by incumbent firms. Rather, it also included 'natural' barriers to entry, in terms of economies of scale, limited access to technology, inputs, sales channels and capital, as well as product differentiation and advertising.[191] This broad notion of entry barriers was informed by the observation that in order to be able to compete effectively with incumbents, a new entrant in a market for differentiated products must overcome existing consumer loyalty that the incumbent had created by investing in goodwill, for instance in the form of advertising or brand reputation. In so doing, the entrant

[186] Kaysen and Turner (n 151) 62–64.
[187] Bain (n 184) 327.
[188] Chamberlin (n 141); Robinson (n 142).Schumpeter (n 83). See also G. J. Stigler, 'A Theory of Oligopoly: Reprinted from Journal of Political Economy Vol. LXXII, No1 (1964)' in G. J. Stigler (ed), *The Organization of Industry* (1968).
[189] D. F. Turner, 'The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal' (1962) 75(4) Harvard Law Review 655 661, 665-666, 671; D. F. Turner, 'The Scope of Antitrust and Other Economic Regulatory Policies' (1969) 82(6) Harvard Law Review 1207 1212–1231. See also The Attorney General's National Committee to Study the Antitrust Laws (n 134) 327.
[190] Crane (n 183) 319.
[191] Kaysen and Turner (n 151) 72–74.

not only has to match the incumbents' current investments into advertising and customer loyalty but also has to catch up with the investments made by the incumbents throughout a considerable period of time. Consequently, the entrant will face considerable entry costs.[192] The Harvard School thus characterised all factors as entry barriers which impose additional costs on the entrants as compared to the incumbent at the time of entry, even though the incumbents had borne similar costs when they entered the market.[193]

While recognising the impossibility to empirically and statistically establish a direct correlation or causal link between a specific market structure, conduct and performance,[194] the Harvard School identified the number and size distribution of sellers and buyers, the conditions of entry and expansion, as well as the character and importance of product differentiation[195] as central structural variables which indicate the degree to which a given market structure is conducive to effective competition.[196] On this basis, the Harvard School developed the following taxonomy of different market structures (see table 1) based on current and historical market shares and entry barriers as an analytical grid to determine the absence or presence of workable competition.[197]

[192] ibid 74.
[193] See for a similar notion of entry barriers The Attorney General's National Committee to Study the Antitrust Laws (n 134) 326–327. See for a critical discussion R. A. Posner, 'The Chicago School of Antitrust Analysis' (1979) 127(4) University of Pennsylvania Law Review 925 929–931.
[194] Kaysen and Turner (n 151) 60–61, 71; Mason (n 140), 1281.
[195] For structural definitions of workable competition Kaysen and Turner (n 151) 71; Bain (n 151), 38. 40. Mason (n 140), 1267–1268. The Attorney General's National Committee to Study the Antitrust Laws (n 134) 325 ff.
[196] Kaysen and Turner (n 151) 71, 75.
[197] See in this regard also The Attorney General's National Committee to Study the Antitrust Laws (n 134) 326.

Table 2- The taxonomy of market structure by the S-C-P paradigm

	Atomistic - competitive[198]	**Loose oligopoly**[199]	**Tight oligopoly**[200]	**Dominant firm or partial monopoly**[201]
Number of suppliers	Multitude	20 or less firms supplying 75% of the market	8 or less firms supplying 50% of the market	Single firm
Market Share	Absence of a relatively large firm	No supplier with more than 10 to 15%, plus competitive fringe of smaller firms which hold together 25% market share	Largest firm with a market share of 20% or more and with/without competitive fringe	60% or more in the absence of any other individual seller supplying a significant proportion of demand
Barriers to Entry	Low	High	High	High

4.4 The Operationalisation of the Structural Understanding of Competition through Antitrust Policy

The structural assumptions about the relationship between market structure and performance underpinning the S-C-P paradigm shaped the Harvard School's view about antitrust policy in two respects. First, the assumption that entry barriers are generally high and that highly concentrated markets tend to lead to anticompetitive outcomes prompted the Harvard School to adopt a calculus of the costs and benefits of antitrust that was favourable towards antitrust intervention. The Harvard School was profoundly sceptical about the capacity of markets to correct themselves, in particular when concentration is high. On the contrary, it reckoned that actual and potential entry is, most of the time, unlikely to constrain and challenge incumbents in a concentrated market. The Harvard School, thus, affirmed that the competitive process could not self-sustain itself in the absence of antitrust rules[202] and claimed that in general antitrust policy is worth its administrative, political and economic costs.[203] The members of the Harvard School, moreover, asserted that an effective antitrust policy and increased scope of state intervention would not have a long-lasting negative impact on business

[198] Kaysen and Turner (n 151) 72.
[199] ibid.
[200] ibid.
[201] ibid.
[202] ibid 5.
[203] ibid.

behaviour.[204] The Harvard School thus implicitly endorsed an error-cost framework that clearly favoured antitrust regulation and over-enforcement (type I errors) over under-enforcement (type II errors).

Second, the S-C-P framework also provided the Harvard School with the relevant economic and legal standards to translate the goal of preserving the competitive process as a safeguard of republican liberty into a concrete antitrust policy. The Harvard School, in fact, focused on structural factors as the essential benchmark to determine the competitiveness of markets. Moreover, the Harvard School assumed that competition policy had to finetune the structural parameters to ensure workable competition. It, indeed, affirmed that it is impossible for antitrust policy to directly pursue its policy goals by regulating economic performance and the competitive process. Rather, antitrust policy had to focus on the regulation of market structure and conduct to improve the results or process- and performance-oriented characteristics of competition.[205]

The structural concept of competition and this error-cost framework also had an important bearing on the legal test that the Harvard School advocated for antitrust policy. Kaysen and Turner were clearly opposed to a growing number of scholars[206] who advocated a legal test that would determine the legality of business conduct on the basis of its specific effects on economic welfare.[207] On the contrary, Kaysen and Turner affirmed that economic performance does not provide an administrable policy standard that could be translated into a sufficiently precise legal test.[208] A 'performance test' would thus lead to too many type II errors,[209] as it would be an 'invitation to nonenforcement'.[210] Instead of a performance test, the Harvard School suggested that the structural, Smithian understanding of competition should be operationalised through a combination of a 'situational' and 'conduct' test, which respectively

[204] ibid 6, 10-11.
[205] ibid 59.
[206] C. E. Griffin, *An Economic Approach to Antitrust Problems* (American Enterprise Association 1951); Business Advisory Council, 'Effective Competition: Report to the Secretary of Commerce by his Business Advisory Council with a letter of comment from the Secretary of Commerce' (1952); C. S. Oppenheim, 'Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy' (1952) 50(8) Michigan Law Review 1139; W. Adams, 'The Rule of Reason: Workable Competition or Workable Monopoly' (1954) 63 Yale Law Journal 354.
[207] Kaysen and Turner (n 151) 53–56.
[208] ibid 59.
[209] ibid 53–56.
[210] ibid Edward Mason, preface, xvi.

focus on market structure and the effect of specific conduct on market power as benchmarks of legality.[211]

Under the conduct test, the Harvard School suggested that antitrust policy should pursue the goal of ensuring the competitive process by limiting market power through the prohibition of conduct that either creates positions of market power or strengthens the market position of powerful firms. [212] This conduct test was largely in line with the existing understanding of antitrust law, as it was supposed to operate on the basis of the well-established distinction between rule of reason and *per se* rule. The rule of reason would apply to a category of conduct for which there might exist an important business justification and the distortive effect of which is contingent upon the market context.[213] The *per se* rule would address all types of conduct 'whose sole and major aim is restraint of competition' and whose effects on competition does not depend on the specific market context.[214] It is noteworthy that this bifurcated conduct test focused on the effect of specific conduct on market power or market structure rather than its effect on economic performance as the principal benchmark of legality. The relevant criterion for defining the anticompetitive character of a given conduct under this test was hence not whether it harmed welfare, efficiency or innovation, but whether it undermined the competitive process as a polycentric market structure by increasing or contributing to the maintenance of market power.[215]

Turner and Kaysen, however, fundamentally departed from the mainstream understanding of antitrust law of the time, by also proposing, in addition to the conduct test, a situational test.[216] Under this situational test, Kaysen and Turner sought to directly tackle the problem of excessive economic power by prohibiting the possession of what they called 'unreasonable market power' by an individual firm or a group of firms. This new standard was supposed to address the problem of excessive concentration of economic power in the hand of a single company directly. Simultaneously, Kaysen and Turner suggested that it would also allow competition authorities to tackle oligopolistic market structures that facilitate tacit collusion and conscious parallelism.[217]

[211] ibid 59.
[212] ibid 89.
[213] ibid.
[214] ibid 90.
[215] ibid 89–90.
[216] ibid 46–49, 111-112.
[217] Kaysen and Turner (n 151) 44, 76; Turner (n 189), 1212–1231.

Under this test, unreasonable market power could be found 'where, for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies, have accounted for 80 percent of such sales.'[218] When a competition authority concluded that a firm had such unreasonable market power, it could impose structural remedies in the form of divestiture, dissolution and divorce. The Harvard School, however, recognised that firms should have the possibility to put forth some form of efficiency defence for market power that would be otherwise considered unreasonable. Market power that is the outcome of (i) economies of scale, (ii) the legal use of patents or (iii) innovation in terms of new processes, products or marketing techniques is considered 'reasonable' even if it exceeds the market share threshold. Moreover, Kaysen and Turner suggested as limiting principle that structural remedies may only be imposed as long as they do not give rise to losses in economic performance.[219]

By introducing an efficiency defence under the situational 'unreasonable market power' test, the Harvard School expressly recognised the need to balance under certain circumstances the goal of preserving competition and curbing excessive concentration with efficiencies. It thus acknowledged that at times the elimination of reasonable market power through de-concentration might come at high costs, for instance, when the breakup of a powerful firm entails that its production is taken over by a multitude of less efficient, smaller firms.[220] The goal of limiting and decentralising market power should, therefore, only be pursued as long as it does not give rise to substantial costs in terms of efficiency and innovation.[221] Yet, Kaysen and Turner posited that most of the time, a policy of limiting and decentralising market power tends to be principally conducive to economic efficiency or performance rather than undermining it.[222] The Harvard School, in fact, disputed the claim that firm size is correlated with efficiency and strongly rejected the Schumpeterian argument that market power is a precondition of innovation by creating the necessary 'breathing space' and incentives for firms to innovate.[223] In direct opposition to Schumpeter, the Harvard School argued that 'competition...is clearly a stimulus of innovation'[224] and assumed that smaller firms are, most of the time, equally efficient and innovative as their larger competitors.[225]

[218] Kaysen and Turner (n 151) 98.
[219] ibid 80.
[220] ibid 79.
[221] ibid 82.
[222] Kaysen and Turner (n 151) 81; Kaysen and Turner (n 151) 100–119.
[223] Kaysen and Turner (n 151) 83–84.
[224] ibid 85.
[225] ibid 84–85.

This assumption also explains why the 'unreasonable market power test' would, in the case of doubt, tilt the balance in favour of de-concentration. In line with an error-cost framework that in the case of doubt tips the scales in favour of type I errors, Kaysen and Turner suggested that the burden of proving that a firm or group of firms possess reasonable market power or that structural remedies would lead to unreasonable performance losses should lie with the defendant. As a consequence, any firm or group of firms whose market share exceeded 50% or 80% respectively would automatically be presumed to run afoul of antitrust and become subject to structural remedies, as long as this presumption was not rebutted. This allocation of the burden of proof, Kaysen and Turner argued, is justified by proof proximity[226] because the defendant party normally has better access to the relevant information necessary to substantiate an efficiency defence than the competition authority or courts. Most importantly, however, this allocation of the burden proof would ensure that in situations of doubt, the concerns about the limitation of market power take precedence over performance considerations. The combined effect of the low threshold of proof for establishing unreasonable market power and the high threshold for rebutting this presumption of illegality suggest that Kaysen and Turner were willing to tolerate some short-term efficiency losses if they were necessary and compensated to achieve a long-term a reduction in market power.[227]

The proposal of a 'non-fault' offence for large monopolistic firms and highly concentrated oligopolistic markets clearly drew upon the republican tradition and its hostility towards bigness and concentrated economic power. It shows that the Harvard School did not view the role of antitrust law as being limited to remedy conduct by which firms actually or likely interfere with the negative economic freedom of other market participants. Rather, the situational test of 'unreasonable market power' was geared against domination that may result from the mere existence of concentrated economic power, irrespective of any actual or likely interference. The Harvard School's policy proposals were hence clearly informed by a concern about the dominating impact of market power and echoed the republican goal of preserving liberty as non-domination through antitrust law.

At the same time, the 'unreasonable market power' test was far from being amongst the most radical attempts to curb the power of big business envisaged at the time. Kaysen and Turner clearly distanced themselves from the more radical 'limitist' movement that advocated the limitation of all forms of economic, social and political power held by big business

[226] C. Ritter, 'Presumptions in EU competition law' (2018) 6(2) Journal of Antitrust Enforcement 189 206.
[227] Kaysen and Turner (n 151) xx ii.

irrespective of its economic costs. [228] The Harvard School, thus, refrained from rooting antitrust policy solely in the republican concern about bigness and the Jeffersonian ideal of a society of free and equals. It clearly disavowed attempts to elevate the limitation of big business and the redistribution of social power between large and small enterprises as a primary goal of antitrust policy. Such a limitist policy, it warned, would either require the subjection of powerful firms to intrusive direct government regulation or presuppose a radical reorganisation of firm size and limitation of firm growth.[229] While the former would come close to a planned economy, the implementation of the latter policy, for instance, through the dissolution of large companies and the enforcement of a one-plant-one-firm rule, would come at extreme welfare costs.[230]

The Harvard School not only put forward with the S-C-P paradigm the economic case in support for the republican concern about industry concentration, but it tried at the same time to anchor antitrust and the concern about economic power more firmly in the realm of economics, rather than politics or ideology. It, therefore, suggested that antitrust policy should primarily deal with market power, rather than social and political power of big business.[231] From the Harvard perspective, the limitation of the political and societal power of big businesses would be achieved as a by-product of strict enforcement of antitrust law, which is oriented towards the preservation of the competitive process by limiting market power.[232] To the Harvard Scholars, such a structuralist antitrust policy was preferable because it would be less costly than a sweeping reorganisation of the distribution of firm size.[233]

The Harvard School, therefore, dismissed an antitrust policy aiming at the complete elimination of market power as impossible and undesirable.[234] On the contrary, it acknowledged that some form of market power is inevitable. It, therefore, suggested an approach that seeks to limit market power and accounts for the costs of de-concentration by distinguishing between reasonable and unreasonable market power and by balancing the costs and benefits of breaking

[228] ibid 50 fn 4. F. I. Raymond, *The Limitist* (W.W. Norton & Co 1947); T. K. Quinn, *Giant Business: Threat to Democracy: The Autobiography of an Insider* (NY Exposition Press 1953). For more specialist scholarship W. Adams, 'Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust' (1951) 27(1) Indiana Law Journal 1; W. Adams, 'The Aluminium Case: Legal Victory - Economic Defeat' (1951) 41(5) The American Economic Review 915; Adams (n 206). Interestingly, the ideas of the ‚limitist' movement were also shared by the late Henry C. Simons, who was the predecessor of Aaron Director as Dean of the Chicago Law School. He advocated for instance a strict limitation of the maximum amount of property corporations could hold and the break up of large corporations H. C. Simons, *Economic Policy for a Free Society* (Chicago University Press 1948) 17. 59, 82-83.
[229] Kaysen and Turner (n 151) 49.
[230] ibid 51–52.
[231] ibid 14, 44-45.
[232] ibid 49.
[233] ibid 52.
[234] ibid 77.

up of large monopolies and oligopolies.[235] Antitrust law should, therefore, confine itself to the elimination of unreasonable market power while balancing such a policy with potential welfare costs. The underlying assumption was that the protection of the competitive process and reduction of market power would not only enhance as by-product economic performance or efficiency markets,[236] but also keep down the concentration of market power at a level where it is compatible with the ideal of republican liberty and republican democracy.

The Harvard School, thus, sought to devise a balanced approach towards the 'Behemoth-problem' that accounts for the economic costs of radical de-concentration on efficiencies, without fully abandoning the republican hostility towards concentrated economic power as a threat to liberty as non-domination. It thus tried to find a middle-ground between the republican concern about domination deriving from economic concentration and the insight of theories of imperfect competition that the 'politically tolerable minimum' level of competition may be 'less than the level which could be urged as desirable on economic grounds.'[237] The proposed unreasonable market power test, indeed, addresses a two-fold boundary issue that plagued the republican concept of liberty. First, the Harvard School put forth a clear cut off rate above which concentrated economic power is to be considered as giving rise to domination. It thus set out clear limits for the scope of republican liberty that would, otherwise, potentially perceive any form of power and situation of subordination as domination and unfreedom, which requires state intervention. Second, by coupling the unreasonable market power test with an efficiency defence, Kaysen and Turner also defined a clear answer to the question of where legitimate state interference starts and where it ends. It thus also resolved second boundary issue that had not been sufficiently addressed by proponents of republican antitrust. In so doing, the Harvard School put forward with the situational unreasonable market power test the perhaps most concrete and influential proposal of US antitrust history to cast the ideal of liberty as non-domination and the concept of a competition-democracy nexus into a legal standard.

5 Conclusion

This chapter traces the role that the idea of a competition-democracy nexus played in the legislative history of the Sherman Act and the development of US antitrust policy until the

[235] ibid 78.
[236] See with regard to innovation for instance ibid 85–86.
[237] ibid 5.

1970s. It shows that the idea of a link between competition and democracy lay at the very heart of the genesis of US antitrust. Most importantly, it demonstrates that this idea of a competition-democracy nexus was deeply rooted in and can only be explained by the concept of republican liberty as non-domination.

The chapter shows that the adoption of the Sherman Act was not only an attempt to prevent powerful firms from indulging in conduct by which they interfere with the negative economic liberty of competitors or consumers. On the contrary, the Sherman Act marked the departure from such a negative understanding of economic liberty that had underpinned the *laissez-faire* approach of the common law towards restraints of trade and concentrated economic power throughout the 19th century. Instead of being merely concerned about actual or likely interference by powerful trusts and corporations, the Sherman Act emanated from the perception that concentrated economic power in itself was a source of domination that frustrated liberty in its republican sense as non-domination. Proponents of the Sherman antitrust bill deemed the mere presence of concentrated economic power incompatible with republican liberty because it made all other market participants subject to a relationship of dependence, subjugation and subordination. When enacting the Sherman Act, Congress did not only oppose specific conduct by which trusts or large businesses actually or likely interfere with other market participants. Rather, the Sherman Act was adopted to protect economic liberty against potential interference that flows from the capacity of those powerful firms to arbitrarily interfere with the liberty and livelihood of other market participants at whim. This fear about the arbitrary domination by corporate Behemoths picked up on the ancient republican theme that an individual cannot be free as long as he or she is subject to a master, however benevolent he may be.

It is this imaginary of the master-slave relationship from which originates the idea of a competition-democracy nexus that informed the enactment of the Sherman Act and shaped US antitrust policy throughout the first half of the 20th century. In continuity with the republican tradition of the early proponents of competitive markets, the framers of the Sherman Act perceived the persistence of such a state of unfreedom and subjugation to a master-slave relationship as incompatible with the ideal of a republican society and democracy of free and equals. These Congressmen indeed not only expressed their opposition against unchecked power, concentrated in the hands of a single monarch or an oligarchic elite in the political sphere; but they also perceived concentrated economic power as a threat to liberty as non-domination and a republican form of government.

The enactment of the Sherman Act thus constituted a response to the Behemoth problem of private government and domination that the rise of the large scale corporation had posed in a new form. To tackle the Behemoth problem, Congress did not only revitalise the view coined by early proponents of competitive markets that asymmetric power relationships and concentrated economic power undermine republican liberty, but it also turned to the Smithian understanding of competition as a solution against the woes caused by concentrated market power. The Sherman Act was adopted with the goal of restoring and protecting competition as a polycentric market structure that diffuses economic power amongst many similarly sized players. By pitting the interests of market participants against each other, polycentric competition was assumed to keep their power in check. The framers of the Sherman Act thus perceived antitrust law as a tool to preserve competition as an institution of antipower that promotes an economic order of free and equals, which is compatible with a republican society and polity. This idea of competition as a safeguard of liberty as non-domination also had an important egalitarian dimension, which was rooted in the republican understanding of liberty as independent and equal status of the citizens of a republic. In keeping with this egalitarian dimension of republican liberty, antitrust law was thus also supposed to preserve equality of economic opportunity as the bedrock of a Jeffersonian ideal of a society of free and equals and of a virtuous citizenry composed by small, independent businessmen.

This chapter further traces how this concern about republican liberty and the idea of a competition-democracy nexus became a recurrent theme that prominently emerged at different critical junctures of US antitrust policy. This republican understanding of antitrust, for instance, shaped the rhetoric of the trust-buster policy of Theodore Roosevelt and reached its pinnacle with President Wilson's and Louis Brandeis' political crusade against the 'curse of bigness'. The idea of a competition-democracy nexus gained new traction during and in the aftermath of the Second World War when the role big business had played in the rise of fascism and totalitarianism in Germany and Japan moved centre-stage in the political discourse about US antitrust law. The last, and perhaps most comprehensive attempt to operationalise the goal of republican liberty and the idea of a competition-democracy nexus through a concrete antitrust policy was undertaken by the Harvard School. Yet, the Harvard School's blueprint for an antitrust policy informed by the goal of republican liberty came at a critical juncture when the idea of the Smithian competition as polycentric market structure and the hostility against firm size and concentration was increasingly challenged by economic theory. The tensions within the Harvard School's policy framework already made visible some of the fault-lines along which the republican antitrust edifice would soon crumble and fall apart.

CHAPTER III– ORDOLIBERALISM, REPUBLICAN LIBERTY AND THE BIRTH OF THE IDEA OF A COMPETITION-DEMOCRACY NEXUS IN EUROPE

Competition is the most remarkable and ingenious instrument for reducing power known in history.[1]

1 Introduction

Our journey tracing the idea of republican liberty throughout the history of competition law has so far focused on the importance of the competition-democracy nexus for the normative and political understanding of antitrust in the United States (US). Throughout most of the 20th century, the idea that competition promotes republican liberty and a republican polity has been a fundamental tenet of US antitrust law and US democracy. This may, at least in part, explain why antitrust was often portrayed as something 'characteristically American.'[2] Yet, the idea of a competition-democracy nexus and the underpinning concern about republican liberty are by no means uniquely American phenomena.

In 1933, in the shadow of the rise of the Nazi regime, the economist Walter Eucken and the lawyers Franz Böhm and Hans Großmann-Doerth started to convene regularly at the University of Freiburg, located in a mid-sized city in the South-West of Germany, to discuss the economic, social and political consequences of concentrated economic power.[3] These interdisciplinary gatherings gave birth to the influential intellectual paradigm of the so-called 'Ordoliberal' or 'Freiburg School'. The Freiburg School played a pioneering role in coining and promoting the idea of a link between competition and democracy in Europe.

The key tenet of Ordoliberalism was that there is a fundamental interdependence between the economic, social and political order. Ordoliberals assumed that the specific form

[1] F. Böhm, 'Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 279.
[2] R. Hofstadter, 'What Happened to the Antitrust Movement' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 227.
[3] F. Böhm, W. Eucken and H. Großmann-Doerth, 'Unsere Aufgabe (The Ordoliberal Manifesto) - 1936' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008).

of the economic order has a direct impact on the form of the social and political system. On this premise, the Ordoliberals postulated that a capitalist market economy could only function in a way that is in line with the ideal of a democratic society if it operates within the framework of a legal order which ensures economic freedom. In a modern capitalist economy, this ideal of economic liberty is, however, constantly threatened by the excessive concentration of economic power in the hands of the state and of private large-scale corporations. Competition, owing to its tendency to diffuse economic power, was therefore assumed to constitute the only form of economic order which is compatible with the ideal of liberty, democracy, and the rule of law.[4] Based on this core assumption, the Ordoliberal school of thought, which was also joined by the economists Leonhard Miksch, Alexander Rüstow, Wilhelm Röpke[5], and the lawyer Ernst-Joachim Mestmäcker,[6] developed a highly integrated[7] intellectual programme that should influentially shape the design of the German and European economic governance and competition law during the second half of the 20th century.[8]

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[4] Prefrace by Ernst Joachim Mestmäcker in F. Böhm (ed), *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden [1933]* (Nomos 2010) 5.

[5] The exact delineation of the Ordoliberal School is a difficult exercise. Alexander Rüstow and Wilhelm Röpke were closely related to the Freiburg School, although their thinking was later associated with the related paradigm of "sociological liberalism" (*Soziologischer Liberalismus*).Albeit not members of the Freiburg School in the strict sense, the founding fathers of the German Social Market Economy (*Soziale Marktwirtschaft*), Alfred Müller-Armack and Ludwig Erhard, were deeply influenced by Ordoliberal ideas.
Friedrich August von Hayek taught at the very beginning of his academic career in Freiburg and was, like Ludwig von Mises, a close interlocutor of the members of the Freiburg School. In particular Hayek's early writings show important overlaps with the Freiburg School and also contributed to the further development of the Ordoliberal thinking. Even though Hayek and von Mises are often considered as the pioneers of the so-called Austrian school of competition law, von Hayek is together with Böhm's student Mestmäcker recurrently referred to as second-generation ordoliberal. In more recent times, several German antitrust scholars such as Peter Behrens and Heike Schweitzer have been referred to as third-generation Ordoliberals. For attempts to delineate the Freiburg School see M. Foucault, *Naissance de la Biopolitique: Cours au Collège de France, 1978-1979* (Gallimard; Seuil 2004) 110; F. Maier-Rigaud, 'On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete' in D. Zimmer (ed), *The Goals of Competition Law* (Elgar 2012). The role of the Ordoliberal School during the Nazi regime remains quite under-researched. Some scholars suggest that the Freiburg School was in close contact with the resistance movement *Freiburger Kreis*. The liberal economic and constitutional programme advocated by the Ordoliberals, indeed, stand in stark contrast with the economic and political programme of the raising Nazi regime. See Mestmäcker's introduction to Böhm (ed) (n 4) 1. Franz Böhm also was sanctioned by the Nazi regime for his criticism of the treatment of Jews by being removed to non-active service in 1940. E.-J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (Nomos 2003) 116. Only Röpke, an intellectual opponent of Ferdinand Zimmerman (aka. Ferdinand Fried) – one of the most vocal proponents of an autarchic corporate economy during the 1930s and 1940s – emigrated from Germany in 1933. See however for recent literature on the role of Ordoliberals during the Third Reich R. Ptak, 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy' in D. Plehwe and P. Mirowski (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective, With a New Preface* (Harvard University Press 2015) 112-119.

[6] Foucault (n 5) 110.

[7] D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press; Oxford University Press 1998) 255.

[8] ibid 232–391. For a recent comprehensive inter-disciplinary study which lends support to the argument ,that Ordoliberal ideas have indeed influenced the evolution of EU competition law. K. K. Patel and H. Schweitzer, 'Introduction' in K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* 10.

This chapter argues that this programme of the Ordoliberal School, first developed in the 1930s, forms the intellectual foundation of the idea of a competition-democracy nexus in EU competition law. This argument may in itself appear controversial, as some authors have recently challenged the widely held view that Ordoliberalism had an important bearing on the initial design and development of EU competition law. These scholars have argued that the history of the drafting process of the competition law provisions contained in the founding treaties of the European Union – the Treaty of Paris (1951)[9] and the Treaty of Rome (1957)[10] – shows very little signs of Ordoliberal influence.[11] Their account remains, however, unconvincing for two reasons. First, it has been at least in part relativised, if not refuted, by other historical studies suggesting that Ordoliberal ideas did have a significant, albeit not exclusive, influence on the drafting process of the Treaty of Rome[12] and the formative era of EU competition law and policy.[13] Second, existing attempts to defy the thesis of Ordoliberal influence on EU competition law and policy are methodologically dubious: they try to cast doubt on the Ordoliberal influence on EU competition law, while giving no[14] or very little consideration[15] to the actual decisional practice of the EU Commission and the foundational case law of the Court of Justice. This and the following chapters, therefore, rather support and further develop the conventional view that EU competition law has a very strong foundation in Ordoliberal thought. It does so, by shedding new light on how Ordoliberalism first developed the idea of a competition-democracy nexus in European competition law. Chapters IV and V

[9] Treaty Establishing the European Coal and Steel Community.
[10] Treaty establishing the European Economic Community.
[11] P. Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (CCP Working Paper, 2007).A. Wigger, 'Debunking the Myth of the Ordoliberal Influence on Post-war European Integration' in C. Joerges and J. Hien (eds), *Ordoliberalism: Law and the rule of economics* (Hart Publishing 2018) 171–176.
[12] H. Schweitzer, 'Parallels and Differences in the Attitudes towards Single-Firm Conduct: What are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC' . EUI Law Working Paper 32/2007 9–18 <http://cadmus.eui.eu/handle/1814/7626> accessed 30 September 2018.
[13] S. M. Ramírez and van de Scheur, Sebastian, 'The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge' in K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* .
[14] Wigger (n 11).
[15] With regard to the foundational case law by the Court of Justice of the EU ('CJEU'), Akman merely observes that the 'ECJ judgment in *Continental Can* holding that Article 82EC applies to not only exploitative practices, but also exclusionary practices which strengthen the dominant position on the market appears to have been contrary to the intention of the drafters.' (n 11) 40. In a more recent paper, Akman also sought to challenge the Ordoliberal influence on the jurisprudence of the CJEU based on a primarily quantitative analysis of the frequency of the use of various combinations of the term 'freedom' in the case law. P. Akman, 'The Role of 'Freedom' in EU Competition Law' (2014) 34(2) Legal Studies 183 188–189. The methodology of this paper is also questionable as it ignores, as Chapter IV and V of this study show, that concerns about freedom or other values can be operationalised through other mechanisms than a mere linguistic reference to specific terms, such as 'freedom'.

will, then, further trace how this Ordoliberal idea of a competition-democracy nexus has been implemented by EU competition law.

As the emergence of the Ordoliberal School in 1933 coincided with the doom of the democratic regime of the Weimar Republic and the rise of the Nazi Regime, the antitrust literature mainly portrays Ordoliberalism as a historical reaction to the infamous role[16] that concentrated economic power and big business played in the doom of democracy and in the ascent of the totalitarian Nazi regime.[17] Ordoliberalism is thus often described as time-bound and outdated 'doomsday theory'.[18] This reductionist account of Ordoliberalism has also prompted prominent scholars to claim that the Ordoliberal concern that excessive industry concentration may threaten democracy and, eventually, facilitate the rise of fascism can be easily addressed by our current form of antitrust rules grounded in the consumer welfare standard.[19]

This conventional narrative of the Freiburg School, however, paints an overly simplistic, ahistorical and distorted picture which does not do justice to Ordoliberal thought. It is true that the Ordoliberals perceived the continuous economic and political influence of large German corporations throughout the Third Reich as an example of how private economic power of big business can be easily transformed into political power. It is also accurate that to Ordoliberals the role economic concentration played in the fall of the Weimar Republic and the rise of the Nazi regime also exemplified how the comingling of economic and political power can

[16] R. A. Brady, *The spirit and structure of German fascism* (Citadel Press 1971 [1937]); F. Neumann, *Behemoth: The structure and practice of National Socialism, 1933-1944* (Octagon 1963 [1942]). For recent studies of the role of cartels and big business in the economy of the Third Reich J. Diarmuid, *Hell's Cartel* (Bloomsbury 2008); A. Tooze, *The Wages of Destruction: The Making & Breaking of the Nazi Economy* (Penguin 2007); A. Tooze, 'The German National Economy in an Era of Crisis and War, 1917-1945' in H. W. Smith (ed), *The Oxford Handbook of Modern German History* (Oxford University Press 2011).

[17] Foucault (n 5) 80. D. J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (1994) 42(25) American Journal of Comparative Law 25 28–30.Gerber (n 7) 36–38. G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) 99–102; O. Andriychuk, 'Thinking Inside the Box: Why Competition as a Process is a sui generis Right - A Methodological Observation' in D. Zimmer (ed), *The Goals of Competition Law* (Elgar 2012); L. L. Gormsen, *A principled approach to abuse of dominance in European competition law* (Cambridge University Press 2010) 39.

[18] A. J. Padilla and C. Ahlborn, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) 24.

[19] D. Crane, 'Antitrust and Democracy: A Case Study from German Fascism' (2018). University of Michigan Law & Econ Research Paper No. 18-009 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164467> accessed 20 May 2018; D. Crane, 'Fascism and Monopoly' forthcoming Michigan Law Review accessed 1 August 2019.

contribute to the total elimination of economic and political freedom and, consequently, both competition and democracy.[20]

Yet this chapter argues that the Ordoliberal school of thought and its core messages cannot be tied to the particular time period, historical circumstances and contingencies of the fascist experience in Germany and Europe. On the contrary, the Ordoliberal programme is more than a mere response to the infamous role of economic concentration during the late Weimar Republic and the totalitarian Nazi regime. Rather, the Freiburg School developed its intellectual programme in response to the broader challenges that industrialisation, technological innovation, the rise of large scale corporations and industry concentration posed to the idea of competition coined by Adam Smith and the early proponents of competitive markets.[21] The surge in cartelisation and monopolisation of the German economy in the late 19th and early 20th century impressively demonstrated how the rise of large scale corporations offered unprecedented opportunities for private units to gain and yield power in a way that Smith and other classical economist did not foresee even in their most daring dreams.[22] Like in the US, the industrial revolution raised the question of power and the 'Behemoth problem' in a new form.[23]

Ordoliberalism, this chapter shows, thus emerged within the context of a broader social and academic debate on how to cope with the disruptive effects of industrialisation and economic progress that epitomised in the phenomena of cartelisation and monopolisation and the decline of competition during the late 19th and early 20th century in Germany.[24] The members of the Freiburg School raised their voice in response to what they perceived both as a political and intellectual failure to adequately address the decline of competition and the rise of private power.[25] Far from merely constituting a response to totalitarianism, Ordoliberalism thus aimed to provide a consistent legal and economic alternative to the, at the time, prevailing economic and political approaches of *laissez-faire* liberalism and corporatism which had emerged in response to the new social, political and economic challenges posed by industrialised capitalism. To this end, the Ordoliberalism championed in the same way as the framers of the Sherman Act the goal of preserving Smithian competition as an essential

[20] Foucault (n 5) 183. W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 243.
[21] W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 166.
[22] ibid 27-28, 150, 178. L. Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (Verlag Helmut Küpper 1947) 1, 11; Böhm (ed) (n 4) 237, 297-298.
[23] Eucken (n 21) 175.
[24] Böhm (ed) (n 4) 235–237.
[25] ibid 237.

safeguard of republican liberty and republican democracy against the domination resulting from the concentration of economic power in the hands of corporate Behemoths.

In support of this alternative, republican reading of Ordoliberalism, this chapter provides first a short account of the historical and intellectual context in which the Ordoliberal School emerged (Section 2). In a second step, the chapter discusses the role of republican liberty for the Ordoliberal notion of economic liberty and the central tenet of the Freiburg School that there is a link between competition and democracy (Section 3). In a third step, this chapter describes how the Ordoliberals operationalised the ideal of republican liberty through a structural, Smithian understanding of competition (Section 4). An essential contribution of the Ordoliberal school was the insight that polycentric competition can only be preserved within the framework of legal rules or what they referred to as 'Economic Constitution'(Section 5). The last section discusses various, somewhat conflicting approaches through which the Ordoliberals sought to translate their ideal of republican liberty and the competition-democracy nexus into a concrete antitrust policy (Section 6).

2 Setting the Scene

The socio-economic and intellectual context in which the Ordoliberal School developed its intellectual programme and the idea of a link between competition and democracy had striking similarities with the historical situation in which the US Congress adopted the Sherman Act. As of the 1860s, the German Economy was profoundly transformed by a wave of technological and industrial innovation.[26] This second wave of industrial revolution led to the rise of large corporations, in particular in the field of heavy, electric, chemical and automobile industry, such as Bayer (1863), Hoechst (1863), BASF (1865), Bosch (1883), Thyssen (1891), Benz & Cie and Krupp (1903) – to name but a few.

This long-lasting phase of economic growth came, however, to an abrupt end with the outburst of the First World War. The worldwide economic downturn during the 1920s compounded by the growing financial burden of the war reparations and war debt plunged the German Economy into a period of deep economic instability and turmoil. This economic decline during the Weimar Republic accentuated an already quite substantial trend toward

[26] Eucken also identifies 1870 as the starting of the trend towards industry concentration of the German economy. Eucken (n 21) 31.

industrial concentration and cartelisation of the German economy.[27] Just in the same way as the large US companies reacted to the economic downturn in the 1880s by resorting to pools, trusts and other vehicles of market consolidation, so too made large parts of the German industry an attempt to stabilise economic conditions by combining their forces into large combines and conglomerates. [28] The number of cartels skyrocketed from 385 in 1905 to 2500 in 1925.[29] In 1925/28, the level of cartelisation in the mining, large-scale industry, chemical industry, glass industry, cement industry and paper industry reached 65% to 90%.[30]

2.1 The laissez-faire *Approach towards Cartelisation and Industry Consolidation*

While US Congress had enacted with the Sherman Act a firm response to the trust problem, the German judiciary and legislator adopted a *laissez-faire* approach towards the proliferation of cartels and monopolistic firms. This permissive attitude had been shaped by two leading cases handed down in 1890 and 1897 by the German *Reichsgericht*, the Supreme Civil Court of the time. In both cases, the court declared cartel agreements permissible and upheld the legality of foreclosure practices by which the cartels disciplined deviant members with a view to maintaining their stability (*Kartellzwang*).[31]

During the Weimar Republic, industry groups and big business gained an unprecedented level of economic, but also political power. This allowed them to exert a growing influence on the economic policy and water down measures aimed at curtailing their power.[32] As a consequence, the Cartel Act (*Kartellverordnung*) adopted in 1923[33] stopped short of outlawing cartels. It only established a publicity obligation, according to which certain types of cartel agreements had to be publicised and were potentially subject to a public interest review by the

[27] Eucken for instance pointed out that cartelization was already strong in the coal industry ibid.
[28] The high degree of cartelisation and monopolization of the German economy during the Weimarer Republik is confirmed by historical research. H. Knortz, *Wirtschaftsgeschichte der Weimarer Republik: Eine Einführung in Ökonomie und Gesellschaft der ersten Deutschen Republik* (Vandenhoeck & Ruprecht 2010) 32-35; 130-132; 193.; D. Abraham, *The Collapse of the Weimar Republic: Political Economy and Crisis* (Holmes & Meier 1986) 23–24.. However, some scholars object that the German industry was already since the beginning of German industrialization in the 1870s highly cartelised and that only few of the more than 5000 cartels could be categorized as „strict cartels". See in this sense: T. Balderston, *Economics and politics in the Weimar Republic* (Cambridge University Press 2002) 65–69.
[29] M. Spoerer and J. Steg, *Neue Deutsche Wirtschaftsgeschiche* (2013) 56–57. Tooze (n 16) 115, 120. Eucken (n 21) 170, 172.
[30] Spoerer and Steg (n 29) 59–61.
[31] Eucken (n 21) 306–307; F. Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (Nomos 1980) 242–243.
[32] Eucken (n 21) 327. This claim is also confirmed by more recent scholarship Tooze (n 16) 113.
[33] Kartellverordnung, Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen 3. November.1923. RGBl I, 1067.

State, which could order their dissolution.[34] The adoption of the 1923 Cartel Act, nonetheless, was met with fierce opposition in the business community, which decried it as a violation of freedom to contract and an assault on property rights.[35] The *Reichsgericht* eventually bent to the mounting corporate pressure by interpreting the category of cartel agreements to fall under the publicity obligation and potential public interest review restrictively,[36] thus pulling out the last tooth of an already quite feeble law.

2.2 The Role of Cartels and Big Business under the National-Socialist Economy

Towards the end of the Weimar Republic, the Brüning government responded to the deep economic recession by introducing elements of a centrally-planned economy and nationalising some of the large corporations and cartels. This policy was continued by the Nazi regime after its rise to power in 1933. Far from curbing the power of big business, the transformation of the economy into an increasingly centrally-planned economy and the organisation of compulsory cartels by the state led to a further concentration and cartelisation of already consolidated industries.[37] Between 1933 and 1936, 1200 voluntary and 120 compulsory cartel agreements were entered.[38] Existing cartels and conglomerates were simply transformed into administrative bodies and transmission belts for central planning.[39] The power of large industry leaders and their conglomerates, however, remained largely untouched. On the contrary, their economic and financial power was increasingly sought after by the Nazi regime in order to effectively implement more measures of central planning and gain important political and financial support.[40]

The perhaps most emblematic example for the crucial role the German industry giants and cartels played for the rise of the Nazi regime is a secret meeting that took place on February 20, 1933 – the same year in which the members of Freiburg School met for the first time. Less than a month ahead of the last democratic elections of the German Reichstag in March 1933

[34] Böhm (ed) (n 4) 329; Eucken (n 21) 171–172. Mestmäcker (n 5) 121–124.
[35] Eucken (n 21) 172.
[36] Böhm (ed) (n 4) 41 – 44, in particular fn 11, 297.
[37] E.-J. Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' in L. F. Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar 2011) 36; W. Eucken, 'Das Problem der wirtschaftlichen Macht' in W. Eucken and W. Oswalt (eds), *Wirtschaftsmacht und Wirtschaftsordnung: Londoner Vorträge zur Wirtschaftspolitik und zwei Beiträge zur Antimonopolpolitik* (Lit 2001) 16–18; Eucken (n 21) 293, 334.
[38] Tooze (n 16) 108.
[39] ibid 106–114.
[40] ibid Chapter 4.

that should pave the way for Reichskanzler Hitler's rise to absolute power, about twenty of the most important German business leaders were invited to a meeting with the then President of the German Reichstag Hermann Göring, the future Minister of the Economy, Hjalmar Schacht, and Adolf Hitler. During the meeting, Hitler promised the industry leaders to put an end to parliamentary democracy, protect private property, and crush the left-wing parties and the unions in return for financial support of the Nazi party's (NSDAP) electoral campaign. In return, the leaders of the large corporations pledged to inject about 2 million Reichsmark into NSDAP's depleted campaign budget.[41] These close ties between Germany's large conglomerates with the Nazi regime continued to play a major role for the economic policy throughout the Third Reich.[42] The support of large cartels and conglomerates was crucial for the implementation of the centrally planned economic policy and the building up of the war economy.[43] German conglomerates and cartels thus were 'an active partner'[44] of the Nazi regime. They did not only benefit from increased state demand of war-related production and state-funded capital but also profited from the use of forced labour and their active contribution to the extermination of the Jews.[45]

2.3 The Rejection of laissez-faire *Liberalism*

Yet, in the late 1920s and early 1930 when the member of the Ordoliberal School started to develop their ideas and convened at the University of Freiburg, they could only to a very limited extent presage the role big business and economic concentration would play in the rise of fascism. Rather, the Ordoliberals developed their argument that the excessive concentration of economic power and the elimination of competition by the surge in cartelisation in the German economy posed a risk to democracy in opposition to the two leading approaches towards the problem of economic concentration of the time.

The Ordoliberals formulated their intellectual programme in the first place in opposition to the predominant doctrine of *laissez-faire* liberalism. To Ordoliberals, *laissez-faire* liberalism

[41] ibid 99–100.
[42] The Nazi economy on the one hand relied on existing cartels and conglomerates in the sector for steel, chemicals and synthetic fibres. On the other hand it promoted the massive consolidation of other sectors and implemented state-directed expansion of certain sectors, e.g., the aircraft industry See for a detailed analysis Tooze (n 16) Chapter 4; Mestmäcker (n 37) 37; Miksch (n 22) 213.
[43] W. Eucken and T. W. Hutchison, 'On the Theory of the Centrally Administered Economy: An Analysis of the German Experiment. Part II' (1948) 15(59) Economica 173 182–184. Abraham (n 28) 317–324. The support of the rising NSDAP and its economic governance by powerful German industrialists and cartels is also revealed by historical research. ibid. Tooze (n 16) 411. However, some scholars are rather reluctant to describe this cooperation between the rising Nazi regime and big business as "conspiracy" ibid 413.
[44] Tooze (n 16) 134. See also Diarmuid (n 16).
[45] Amato (n 17) 40. See also Diarmuid (n 16) 233–284.

was the principal culprit for the failure of the late German Empire and the Weimar Republic to tackle the problem of excessive concentration of private economic power.[46] The Ordoliberals above all criticised the *laissez-faire* conception of negative liberty, which perceived anticompetitive contracts or cartels as a legitimate exercise of the parties' contractual or commercial freedom that should be insulated from state interference. [47] Ordoliberals clearly dismissed this *laissez-faire* conception of negative economic liberty that would decry any form of state intervention to restore competition as undue interference with contractual and commercial freedom.[48]

The unwillingness of *laissez-faire* liberalism to address the 'Behemoth problem' and tame the self-destructive forces of negative economic freedom, the Ordoliberals argued, fundamentally undermined popular trust in competitive markets and, ultimately, fuelled calls for a more corporatist and centrally planned economy. The failure of *laissez-faire* liberalism and the Weimar State to preserve competition and curb the power of concentrated economic power increasingly eroded also the societal and political institutions of the Weimar Republic.[49] For the Ordoliberals, the incapacity of the Weimar Republic to address the monopoly problem and to devise an economic policy that would have stabilised the economy and society eventually undermined supporting social structures and democratic legitimacy of Weimar.[50] On this account, the members of the Freiburg School established a clear causality between the subversion of competition due to the concentration and the abuse of private economic power on the one hand, and the destruction of the social and political conditions of democracy during the Weimar Republic on the other.

2.4 The Rejection of Corporatism

At the same time, the Ordoliberals also dismissed the corporatist movement. The proponents of corporatism sought to counter the new challenges posed by industrialisation by resuscitating the Medieval virtues of the feudal economic and social order. They advocated an economic system in which all professional groups are re-organised in a hierarchical way modelled upon the structure of guilds.[51] In a similar way as Socialist and Marxist proponents

[46] Böhm (ed) (n 4) 288.
[47] Böhm (ed) (n 4) 267, 268; F. Böhm, E.-J. Mestmäcker and H. Sauermann (eds), *Wirtschaftsordnung und Staatsverfassung: Festschrift f. Franz Böhm z. 80. Geburtstag* (Mohr Siebeck 1975) 214, 233, 268.
[48] Böhm (ed) (n 4) 297, 329.
[49] ibid 234.
[50] Eucken (n 20) 326–330. Böhm (n 1) 273. Knortz (n 28) 193.
[51] Böhm (ed) (n 4) 237-238, 290; Eucken (n 21) 145, 148.

of a more centrally-planned economy,[52] the corporatist movement welcomed the increase in industry concentration and cartelisation as a crucial step towards a more rationalised, higher form of economic organisation and planning, which would solve the economic instability that wreaked havoc on the German economy.[53]

Corporatism gained wide support both amongst Christian[54] and nationalist thinkers, most prominently represented by Ferdinand Fried.[55] Proponents of corporatism welcomed the growing control that cartels and monopolistic corporations exerted over the economy as a harbinger of a more 'organic'[56] corporatist economic and social order in which self-organised corporatist professional groups would co-regulate markets together with the State. By locating economic planning in more centralised economic units that would regulate markets in the public interest, a corporatist organisation of the economy would, thus, bring order into what was increasingly perceived as an anarchical and disruptive process of competition. [57]

Competition would thus morph into a more rationalised, organic and socially embedded[58] form of economic coordination and cooperation. Instead of promoting excessive individualism, these more organic forms of economic organisation would foster an economic and social order driven by more social or national motives. [59] In line with the precepts of the historical school, proponents of corporatism, further, assumed that the legal order would have to adapt itself to the economic reality of capitalism and concentration.[60] Any attempt to obstruct this process by means of legal rules would suffocate the inner forces of the organic economic evolution and deprive the national economy' [of its] specific identity.'[61] Proponents of a more centrally administered, corporatist economy thus shared with *laissez-faire* liberalism a fairly fatalistic attitude towards monopolisation and cartelisation.[62]

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[52] Eucken (n 21) 200–212.
[53] Böhm, Eucken and Großmann-Doerth (n 3).Eucken (n 21) 28, 55-58.
[54] This idea also lied at the heart of POPE PIUS XI, *QUADRAGESIMO ANNO: Encyclical of Pope Pius XI On Reconstruction of the Social Order* (1931) paras. 84-88.
[55] As leader of the intellectual circle the 'Tat-Kreis', Ferdinad Fried's proposals for the re-organisation of the German economy on the basis of a neo-feudal guilded order and his call for autarky as principle of commercial policy became later on the blueprint for the economic policy of the Nazi regime. In combination with the concept of '*Lebensraum*', the goal of economic autarky also became one main driver for the expansionist plans and wars of the German Reich.
[56] Böhm (ed) (n 4) 234.
[57] Mestmäcker (n 5) 117–118.
[58] Eucken (n 21) 148.
[59] Böhm (ed) (n 4) 19, 237–238.
[60] Mestmäcker (n 5) 117–118. ibid.
[61] Böhm (ed) (n 4) 303.
[62] Böhm, Eucken and Großmann-Doerth (n 3); Miksch (n 22) 13.

The Ordoliberals vehemently disputed the idea that the transition towards a more corporatist, coordinated economy (*Gemeinwirtschaft*)[63] would cure the failures of *laissez-faire* liberalism in dealing with the problem of private economic power. On the contrary, they pointed out that a more corporatist organisation of the economy would only cement the already existing bastions of private economic power and exacerbate the attempts of interest groups and factions to gain control over the state. This interest capture, or what Ordoliberals referred to as 'group anarchy', would ultimately undermine the state's capacity to implement an independent economic policy.[64]

The Ordoliberals also admonished that the delegation of co-regulatory powers to professional corporations would fail to align the organisation of the economy with the public interest. The contrary would be the case. The guilds and professional corporations would try to gain group privileges that entrench their control over markets and enforce rules which cater to their own interest.[65] The corporatist producer guilds would thus create instances of private government which are vested by the State with authority to exert power over other economic players.[66] The Ordoliberals warned that the corporatist model of economic organisation would eventually resurrect a neo-feudal mercantilist order in which market participants and consumers are helplessly exposed to the private egoisms of the producer classes.[67] Far from taming private economic power, a corporatist order would only accentuate interest capture and ruthless turf wars between different economic and social factions.[68] As private bodies would increasingly take on state competences, the economic and political institutions would also be increasingly dominated by hierarchies, private power relationships and interest capture.[69] Corporatism thus will eventually also disempower the institutions of parliamentary democracy and corrode democratic processes that will be increasingly captured by private interest groups.[70] Instead of restoring social peace and order, a return to a neo-feudal social order would even exacerbate the 'Behemoth problem' by sowing the seeds of private domination and anarchy.

[63] Knortz (n 28) 32, 81; Eucken (n 20) 53–55.
[64] Böhm (ed) (n 4) 290 - 291 and footnote 118. Böhm targeted here directly the policy proposals by Ferdinand Fried.
[65] ibid 18–19.
[66] ibid 19.
[67] ibid 237–238.
[68] ibid 237-238, 290. Eucken (n 21) 171, 244.
[69] ibid 328.
[70] ibid.

3 Economic Liberty as Republican Liberty at the Core of the Ordoliberal Programme

The Ordoliberals dismissed with the *laissez-faire* liberalism and corporatism the two prevailing views of the time on the question of how the law should deal with the ever more growing phenomenon of industry concentration and the rise of the large-scale corporation. Instead of endorsing *laissez-faire* liberalism or corporatism, the Ordoliberals put forward an alternative vision of a competitive economic order that ensures competition and economic liberty. The goal of economic liberty indeed was at the centre of the Ordoliberal thinking[71] and understanding of competition law.[72] Ordoliberals indeed viewed competition in the first place as an 'order of freedom' (*Freiheitsordnung*).[73] Apart from stressing the superiority of competition over other forms of economic order in terms of wealth-maximisation, efficiency and innovation,[74] the Ordoliberals identified as a central feature of competition that it outperforms other forms of economic organisation in preserving economic freedom.

3.1 The Rejection of Negative Liberty

To stress the liberty-enhancing characteristics of polycentric competition, the Ordoliberals reverberated the Smithian allegory of the invisible hand. They underscored that competition ensures the harmonious self-coordination of independent and autonomous individuals through the impersonal price mechanism. [75] In contrast to a centrally planned

[71] For a detailed discussion of the Ordoliberal understanding of economic freedom see also Maier-Rigaud (n 5); H. Schweitzer, 'Efficiency, Political freedom and the Freedom to Compete: Comment on Maier-Rigaud' in D. Zimmer (ed), *The Goals of Competition Law* (Elgar 2012).

[72]See for instance Mestmäcker identifying the 'freedom to compete' (Wettbewerbsfreiheit) as normative goal of competition law in his preface to Böhm (ed) (n 4) 12. ibid 273, 326-327. F. Böhm, 'Freiheit und Ordnung in der Marktwirtschaft [1971]' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008). Eucken (n 21) 48-49, 53, 163, 174-175, 221, 245, 264-279. Miksch (n 22) 12, 15, 25. Böhm (n 31) 53, 106–109, 174-175, 264-27; F. Böhm, 'Das Problem der privaten Macht. Ein Beitrag zur Monopolfrage [1928]' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 234; P. Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (Discussion Paper N°7/15, 2015) 8; P. Behrens, 'The "Consumer Choice Paradigm" in German Ordoliberalism and its Impact upon EU Competition Law' (Europa-Kolleg Hamburg - Discussion Paper N°1/14, Hamburg 2014) 12 <http://www.econstor.eu/handle/10419/95925> accessed 15 February 2015.

[73] Böhm (n 31) 18, 232.

[74] Miksch (n 22) 14, 52, 59.W. Eucken and F. W. Meyer, 'The Economic Situation in Germany' (1948) 260 Annals of the American Academy of Political and Social Science 53 60–62. W. Eucken and T. W. Hutchison, 'On the Theory of the Centrally Administered Economy: An Analysis of the German Experiment. Part I' (1948) 15(58) Economica 79 88–89. Böhm (ed) (n 4) 209. 211, 220, 223, 227, 240, 257, 260-262; Eucken (n 20) 30, 39-40, 87, 101, 242, 245, 306, 318.

[75] F. Böhm, 'Rule of Law in a Market Economy [1966]' in A. T. Peacock and H. Willgerodt (eds), *Germany's social market economy: Origins and evolution* (Macmillan for the Trade Policy Research Centre, London 1989) 53–54; Eucken (n 21) 22, 246. Böhm (n 75) 53–54; Eucken (n 21) 22, 246.

economy, which is based on the subordination of all individuals to a central plan, competition as a 'coordination order' (*Koordinationsordnung*)[76] enables the impersonal coordination of independent and free individuals pursuing their respective economic plans.[77] Competition, thus, enhances liberty as it enables autonomous and independent economic players to coordinate their economic activities in a way that is aligned with the public interest without the need of any interference by an external authority with market players' choices.[78] To Ordoliberals, the functioning of competition simultaneously presupposes and is constitutive of economic liberty.[79]

The Ordoliberal understanding of liberty, however, clearly differed from the *laissez-faire* conception of economic freedom as negative liberty or subjective, unrestricted natural right of the individual.[80] On the contrary, Ordoliberals blamed the negative notion of economic liberty as non-interference and the notion of competitive markets as a 'natural order' as the major reason for the decline of competition.[81] *Laissez-faire* liberals, the members of the Freiburg School observed, had relied on an overly narrow, single-edged conception of economic freedom that only perceived State interference as a source of unfreedom.[82]

Ordoliberals pointed out such an exclusively negative understanding of economic freedom turned a blind eye on the threat posed by the arbitrary exercise of private economic power to individual economic freedom and the process of competition.[83] *Laissez-faire* liberalism ignored that unrestricted negative freedom enables the acquisition and use of private economic power that may culminate in the elimination of economic freedom and competition in their entirety. Perceiving only state interference as a threat to liberty, *laissez-faire* liberalism had failed to protect economic freedom against the arbitrary interference by powerful private players.[84] The Ordoliberals eloquently dismissed the *laissez-faire* assumption that restraints of competition or private monopolies do not undermine freedom but constitute the outcome of the legitimate exercise of contractual freedom. They, instead, affirmed that private restraints of

[76] Böhm (n 31) 25; Eucken (n 21) 22, 115.
[77] Eucken (n 21) 87, 163, 245.
[78] For the similarity between the Ordoliberal concept of competition as polycentricity and the Hayekian idea of 'spontaneous orders' see Mestmäcker (n 5) 35.
[79] Böhm (ed) (n 4) 301–302, 308. Eucken (n 21) 48, 264-279.
[80] Böhm (ed) (n 4) 297, 326. Miksch (n 22) 12, 221. Eucken (n 21).
[81] Böhm (n 31) 219–220; Miksch (n 22) 5–6; Foucault (n 5) 105.
[82] Eucken (n 21) 52.
[83] Eucken (n 37) 12–13; Eucken (n 20) 49–52; Böhm (n 72) 53-55; 65-66; Böhm (n 31) 12; Miksch (n 22) 5-6,10.
[84] Böhm (n 75) 51. Eucken (n 21) 49, 52-53, 170, 272-273, 277; Miksch (n 22) 5–10; Böhm (n 31) 261; Mestmäcker (n 5) 117.

competition law reduce economic liberty even if they are of contractual and hence voluntary nature, as they allow the parties to exert domination upon other market participants.[85]

3.2 Republican Liberty and the Ideal of the Private Law Society as a Domination-Free Order

In contrast to *laissez-faire* liberalism, the Ordoliberal notion of economic freedom did not merely apprehend liberty in it a negative sense as the absence of interference. Rather, the Ordoliberals understood economic liberty as the absence of domination. This republican notion of liberty clearly emerges from the Ordoliberal ideal of the private law society (*Privatrechtsgesellschaft*)[86] as 'domination-free social order' (*herrschaftsfreie Sozialordnung*).[87] The Ordoliberals, indeed, considered private law as the legal foundation for a society of free and equals. The institutions of private law form the basic means for decentralised, autonomous economic planning and enable the 'supra-individual' coordination of economic activity through competition. Private law, thus, constitutes the legal and institutional requisite for competitive markets because it equips market players with the essential tool to determine their plans and coordinate economic exchanges,[88] without, however, having any power or command over third persons.[89] For Ordoliberals, a private law society is a world free of domination and subjugation.[90] It comes close to the republican ideal of a heterarchical society composed of individuals who are their own masters.[91]

Competition as *modus operandi* of economic interaction and coordination is a central pillar of the Ordoliberal ideal of this domination-free private law society. Ordoliberals perceived competition as the organising principle of a 'domination-free economic order' ('*herrschaftsfreie Wirtschaftsordnung*') for it enables the mutual, decentralised coordination of autonomous economic plans.[92] This coordination is, however, not the result of political or social power relationships.[93] On the contrary, it simply emerges through the continuous mutual self-adaptation of the autonomous plans of independent market participants.[94] In line with the

[85] Böhm (n 31) 261.
[86] For an account of the concept of "private law society" in English see Böhm (n 75); S. Grundmann, 'The Concept of the Private Law Society: After 50 Years of European and European Business Law' (2008) 16(4) European Review of Private Law 553.
[87] Mestmäcker's introduction to Böhm (ed) (n 4) 8–9. Böhm (ed) (n 4) 206, 300, 303, 305; Eucken (n 20) 52.
[88] Mestmäcker preface to Böhm (ed) (n 4) 8–9; Eucken (n 21) 270–280.
[89] Böhm (n 31) 228.
[90] ibid 226.
[91] ibid. For a discussion of the parallels with the Kantian understanding of freedom see Mestmäcker (n 5) 33–34.
[92] Böhm (ed) (n 4) 303.
[93] ibid 64.
[94] ibid 301. ibid 64, 301, 305, 314. Böhm (n 31) 36–37; Eucken (n 21) 22, 246.

Smithian model of competition, the members of the Freiburg School thus understood competition in the first place as a process that guarantees the decentralised, polycentric coordination of economic plans.[95] Polycentric competition as the organising principle of the economic sphere constitutes an institutional cornerstone of this Ordoliberal ideal of a domination-free social order governed by private law.[96]

Economic power, by contrast, constitutes the antipode to or a 'denaturalisation'[97] of the private law society as a domination-free social order.[98] Ordoliberals highlighted that for competition to operate as a domination-free process, none of the market players may have the power to impose his will on others and to steer the course of economic transactions in line with his private interests.[99] The presence of powerful firms thus risks transforming competition as polycentric order of co-ordination into an order of subordination, as these players are in the position to exert individual or collective arbitrary power over other market participants.[100] Arbitrary economic power thus injects an element of domination into the economic system that is incompatible with the Ordoliberal ideal of a private law society of free and equals.[101]

Economic power, first of all, undermines the operation of competition as 'domination-free' polycentric coordination mechanism.[102] Powerful private players can, for instance, exert domination by using their power to modify the rules of the game of competition and thus determine the economic opportunities of other market participants.[103] By privately regulating markets, powerful firms are able to exert private government without being subject to any democratic legitimacy and accountability mechanisms, which ensure that they act in a non-dominating way that takes into account the interests of the other affected parties.[104] In a similar vein as the proponents of the Sherman Act, the Ordoliberals thus perceived concentration of economic power as such, and not only the interference resulting from its abuse, as a source of unfreedom.[105] Economic power was not merely regarded as obstruction of liberty when it led to the interference with the sphere of freedom or autonomy of other market players. It was also

[95] Böhm (n 31) 37; Mestmäcker (n 5) 117.
[96] Mestmäcker (n 5) 117.
[97] Mestmäcker's preface to Böhm (ed) (n 4) 11. See also ibid 17.
[98] ibid 33-35, 47 - 48, 64,.Böhm (n 31) 220, 225, 227.
[99] ibid 225, 227.
[100] Böhm (n 31) 36; Eucken (n 21) 22, 246.
[101] Böhm (n 31) 225.
[102] Böhm (n 31) 214; Mestmäcker (n 5) 125–126.
[103] Eucken (n 21) 246. ibid.
[104] Miksch (n 22) 15, 17, 27, 117, 119. Eucken (n 21) 51–52. Miksch (n 22) 15, 17, 27, 117, 119.
[105] Böhm (n 31) 36.

considered to undermine liberty because it subjects market participants into relationships of dependency and subordination to the arbitrary will of the powerful economic players.[106]

This republican thrust of the Ordoliberal understanding of economic liberty manifests itself in the fact that Ordoliberals drew upon the traditional republican allegory of the master-slave relationship to illustrate how concentrated economic power jeopardises liberty. The Ordoliberals underscored that the concentration of economic power renders the liberty of other market participants precarious because the extent to which they can enjoy it remains wholly contingent upon the goodwill of powerful firms. As the concentration of market power transforms the heterarchical process of polycentric competition into a relationship of subordination, weaker market participants become increasingly dependent 'vassals' (*Hintersassen*) of the mastery firms.[107] The Ordoliberals thus clearly perceived the situation of economic dependence upon the arbitrary will of powerful firms as a source of unfreedom.[108] In consonance with the republican tradition, the Ordoliberals also emphasised the psychological dimension of domination. The members of the Freiburg School observed that by vesting powerful firms with the continuous capacity to arbitrarily interfere with other market participants, the concentration of economic power also generates forms of psychological domination ('*psychologisch begründete Verfügungsgewalt'*).[109] As powerful firms can use their economic power to discipline other competitors whenever they see fit, the concentration of economic power thus creates a situation of continuous (legal) uncertainty pushing market participants towards a submissive behaviour.[110]

This republican notion of liberty as non-domination also animated the Ordoliberal admonition that the excessive concentration of market power would entail a 're-feudalisation' (*Refeudalisierung*) of economic and social relationships.[111] Concentrated economic power would, thus, transform the private law society into a hierarchical order characterised by subordination rather than polycentric coordination.[112] The domination of a few large companies would, on the one hand, give rise to monopolistic price wars (*Monopolkämpfe*), i.e. oligopolistic

[106] Böhm (ed) (n 4) 237, 275-276. Eucken (n 21) 52, 174, 176-177, 246, 334. Note that the Ordoliberals objected to the centrally planned economy not only because they assumed that it will lead to continuous interference with economic freedom, but also because it would increase the dependence of the citizens on a tiny administrative elite. Eucken (n 21) 137; Miksch (n 22) 54, 103.
[107] Böhm (n 31) 221.
[108] ibid 36, 225. ibid 225. Eucken (n 21) 52, 279, 293; Miksch (n 22) 54, 103.
[109] Böhm (ed) (n 4) 275.
[110] ibid 275–276.
[111] Böhm (n 1) 273–279. Böhm (n 31) 258–259.
[112] ibid 221. Eucken (n 21) 22, 40.

and monopolistic competition, which will crowd out smaller rivals from the markets.[113] On the other hand, oligopolistic and monopolistic competition will also push smaller competitors to organise themselves in cartels in order to counterbalance the power of larger monopolies and cartels. [114] These oligopolistic and monopolistic battles will further frustrate the functioning of competition as a polycentric process and reduce the openness of markets.[115] The re-feudalization of the economy will eventually entail a situation of what the Ordoliberals called 'group anarchy' (*Gruppenanarchie*) where different interests groups will try to exercise private government, by regulating their sectors and imposing their private monopoly or group interests upon all other market participants.[116]

The Ordoliberals pointed out that this re-feudalisation of the economy will also have negative spill-overs on the social and political sphere and eventually undermine democracy.[117] The members of the Freiburg School warned that the degeneration of a private law society into a neo-feudal order would give rise to antagonistic turf wars between rapacious interest groups, which will try to convert their economic power into political power with a view to pursuing their interests through lobbying and interest capture.[118] While the elimination of competition and the concomitant increase of lobbying will multiply the calls for substituting state control to the chaotic process of competition, big business and vested interests will easily hijack state intervention and continue to pursue their private or group interests[119] and impose their will upon the majority.[120] As a consequence, powerful companies and societal groups would incrementally pervert democratic institutions and the political process by exercising private government through interest capture.[121] Powerful private players will increasingly take on powers which are normally the prerogative of the democratically elected legislator or government,[122] yet without being subject to constitutional boundaries.[123]

To Ordoliberals, the concentration of private power thus raises the spectre of private government both in the economic and socio-political sphere. On the one hand, it undermines liberty as non-domination, as it allows powerful businesses to indulge in arbitrary interference

[113] ibid 40–43.
[114] ibid 43, 171, 234.
[115] ibid 42, 267.
[116] Böhm (ed) (n 4) 234 237,, 239-240.Eucken (n 21) 79, 144-148, 171-172, 244.
[117] Eucken (n 21) 146, 329; Böhm (n 1) 273–279.
[118] Böhm (n 31) 258.
[119] Eucken (n 21) 294, 326. Böhm (n 31) 36. Eucken (n 21) 294, 326.
[120] ibid 53.
[121] ibid 53, 175, 177.
[122] ibid 328.
[123] Eucken (n 21) 328; Böhm (ed) (n 4) 334.

and private government. On the other hand, political institutions will eventually be taken hostage by the powerful private players and lose their capacity of curbing private power and regulate the economy and society in a non-arbitrary way.[124] The failure of the state to reign in the cartelisation and monopolisation will thus not only destroy the societal trust in the legitimacy of the economic process[125] but eventually also erode the legitimacy of the democratic institutions themselves.

3.3 The Egalitarian Dimension of Republican Liberty

The Ordoliberal hostility against the concentration of private economic power and its tendency to reconvert the market society into a neo-feudal order also reveals that the members of the Ordoliberal school endorsed the egalitarian dimension of republican liberty as equal freedom of all market participants.[126] The Ordoliberals thus perceive economic independence as the corollary of the equal status as citizen, the *status civilis*, in a society of free and equals.[127]

This equal status of all market participants is primarily guaranteed by the principle of equality before the law that constitutes a fundamental principle of the private law society.[128] Equality before the law lay at the heart of the Ordoliberal idea of the private law society as a heterarchical social order where 'nobody has the right to give orders'.[129] Ordoliberals, therefore, also highlighted the crucial role of competition in preserving the equal status of all members of the private law society, by ensuring an economic order which relies on coordination rather than subordination.[130] To Ordoliberals, competition fosters the equal freedom of all market participants to plan and pursue their economic activities without being dependent upon the orders or subject to the domination of other players.[131] Competition, thereby, contributes to the realisation of equality before the law by reducing the possibilities of economic domination and eliminating monopolistic privileges.[132] Competitive markets are thus pivotal for the realisation

[124] Eucken (n 21) 292.
[125] Eucken (n 21) 172; Miksch (n 22) 13.
[126] Böhm (n 75) 51.
[127] Eucken (n 20) 52. The members of the Freiburg School grounded their ideal of equality in the Kantian and Christian belief in human dignity. See for instance Böhm (n 31) 12. Röpke also associated the idea of economic freedom and equality with human dignity, which he directly traces back to the religious idea of the ‚human being as being made in the image of God'. W. Röpke, *Jenseits von Angebot und Nachfrage: [ein Klassiker der sozialen Marktwirtschaft]* (Verl.-Anst. Handwerk 2009 [1958]) 17–19.
[128] Mestmäcker (n 5) 36–37. For the importance of equality before the law see also ibid.
[129]Böhm attributes this idea to Eucken Böhm (n 31) 12.
[130] ibid 18.
[131] ibid 106–109.
[132] Eucken (n 21) 336.

of the private law society and the principle of the rule of law that ensures that legal rules, not humans govern.[133]

Competition, however, does more than merely ensuring equality before the law. Ordoliberals assumed that competition also enhances equality of opportunities.[134] The Freiburg School, indeed, apprehended competition as 'open markets'[135] and an inclusive process that guarantees equal opportunities to carry out an economic activity.[136] The Ordoliberals hence adhered to an understanding of procedural, rather than substantive or distributive fairness and equality.[137] Instead of focusing on the outcome of the competitive process,[138] the Ordoliberals highlighted the importance of the rules of the game in determining the opportunities of economic agents to participate in the competitive process. The outcome of this process, in turn, determines the distribution of income.[139] The Ordoliberals affirmed that by ensuring the equality before the law and equal opportunities, the private law society and competition ensure that economic inequalities are only the result of differences in the economic performance of the individual market participants, rather than the outcome of arbitrary power.[140] The members of the Freiburg School thus recognised that the design of the institutional rules underpinning competition and private law also have distributive consequences [141] In their view, the extent to which the outcomes of the economic process can be considered as fair, crucially depends on the design of the rules of the game.

Competition, the Ordoliberals argued, ensures such procedural fairness in terms of equality of opportunity because it ensures an impersonal process where consumers are the only legitimate umpire to decide upon the economic performance of market participants.[142] The Ordoliberals thus perceived competition as an essential safeguard of equality of opportunity and fairness in so far as it ensures that every market player has the right to engage in economic

[133] Böhm (n 31) 226.
[134] ibid 12. Röpke also associated the idea of economic freedom and equality with human dignity, which he directly traces back to the religious idea of the ‚human being as being made in the image of God'. Röpke (n 127) 17–19.
[135] Eucken (n 21) 42, 264-269; Miksch (n 22) 38.
[136] Böhm (ed) (n 4) 272. Böhm (n 72) 306; Gerber (n 17), 38.
[137] Mestmäcker (n 5) 36.
[138] The Ordoliberals acknowledged that competition tends to accentuate inequalities in the distribution of wealth, in so far as competitive success is heavily contingent upon consumers idiosyncratic judgments and mere luck. Böhm (ed) (n 4) 230; Eucken (n 21) 300.
[139] Böhm (ed) (n 4) 257, 300-301.
[140] ibid 257-262, 271-272.F. Böhm, 'Die Bedeutung der Wirtschaftsordnung für die politische Verfassung: Kritische Betrachtungen zu dem Aufsatz von Ministerialrat Dr. Adolf ARNDT über das »Problem der Wirtschaftsdemokratie in den Verfassungsentwürfen«' (1946) 1(6) Süddeutsche Juristen-Zeitung 141 147; Miksch (n 22) 54.; Böhm (n 140), 147; Miksch (n 22) 54.
[141] Böhm (ed) (n 4) 256.
[142] ibid 260–262.

activities and to compete on the merits. To illustrate the impersonal and, hence, impartial features of the competitive process, the Ordoliberals compared competition with democracy. Just as in a democracy political parties or politicians compete on equal terms for the favour of the individual voter, so too enables the competitive process producers to compete for the vote of the individual consumer who ultimately determines as neutral arbiter their success. As long as no market participant is unfairly excluded from the process of competition, the results of the competitive process are akin to the outcomes of a democratic process: it is legitimised as a fair expression of the '*volonté générale*'[143] rather than the arbitrary will of powerful private interests.[144]

By putting the principle of equal opportunity at the heart of their understanding of competition, the Ordoliberals also echoed Adam Smith's understanding of equality of opportunity and fairness as guiding principles of the competitive process.[145] This fairness dimension is most strikingly articulated in the Smithian allegory of the 'impartial spectator'.[146] It is striking that the Ordoliberals reverted to Smith's famous allegory of the 'impartial spectator' to illustrate how competition ensures fairness and equality of opportunity. They affirmed that the competitive process forces the market participants to engage in a fair or just behaviour, in so far as it requires them to tame their self-interest because they have to satisfy the preference of consumers as 'impartial spectator'.[147] When competing for the favour of the consumers, competitors are free to do everything to enhance their economic performance, as long as they do not hinder other competitors from doing the same. Any kind of conduct through which a player tries to take advantage over her competitor by reducing the latter's opportunity to compete is considered to be at odds with the rules of fair play.[148]

Economic power, therefore, posed a threat to the principles of equality of opportunity and equality before the law that lay at the centre of the Ordoliberal ideal of a domination-free economic and social order. Like Adam Smith, the Ordoliberals objected to individual and collective forms of monopolies, such as guilds or professional associations, as well as to any

[143] Böhm (n 1) 268.
[144] Eucken (n 21) 300.
[145] For a discussion of the impact of Adam Smith's ideal of justice on the Ordoliberal thought see Mestmäcker's preface to Böhm (ed) (n 4) 7–11. Mestmäcker also points to a similar role of Smith's concept of an 'impartial spectator' for Amartya Sen's theory of justice. ibid 7–8.
[146] The reception of Smith by the Ordoliberals is indeed quite striking, in particular in the work of Böhm and Mestmäcker. For instance, Böhm directly refers to a German translation of Smith's famous passage in the *Theory of Moral Sentiments* to illustrate the notion of equality of opportunity underpinning the competitive process ibid 239. Compare A. Smith, *The Theory of Moral Sentiments: [1759]* (Penguin 2009) II. ii, 101.
[147] Mestmäcker's preface to Böhm (ed) (n 4) 9.
[148] ibid 227, 239, 240.

kind of privileges because they reduce the equal opportunities of other market players to participate in the competitive process.[149] Members of the Freiburg School also pointed out that the holders of concentrated market power have the ability to unduly meddle with other individuals' professional opportunities and thus subjugate them to their interests.[150]

To Ordoliberals, distortions of competition hence do not only entail a misallocation of resources. More importantly, they undermine the equality of opportunity as the central element of the competitive market system.[151] Any attempt by powerful firms to collectively or unilaterally hinder or exclude competitors from participating in the competitive process was therefore condemned by the Ordoliberals as an attempt to substitute private power-relationships to the impersonal process of competition in determining the opportunities of market participants to participate and succeed in the market.[152] Cartelistic and monopolistic firm conduct thus were considered as attempts to rig the rules of the competitive process, which is supposed to determine the economic success of market participants in an impartial way, based exclusively on their economic merits.[153] Distortive conduct was hence perceived as undue domination or private government by which powerful market players displace the democratically legitimised legislator by defining the rules of the game through private fiat. The Ordoliberals, therefore, argued that once the rules of the game are set, the emergence of concentrated economic power must be prevented lest powerful market players re-write or disregard the rules in their favour.[154]

3.4 The Republican Concept of Liberty at the Heart of the Ordoliberal Idea of a Competition-Democracy Nexus

The existing competition law literature has recognised the pivotal role of economic liberty for the Ordoliberal understanding of competition. Yet, most of the existing scholarly literature portrays the Ordoliberal understanding of economic liberty as negative liberty in the Hobbesian terms of 'freedom of action'[155] or absence of interference. The mainstream account

[149] Böhm (n 1) 274.
[150] Böhm (ed) (n 4) 256; Böhm (n 31) 261.
[151] Eucken (n 21) 166, 183, 315.Böhm (n 31) 257. Eucken (n 21) 166, 183, 315.
[152] Böhm (ed) (n 4) 256.
[153] ibid 271.
[154] Eucken (n 21) 54, 267, 300; Miksch (n 22) 103.
[155] W. Möschel, 'Competition Policy from an Ordo Point of View' in A. T. Peacock, H. Willgerodt and D. Johnson (eds), *German neo-liberals and the social market economy* (Macmillan for the Trade Policy Research Centre 1989) 142; G. Monti, 'Article 81 EC and Public Policy' (2002) 39(5) Common Market Law Review 1057 1059–1061; J. S. Venit, 'Article 82: The Last Frontier - Fighting Fire with Fire' (2004) 28(4) Fordham International Law Journal 1157 1163–1164; J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 25(5) European Competition Law Review 263 263, fn 41; Gormsen (n 17) 43–45.

thus ignores that the Ordoliberals clearly cultivated a republican understanding of liberty, which had two inextricably intertwined dimensions. On the one hand, the Ordoliberals defined economic liberty not only as non-interference but as the absence of subjugation, dependence, and, hence, domination. On the other hand, the Ordoliberal understanding of economic liberty also had a strong egalitarian dimension as it approached economic liberty as equal status, equality of opportunity, and, hence, equal freedom. The concentration of economic power was, therefore, an anathema for Ordoliberals because it undermined the ideal of a domination-free private law society of free and equals.

In portraying the Ordoliberal notion of economic liberty as negative liberty, the existing literature also fails to explain the relationship which the Ordoliberals perceived between competition and democracy. Liberal authors, such as Hayek and Berlin, have argued that the realisation of negative freedom does not necessarily require a democratic form of government. On the contrary, negative liberty can also be guaranteed in an autocracy where state power is, for instance, subject to the rule of law and constitutional control.[156] The Ordoliberal claim of a link between competition and democracy would, therefore, make little sense, if the Ordoliberals had perceived economic liberty as a purely negative concept of non-interference.

By contrast, as discussed in the foregoing, the proponents of republican liberty as non-domination have always underscored that the realisation of liberty as non-domination presupposes a specific form of republican government. It is indeed this link between liberty as non-domination and the idea of a republic as a domination-free form of government and society, which explains the Ordoliberal idea of interdependence between the economic, social, and political order.[157] The Ordoliberals indeed endorsed the republican account of early proponents of competitive markets, such as Adam Smith or the Levellers, in underlying that the genesis of economic freedoms coincided with, and were part of a broader quest for social and political liberties in the transition from a feudal to a market society.[158] The Ordoliberal claim that freedom in the economic sphere also fosters freedom in the social and political sphere builds upon the idea that the advent of competitive markets reduced the level of domination and dependence in a post-feudal market society.

[156] I. Berlin, *Four Essays on Liberty* (Oxford University Press 1969) 178; Hayek, Friedrich A. von, *The road to serfdom* (Routledge 2001) 72–74.
[157] Eucken (n 21) 16, 304-308; Maier-Rigaud (n 5) 137.
[158] Böhm (n 31) 220.

Only by perceiving economic liberty as non-domination, the Ordoliberals could credibly argue that economic liberty constitutes a precondition and corollary of other fundamental and political rights and freedoms within a democratic society and polity.[159] The Ordoliberals asserted that individual citizens could not fully enjoy their equal status and fundamental political rights if they are subject to domination by other citizens or the state in the economic sphere.[160] It is on this basis that Ordoliberal thinkers frequently equated the economic freedom with other political rights, such as the freedom of speech, the freedom of assembly as well as the right to vote.[161] Ordoliberals even went as far as likening consumer choice in a competitive market economy as a counterpart of citizens' right to vote in a democracy.[162] Apprehending competition itself as some form of universal suffrage or plebiscite,[163] Ordoliberals argued that competition could be described as 'from a technical point of view the most ideal existing manifestation of democracy'.[164] Competitive markets, however, only benefit from this quasi-democratic legitimacy and contribute to a democratic society and polity as long as the liberty of consumers and competitors is not tainted by domination by private and public power.[165] By guaranteeing liberty as non-domination in the economic and social sphere, competition ensures the social preconditions of a republican or democratic society of free and equals.[166]

There are, hence, striking parallels and similarities in how antitrust rhetoric in the US until the 1970s and the Ordoliberals conceptualised the idea of a competition-democracy nexus. The common denominator or 'Rosetta stone' connecting both versions of the competition-democracy nexus is the concept of liberty as non-domination. The republican concept of liberty explains why the US antitrust movements and the Ordoliberals alike perceived the concentration of economic power, and not only its abuse, as an antonym of liberty and threat to a republican form of society and democracy. The pivotal importance of the republican concept of liberty for the idea of a competition-democracy nexus in the US and Ordoliberal antitrust

[159] E.-J. Mestmäcker, 'Wirtschaftsordnung und Staatsverfassung' in F. Böhm, E.-J. Mestmäcker and H. Sauermann (eds), *Wirtschaftsordnung und Staatsverfassung: Festschrift f. Franz Böhm z. 80. Geburtstag* (Mohr Siebeck 1975) 385; Böhm (n 72) 256–257.
[160] Böhm (n 140), 141.
[161] Böhm (ed) (n 4) 298, 327.; Böhm (n 140), 141; Böhm (n 31) 256. Miksch (n 22) 215–216.Assuming that economic liberty encapsulates the Kantian principle that human beings should be treated as end in themselves, not only as means, Eucken argued that economic freedom is the basis for personal liberty and human dignity. Eucken (n 21) 48, 53, 126, 130, 176. In his early writings, Böhm, however, pointed out that economic freedom is not entirely congruend with political fundamental rights and human dignity Böhm (ed) (n 4) 298, 327.
[162] See Mestmäcker's introduction to ibid 8. ibid 209, 262, 270, 306–307. Eucken (n 21) 30. Miksch (n 22) 12, 215. Böhm (n 1) 268.
[163] Miksch (n 22) 215. ibid.
[164] Böhm (n 31) 89.
[165] Eucken (n 21) 177.
[166] Böhm (n 31) 220.

movements also emerges from the emphasis both movements put on its egalitarian dimension. Just as the republican US antitrust movement celebrated the ideal of the Jeffersonian society as an epitome of a republican society of free and equals, so too cherished the Ordoliberals the ideal of a private law society free of any hierarchies and relationships of subordination. The ideal of a Jeffersonian society and the imaginary of a private law society both celebrate competition for ensuring a domination-free coordination of economic activity and ensuring the independence, equality of opportunity and equal status of all market participants.

4 The Ordoliberal Understanding of Competition

The Ordoliberals, in a similar way as the proponents of a competition-democracy nexus in the US, endorsed competition not only or primarily for its welfare-enhancing features but perceived it as a harbinger and safeguard of a society of free and equals. What does explain this striking similarity between the idea of a competition-democracy nexus and the similar reliance on the concept of republican liberty between antitrust movements at different points in time on both sides of the Atlantic?

4.1 The Republican Thought of Early Proponents of Competitive Markets as Common Origin

Even though the Ordoliberals were certainly aware of the existence and interpretation of antitrust law in the US, references to US antitrust or US commentary are extremely rare in the writings of the Freiburg scholars. At no time do the Ordoliberals in their early works refer to the famous speeches of Senator Sherman and other Congressmen, Louis Brandeis or the case law by the US Supreme Court to support or illustrate their concept of economic liberty as non-domination and the claim that there is a link between competition and democracy. Instead of being the result of direct cross-fertilisation, the congruences between the US and Ordoliberal version of the competition-democracy nexus can instead be explained by their common origin in the republican thought that underpinned the views of the early political economists, such as Smith, John Steuart, the Levellers, and Montesquieu, who celebrated competition as a precursor of greater economic and political liberty.

The importance of republican thought for the Ordoliberal concept of liberty and competition is reflected by the prominent influence of the work of Immanuel Kant[167] and, in particular, Adam Smith[168] on the Ordoliberal writings. Drawing upon Adam Smith and other early political economists, the Ordoliberals and the antitrust movement in the US did not only formulate a similar republican critique of concentrated economic power. Like the framers of the Sherman Act, the Ordoliberals also turned to Adam Smith's understanding of competition as a polycentric market structure with a view to resuscitating not only the economic but also political content of competitive markets cherished by the first political economists. The Ordoliberal concern about economic concentration as a source of domination and as a driver of the degeneration of the private law society into a neo-feudal order thus echoed the account of early proponents of competitive markets who ascribed the transition from a hierarchical feudal to a heterarchical, republican and society to the polycentric dispersal of economic power previously held by the feudal elites.[169] Along similar lines, the Ordoliberals perceived the preservation of competition against concentrated economic power as an essential safeguard of liberty as non-domination and a domination-free society that prevents a backslide towards a neo-feudal order.[170]

4.2 A Structural Understanding of Competition as Response to the 'Behemoth Problem'

The rampant industrialisation and the accompanying concentration of economic power in the hands of large-scale corporations posed in the eyes of the Ordoliberals the 'Behemoth problem' in a new form. In order to guard republican liberty against private government and domination by powerful corporate giants and guilds, the Ordoliberals, in the same way as the early antitrust movements in the US, reverted to the pre-industrialised, Smithian understanding

[167] Ordoliberals in fact explicitly underscored the importance of Kantian ethics for their ideal of an economic, political and social order Eucken (n 21) 52, 176; Mestmäcker (n 5) 33–35. The importance of Kantian philosophy for the Ordoliberal thought may also have biographical explanations, as the father of Walter Eucken, Rudolf Eucken was an influential Kantian philosopher who won the Nobel prize for literature in 1908. Gerber (n 17), 28, fn. 11. See also with respect to the Kantian thought on Ordoliberalism ibid 39–40.

[168] Böhm (ed) (n 4) Mestmäcker, Introduction 7; Böhm (ed) (n 4) 239. Miksch (n 22) 11. It is worth noting that research in political philosophy, in particular by Samuel Fleischacker, suggest that Kant's and Smith's understanding of liberty share important features and have in common that they cannot easily be categorised as 'negative' or 'postitive' concepts of freedom. He instead suggests that Kant and Smith proposed a third concept of liberty putting emphasis on the independence, in terms of independent judgement, by the individual. S. Fleischacker, *A Third Concept of Liberty: Judgment and Freedom in Kant and Adam Smith* (Princeton University Press 1999).

[169] Böhm (n 31) 226. In a similar way as Smith in Chapter III, iii of The Wealth of Nations, Böhm for instance tries to trace the history of economic freedom and competitive markets and describes at length how competition replaced the feudal order ibid 237–255.

[170] ibid 220.

of competition as an institution of antipower. The Ordoliberals indeed realised that only a 'very specific'[171] (*ganz bestimmt*) form of competition could ensure the domination-free heterarchical economic and social order envisaged by the private law society.[172] In line with the early proponents of competitive markets, the Freiburg scholars argued that a market structure in which power is dispersed amongst many players is the only form of competition that enables a mode of social and economic coordination that is compatible with a society of free and equals.[173] Only competition as a polycentric process enables the non-hierarchical organisation of economic activities through decentralised coordination of the independent and autonomous economic plans of a multitude of players through continuous self-adaptation and learning.[174] The Ordoliberals thus endorsed the Smithian concept of competition as polycentricity and polyarchy, which ensures that no market player possesses excessive economic power.[175]

The Ordoliberals thus subscribed to the structural assumption underpinning the Smithian understanding of competition that a market composed by a high number of players automatically reduces their capacity to wield unilateral and collective power as it disperses economic power amongst many players.[176] The Ordoliberals indeed referred to competition as 'most remarkable and ingenious instrument for reducing power known in history'.[177] The dispersal of economic power ensures that competition can operate as some form of checks-and-balances or accountability mechanism,[178] ensuring that each market players' scope of arbitrary power is constrained by the aggregate autonomous and independent decisions of all competitors and the choices of consumers.[179] The higher the number of market players, the higher the number of independent and autonomous plans by which the individual market players are constrained. A high number of market players also provide consumers with a number of alternatives to which they can switch if a firm tries to exercise market power. At the same time, a high number of market players increase the strategic uncertainty for the individual firm and makes coordination or the unilateral exercise of market power more difficult.[180] Competition as a polycentric market structure, thus, minimises the instances where private players can exert

[171] ibid 235.
[172] Böhm (ed) (n 4) 129.
[173] Eucken (n 20) 249; Böhm (n 1) 269; Böhm (n 72) 121.
[174] Böhm (n 31) 120, 164. It is noteworthy, that, in a similar way as Hayek, the Ordoliberals recur here to concepts of cybernetics and of information economics. They describe the market as huge computer processing social information and coding it in form of market prices ibid.
[175] Böhm (ed) (n 4) 33-34, 45-48, 64-65. Eucken (n 20) 41 - 42, 237.
[176] ibid 163, 244, 279, 291.
[177] Böhm (n 1) 279. See also Eucken (n 21) 50, 237.
[178] Böhm (ed) (n 4) 229, 309, 326. Eucken (n 21) 41, 50, 237, 245-249, 291; Miksch (n 22) 40–41.
[179] Böhm (n 31) 36.
[180] Miksch (n 22) 41, 66, 247.

individual or collective arbitrary power.[181] Moreover, by promoting structural equality of power between market players, a competitive market structure ensures that every member of the society enjoys, to a similar extent, private autonomy without having the possibility to interfere with the freedom of others arbitrarily.[182] Under this condition, the competitive market will operate as domination-free polycentric process of coordination.[183]

This understanding of competition as an instrument to reduce power and as an accountability mechanism reverberates the Smithian and Madisonian idea that the separation and dispersal of power amongst a multitude of rival units will ensure a checks-and-balances mechanism where one agent through his interest pursuits of its self-interest imposes checks on the power of the other. Polycentric competition thus does not only reduce domination in the economic sphere but, by keeping economic power in check, it also strengthens the stability of the democratic polity and guards political institutions and decision-making processes against interest capture.[184] Drawing upon the Smithian and Madisonian solution to the 'Behemoth problem', the Ordoliberals perceived competition as a mechanism of antipower and bulwark against organised private power in the economic, societal and political sphere.[185] It is for its capacity to ensure liberty as non-domination and thus a society of free and equals that the Ordoliberals advocated the dispersal of public and private economic power through competition as an important feature of a democratic political system.[186] Ordoliberals thus approached economic power not exclusively as economic, but rather as a legal and political question about how much market power may be tolerated in a democratic society and polity.[187]

4.3 The Smithian Concept of Competition as a Counter-Project to the New Theories of Competition

By championing the Smithian concept of competition as an institution of antipower and safeguard of republican liberty, the Ordoliberals, in the same way as the proponents of antitrust in the US faced, however, an uphill battle. Deeply rooted in a pre-industrialised economy, the Smithian understanding of polycentric competition, which presupposes a more or less atomistic

[181] Böhm (n 31) 36.
[182] Böhm (ed) (n 4) 48.Böhm (n 75) 54.
[183] Böhm (ed) (n 4) 64, 275, 281, 296.
[184] Böhm (n 140), 141.
[185] Böhm (ed) (n 4) 229.
[186] Mestmäcker 384.
[187] Böhm (n 31) 260.

market structure, appeared to be utterly out of kilter with the rise of the large-scale corporations and the surge of industry concentration in the German economy.

The Freiburg School, therefore, also embodies the attempt to defend the Smithian understanding of competition against a growing consensus that the industrial revolution and technological innovation have made the economic model of competition obsolete. In effect, the Ordoliberals disputed the view that a polycentric market structure can only rarely be realised in an industrialised economy.[188] Ordoliberals also opposed the view that there is a positive correlation between greater firm size or higher levels of industry concentration and efficiency or technological progress.[189] Above all, they levelled their criticism against the widespread view, nourished by *laissez-faire* liberals and proponents of corporatism alike, that cartels and monopolies constitute a 'higher form' of economic organisation.[190] Noteworthily, several Ordoliberals explicitly rejected Schumpeter's account of dynamic competition that casts innovation and technological progress as a major source of industrial concentration.[191] While acknowledging that high levels of industry concentration can under certain circumstances be explained by superior efficiencies and innovation,[192] the Ordoliberals underscored that the surge in cartelisation and the prevailing legal framework are at least of equal importance in explaining the increase in industry concentration.[193] Rather than accepting industry concentration as 'political datum' or outcome of a deterministic process of creative destruction,[194] the Ordoliberals, in fact, politicised the specific form of market structure and firm size.[195] The Freiburg scholars regarded industry structure and firm size as a variable that can be regulated by means of economic or competition policy. They affirmed that economic and competition policy could actively shape technological progress and determine the degree of plant size, firm size and industry concentration.[196] Industrialisation and technological progress notwithstanding, for Ordoliberals, competition policy and economic policy, in general, still had an active role to play in managing the structure of markets and preserving competition as polycentric process.[197]

[188] Eucken (n 20) 226.
[189] ibid 225–226.
[190] Böhm (ed) (n 4) 234. Eucken (n 20) 226–227, 237, 239.
[191] Böhm (ed) (n 4) 67, 231.Eucken (n 20) 38, 225-233, 239; Miksch (n 22) 76.
[192] Böhm (n 31) 214–215.
[193] Eucken (n 20) 235.
[194] ibid 236, 239.
[195] ibid 239.
[196] ibid 236.
[197] ibid 237–241.

The members of the Freiburg School cast the concentration of economic power as market failure or negative externality. Despite the tendency of the competitive process to diffuse market power, the Ordoliberals assumed that the gains and monopoly rents firms could derive from market power create incentives for them to gain market power. Competition itself might thus compel firms to strive for greater size to such an extent that it might have harmful economic effects and eventually destroy the very preconditions of competition.[198] Markets, therefore, may fail to keep down market power to a sustainable level and create incentives to engage in conduct which harms competition and economic welfare, while sanctioning pro-competitive behaviour.[199] To Ordoliberals, economic power is often the outcome of unrestricted market forces.[200] Unlike Schumpeter, who heralded monopoly profits deriving from market power as important incentives for entrepreneurship and innovation, the Ordoliberals identified market power as the inherent 'design flaw'[201] and 'Achilles tendon'[202] of competitive markets. Due to the adverse effect of industry concentration on liberty as non-domination, the Ordoliberals assumed that the incapacity of markets to self-correct certain forms of undue market concentration poses a fundamental challenge to economic policy and law.[203]

5 How to Operationalise the Ideal of Smithian Competition as an Institution of Antipower?

The insight that the concentration of economic power constitutes a market failure that cannot be corrected through the unrestricted interplay of market forces was crucial for the Ordoliberal concept of competition policy. In contrast to *laissez-faire* liberals, the Ordoliberals recognised that competition as the ordering principle of the competitive market economy is inherently fragile. Although the Ordoliberals partially adhered to the idea of the market as 'natural order'[204], they insisted that the realisation and maintenance of this order cannot be sustained by private actors or market forces themselves, but must be ensured by the state through regulation and economic policy.[205] The Ordoliberals thus rediscovered the fundamental

[198] Böhm (n 31) 215.
[199] ibid.
[200] Eucken (n 20) 290–292.
[201] Böhm (n 31) 216.
[202] ibid 215.
[203] Böhm (n 31) 216; Mestmäcker (n 5) 467.
[204] Böhm (ed) (n 4) 17.
[205] Eucken (n 21) 53; L. Miksch, 'Versuch eines liberalen Programms [1949]' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 164–167; Miksch (n 22) 28.

insight in Adam Smith's work that competition can only operate as a self-governing polycentric order within the framework of certain state-created legal rules and conditions. [206]

5.1 The Concepts of Economic Order and Economic Constitution

One of the central achievements of the Ordoliberal School was that it put emphasis on the pivotal role of legal rules as a precondition of self-governing and spontaneous orders.[207] In opposition to *laissez-faire* liberals, the Ordoliberals argued that the specific form of competition depends on a number of rules of the game that cannot be guaranteed by the game itself. In stressing the importance of the specific rules of the game in ensuring competition, the Ordoliberals approached competition as an institution.[208] To Ordoliberals, the specific form of the economic order (*Wirtschaftsordnung*) is the result of a fundamental economic policy decision (*ordnungspolitische Gesamtentscheidung*) or institutional choice.

A second essential tenet and achievement of Ordoliberals lay in the insight that this fundamental economic policy decision on the design of the economic order, which the Ordoliberals referred to as 'Economic Constitution' (*Wirtschaftsverfassung'*), should not be left to the arbitrary discretion of private economic players, but should fall within the exclusive remit of the legislator taking into account the general interest.[209] Ordoliberals underscored that it is the essential task of the state to determine and protect the legal and institutional framework within which a competitive market economy can thrive.[210] The Ordoliberals thus considered competition and markets as products of legal rules, rather than the absence of rules.[211] In other words, competitive markets do not emerge in a vacuum but are created through and sustained by state regulation.[212] To Ordoliberals, competition is, therefore, a 'state-organised event'.[213] Competitive markets can only be sustained if the Economic Constitution elevates competition

[206] Foucault (n 5) 135. The Ordoliberals underline that A. Smith's work reflects an awareness of the importance of the State and the legal order for the functioning of the market. Yet, they are more sceptical than Smith about the harmonious tendency of the market. See for instance Miksch (n 22) 11. Mestmäcker also stresses the similarity between the Ordoliberals' emphasis on the role of legal rules in ensuring a self-governing economic order and Hayek's distinction between '*Rechtsordnung*' and '*Handelsordnung'*. Mestmäcker (n 5) 35–36.
[207] For the similarities with Hayek see ibid 36.
[208] Böhm (ed) (n 4) 248–249. Böhm (n 31) 234–235; Mestmäcker (n 5) 37.
[209] Eucken (n 20) 55, 245. Mestmäcker (n 159). ibid 383.
[210] Eucken (n 20) 257 et seq; 270 et seq. Miksch (n 205) 167.
[211] Foucault (n 5) 169. Miksch refers to competition as 'event managed by the State' (*staatliche Veranstaltung*). ibid.
[212] Miksch (n 22) 53–54.
[213] ibid 53.

to the legal organising principle of the economic order and ensures its preconditions by guaranteeing a specific set of legal rights and rules.[214]

The Ordoliberal concept of the Economic Constitution and the emphasis it puts on the role of legal rules for competitive markets is deeply rooted in the republican understanding of liberty. Rather than perceiving economic liberty as negative liberty that presupposes the absence of the law, the Ordoliberals assumed that economic liberty is created by the Economic Constitution and hence by the law. The Economic Constitution bestows basic rights and freedoms[215] on market participants. These rights and freedoms constitute the foundations of the private law society as a domination-free order and create the preconditions of competition. The Ordoliberal concept of the Economic Constitution thus echoes the republican 'law-and-liberty' theme, which perceives liberty as the creation, rather than the absence of laws.[216] It recalls the Lockean[217] and Kantian[218] insight that liberty can only exist within the boundaries of the law. The concept of Economic Constitution thus underlines that economic liberty must be constituted and preserved by a legal order that delineates the legitimate spheres of both public and private economic freedom.[219] The right to economic freedom, hence, depends on and can only exist within the boundaries of competitive order defined by legal rules.[220]

Unlike *laissez-faire* liberals who adhered to a purely negative concept of liberty, the Ordoliberals refrained from perceiving any form of state interference as a reduction of liberty. Instead they endorsed the idea of the necessity of a strong state,[221] whose central task is to ensure through a continuously active and positive 'order-oriented' policy (*Ordnungspolitik*) the establishment and protection of competition as ordering principle of the market.[222] By establishing competition as the guiding principle of economic policy, the Economic Constitution also presupposes a commitment to a specific form of non-arbitrary economic policy that is compatible with the principle of the rule of law.

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[214] Mestmäcker's preface to Böhm (ed) (n 4) 9,12. See also Böhm who associates the idea of the Economic Constitution with the attempt of the French Physiocrats to translate the 'natural law' of competition into the legal order Böhm (ed) (n 4) 17; Mestmäcker (n 5) 117.
[215] Böhm (ed) (n 4) 301–302; Eucken (n 20) 264–280.
[216] P. Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997) 35–41.
[217] J. Locke, *The second treatise of government [1689]* (Reclam 2012) § 57.
[218] Eucken subscribed to this Kantian understanding of freedom Eucken (n 21) 52, 176; Mestmäcker (n 5) 33–35.
[219] Eucken (n 21) 177–179; Miksch (n 22) 12.
[220] Böhm (ed) (n 4) 267-268, 326-327. Böhm (n 72) 256–257. Eucken (n 21) 179, 275, 279.
[221] This contrasts with Foucault's claim that the Ordoliberal School was characterised by a '*phobie de l'État*' Foucault (n 5) 77; Mestmäcker (n 5) 117.
[222] Foucault (n 5) 122–125.

The Economic Constitution is not necessarily aimed at curtailing state intervention. In keeping with the idea of republican liberty, it rather seeks to ensure that economic policy takes the form of non-arbitrary interference and thus does not annihilate liberty as non-domination. The Economic Constitution thus does not always stand for 'less' state interference but constitutes in the first place a commitment to a neutral, non-discriminatory, coherent and principled economic policy.[223] Rather than engaging in the micro-management of competition through direct corrective intervention,[224] the Ordoliberals insisted that 'order-oriented' economic policy should address market failures and readjust the conditions of competition, by readjusting the legal framework within which competition takes place.[225] By subjecting public interference to constitutional constraints and the principles of the rule of law and neutrality, the Economic Constitution not only averts instances of arbitrary, discretionary exercise of public power, but also reduces the risk that interest capture leads to a discriminatory economic policy in favour of some market players.[226]

5.2 The Concentration of Private Power as a Constitutional Question

The Ordoliberal concept of the Economic Constitution, however, does not only seek to protect economic liberty against arbitrary state interference but is also explicitly directed against domination by arbitrary private power. On the one hand, the Economic Constitution seeks to reduce arbitrary private power or private government by ensuring that it is the democratically legitimised legislator and government, and not private economic players who establish the rules of the game for competition and delineate the legitimate scope of the use of economic power.[227] On the other hand, the Economic Constitution also imposes checks upon private economic power. The truly innovative feature of the Ordoliberal concept of an Economic Constitution is that it transposes the idea of the rule of law and bounds of power from the state to the holders of private economic power.[228] The Ordoliberals explained the failure of *laissez-faire* liberalism to protect competitive market order by its reluctance to enforce the rule of law against the holders of private economic power.[229] In contrast to *laissez-faire* liberalism, the Ordoliberals

[223] Böhm (n 31) 226.
[224] Miksch (n 22) 15; Eucken (n 20) 179.
[225] Böhm (n 31) 125.
[226] ibid 226. Mestmäcker's preface to Böhm (ed) (n 4) 9; Mestmäcker (n 5) 117.
[227] Eucken (n 20) 246, 326-329. Miksch (n 22) 15, 27-28, 34.
[228] Eucken (n 20) 48–52, 179, 184.
[229] Miksch (n 22) 5. ibid.

thus acknowledged that private economic power constitutes a similar threat to the liberty and equality of citizens as the arbitrary use of economic power by the state.[230]

By transposing the idea of constitutional boundaries to the private sphere and underscoring the role of state-created legal rules in guaranteeing that competition is steered by decentralised and independent decisions of autonomous individuals,[231] the Ordoliberals elevated the issue of private economic power or what we call the 'Behemoth problem' to a constitutional question.[232] The concept of the Economic Constitution, thus, acknowledges that it is insufficient to rely exclusively on private players' exercising their reciprocal powers to prevent arbitrary interference. Instead, they realised that liberty as non-domination could only be maximised through constitutional rules that make certain means of arbitrary interference inaccessible or at least more costly to economic agents.[233]

To address the constitutional problem of private economic power, the Ordoliberals advocated a holistic approach. The members of the Freiburg School suggested that a significant reduction of private economic power and industry concentration can be achieved by designing what they called the 'constituent principles' of the Economic Constitution in a way that ensures that the economic rights, rules and regulations are conducive to competition.[234] Far from perceiving economic concentration as an inevitable datum or assuming that it can only be addressed through competition rules, the Ordoliberals underscored that the level of industry concentration and private economic power depends on a host of economic rules and policies.[235] The Ordoliberals, therefore, perceived the streamlining of economic policy and legislation, ranging from trade and monetary policy to intellectual property, tax or insolvency law, with the principle of competition as an essential feature of the order-oriented economic policy grounded in the principles of the Economic Constitution.[236]'. In highlighting that the preservation of competition against the excessive concentration of economic power requires a holistic policy, which goes beyond the application of specific competition rules, the Ordoliberals promoted the idea of what is nowadays called 'competition advocacy' or 'competition impact assessment

[230] Eucken (n 20) 53–54. Miksch (n 22) 0 (introduction). ibid.
[231] Böhm (n 31) 225; Miksch (n 22) 34, 54.
[232] Miksch (n 205) 164–167. Böhm (n 31) 75.
[233] For the superiority of the 'constitutional strategy' relative to the 'reciprocal powers' strategy Pettit (n 216) 93.
[234] Eucken (n 20) 253,290.
[235] ibid 255-264, 291.
[236] Eucken (n 13) 254–285; Miksch (n 15) 219–220.

6 The Ordoliberal Concept(s) of Competition Law(s)

Although the constituent principles of the Economic Constitution and order-oriented economic policy already provide for a legal framework, which reduces and makes the concentration of economic power more difficult, the Ordoliberals pointed out that they are insufficient to eliminate all instances of market power and economic concentration. The Ordoliberals, therefore, argued that it is the role of specific competition rules to address these residual forms of economic power.[237] Competition rules are hence a crucial element of the Economic Constitution[238] in so far as they determine the basic conditions and inclusiveness of the competitive race[239] and shape the topography and structure of the market.[240] By regulating individual and collective private economic power[241] competition rules, thus, make sure that private players cannot yield arbitrary economic power or rewrite the rules of the game.[242]

6.1 The Concept of Performance-Based Competition as the Overarching Principle

The Ordoliberals also put forth a specific form of competition through which they sought to operationalise the ideal of competition as a domination-free polycentric rivalry. They suggested that competition law should promote performance-based competition (*Leistungswettbewerb*) – a term which can be best translated into English as 'competition on the merits'.[243] This concept understands competition as a process in which all market participants enter into a rivalrous rule-based[244] contest for consumer demand.[245] Performance-based competition is modelled on the basic principle of Adam Smith's 'impartial spectator' according to which every market participant 'may run as hard as he can, and strain every nerve and every muscle, in order to outstrip all his competitors', but may not 'jostle, or throw down any of them'.[246] Accordingly, market participants may only try to obtain the favour of consumers by their own performance, without trying to win the race by using their power to hinder other rivals' ability to compete.[247] Performance-based competition as a rules-based

[237] Eucken (n 13) 290.
[238] Mestmäcker (n 5) 117.
[239] Böhm (n 4) 206, 254, 257.
[240] Eucken (n 13) 237, 290-293, 299.
[241] Böhm (n 24) 125–126.
[242] Böhm (n 4) 303; Miksch (n 15) 28.
[243] Böhm (n 4) 206. Eucken (n 13) 42, 247–249. Miksch (n 15) 15, 54. Behrens (n 65) 8, 11-12.
[244] Böhm (n 4) 206.
[245] ibid 207–209, 240, 257. Eucken (n 13) 244–249.
[246] Smith (n 139) II, ii, p. 101.
[247] Böhm (n 4) 208; Eucken (n 13) 42, 237, 249.

rivalry, thus, reduces the range of means or arms which each rival may legitimately use to win the contest.[248]

The Freiburg School distinguished performance-based competition from 'hindrance competition' (*Behinderungswettbewerb*). Whereas market players who engage in performance-based competition strive to attract consumer demand only by improving their own economic performance, hindrance competition refers to any attempt to win the competitive race by deteriorating or preventing rivals' ability to compete.[249] Performance-based competition hence always has to take the form of what Böhm called 'parallel fight' (*Parallelkampf*)[250] in which rivals enter into a head-to-head competition by running on parallel racetracks without hindering the other competitor from winning by putting a spoke in his wheel.[251] Hindrance competition, by contrast, takes the form of a duel (*Zweikampf*) – say, a boxing fight – in which one player wins by beating his rival to the ground.[252]

Even though all Ordoliberals had identified the excessive concentration as major concern of competition policy and agreed on the ideal of performance competition, they nonetheless struggled to put forward a coherent economic and legal standard that clarifies the level of market power and the type of conduct which is compatible with competition operating as a non-hierarchical process of performance competition.[253] Instead of proposing one uniform approach, the members of the Ordoliberal School put forward at least two somewhat conflicting paradigms. This is often ignored by the academic debate that often over-simplistically approaches Ordoliberalism as a monolithic school of thought.

6.2 The 'Complete Competition' Paradigm

The economists Walter Eucken and Leonhard Miksch coined the concept of 'complete competition' (*vollständiger Wettbewerb*) to translate the Smithian understanding of competition as polycentric rivalry into a bright-line policy standard. To promote performance competition, competition policy would ensure under this standard that market participants act in as many markets as possible as price-takers,[254] without the possibility of exercising market power by

[248] Böhm (n 4) 254.
[249] ibid 38, 240-249, 257-265, 275-276. Eucken (n 13) 43, 247-249, 267, 296, 329.
[250] Böhm (n 4) 209; Eucken (n 13) 42.
[251] Böhm (n 4) 209, 219.
[252] Böhm (n 4) 208; Eucken (n 13) 247.
[253] Böhm (n 24) 217.
[254] Eucken (n 13) 248–249, 237, 279, 291.

influencing the coordination function of the impersonal price mechanism through their market strategies.[255]

While it shares some features of the perfect competition model,[256] it would be simplistic to liken the Ordoliberal concept of 'complete competition' with the perfect competition model coined by neo-classical price theory.[257] Eucken and Miksch were indeed aware of the limitations of the perfect competition model[258] and discussed different forms of imperfect monopolistic and oligopolistic competition.[259] Unlike proponents of imperfect monopolistic and oligopolistic competition, the members of the Freiburg School, however, assumed that oligopolistic or monopolistic competition is inherently unstable[260] and will ultimately give way to collusion or monopoly.[261] Eucken and Miksch, thus, adhered to the structural assumption that an oligopolistic market structure induces market participants to collude and to discipline outsiders or non-compliant firms by engaging in exclusionary behaviour.[262] They also asserted that residual or potential competition is often insufficient to discipline and erode the market power of oligopolistic and dominant firms.[263]

Eucken and Miksch hence seemed to advocate the 'complete competition' standard in a similar way as US economists and lawyers started in the 1940s to champion 'effective' or 'workable' competition as a second-best form of competition.[264] In this sense, the 'complete competition' standard can be seen as an attempt of the Ordoliberals to rescue, in light of the rise of theories of imperfect competition, the political and economic content of the Smithian model of competition by emancipating it from the model of perfect competition. In the same way as the proponents of workable competition, Eucken and Miksch defined minimum criteria that markets have to fulfil in order to be considered sufficiently competitive without however meeting all conditions of 'perfect competition'. In a similar vein as the Harvard School, Eucken and Miksch, for instance, perceived a sufficient number of market participants and relative ease of market entry as a precondition of complete competition.[265]

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[255] Miksch (n 15) 40–41, 80. Eucken (n 13) 40-43, 60, 80, 120, 244-249.
[256] Miksch (n 15) 32–40, 66; Eucken (n 13) 245; Foucault (n 5) 171.
[257] This is also recognised by the literature Gerber (n 7) 245 fn. 52; Padilla and Ahlborn (n 11) 66.
[258] Eucken (n 13) 244–245.
[259] Böhm (n 4) 35. See for a taxonomy identifying 25 different market forms Eucken (n 13) 22; Miksch (n 15) 28-36, 65-67, 82-93.
[260] Böhm (n 4) 36.
[261] ibid 35.Miksch (n 15) 106-107- 114, 116; Eucken (n 13) 298.
[262] Miksch (n 15) 117.
[263] Böhm (n 4) 35; Miksch (n 15) 116.
[264] Böhm (n 24) 25.
[265] Miksch (n 15) 33, 38, 66-67, 80; Eucken (n 13) 248–249.

6.2.1 The Blueprint of Competition Law by Leonard Miksch

Based on the 'complete competition standard', Eucken and Miksch, formulated concrete proposals for the design and application of competition law. The most interventionist or regulatory proposal for the design of competition law has been put forward by Miksch. Instead of perceiving competition law as a specific set of rules which applies across the entire economy, Miksch assumed that competition law has to adapt to different types of market structure.[266] Accordingly, he envisaged three, rather than one set of competition rules, for three different types of market structure.[267]

Miksch suggested that markets in which complete competition prevails should only be subject to 'general competition law' (*allgemeines Wettbewerbsrecht*) that merely comprises a prohibition of anticompetitive agreements.[268] He assumed that in markets characterised by complete competition, economic power is dispersed amongst and constrained by a multitude of market players. Unilateral exercise of market power is thus largely impossible[269] and it is hence sufficient to prevent collective forms of market power through a prohibition of cartel agreements.

The situation is, however, different in more concentrated, oligopolistic markets. Miksch asserted that these market structures tend to be unstable and are conducive to unilateral or collective exercises of private economic power in the form of cartelisation and monopolisation.[270] Concentrated markets, therefore, require additional, more specific rules which Miksch called 'specific competition rules' (*spezielles Wettbewerbsrecht*).[271] The overarching goal of specific competition law is to convert these markets as quickly as possible into completely competitive markets.[272] Should this prove impossible, Miksch suggested that specific competition rules should replicate the functioning of complete competition.[273] Specific competition law, thus, places oligopolistic market players under direct supervision by the competition authority and subjects them to the obligation to engage in so so-called 'bound competition'[274] (*gebundene Konkurrenz*) or 'as-if competition'.[275] Under the 'specific

[266] Miksch (n 15) 34.
[267] ibid 16.
[268] ibid 16, 55-56.
[269] ibid 56.
[270] ibid 108–121.
[271] ibid 16.
[272] ibid 35.
[273] ibid 62–63.
[274] ibid 123–129.
[275] ibid 16, 137, 144.

competition law', the competition authority imposes some form of behavioural remedies that constrain the conduct of oligopolistic firms or firms with significant market power (partial monopolies) in a way that leaves them no other possibility than to act as if they were subject to complete competition.[276] Miksch observed that the content of the specific competition rules would heavily depend on the characteristics of the respective markets and should allow for tailor-made solutions.[277] This concept of 'bound' or 'as-if competition' is perhaps best understood as commitment decisions or consent decrees, which competition authorities nowadays use to devise specifically designed solutions with a view to restoring the functioning and competitive constraints in a given market.

For monopolistic markets, Miksch proposed the most intrusive form of competition law. He suggested that monopolistic firms should be divested and transformed into an oligopolistic market structure, which would become subject to the 'specific competition rules'.[278] In cases where the break-up of monopolistic firms is unworkable because they are natural monopolies or the result of scale economies or other forms of performance competition,[279] Miksch recommended as the solution of last resort that they should be put under state control or direction (*Lenkung*).[280] Albeit acknowledging the intrusiveness and shortcomings of nationalisation,[281] Miksch claimed that state control of monopolies would be preferable to a situation where they have the possibility of subjecting other market participants to their private interests and arbitrary will.[282] State control would prevent them from extracting monopolistic rents by imposing price regulation and bring their conduct as far as possible in line with complete or as-if competition.[283]

The understanding of competition policy championed by Miksch thus heavily relied on a market circumstances or situational test. It is the mere finding of an oligopolistic or monopolistic market structure that would trigger the intervention of competition policy irrespective of whether the monopolistic or oligopolistic firms have abused their market power by engaging in specific conduct deemed to be anticompetitive. This market circumstances test clearly reflects the republican concern about domination, as it is directed against market power a such and does not only address instances where firms abuse their market power by interfering

[276] Miksch (n 15) 137; Miksch (n 15) 222–223.
[277] Miksch (n 15) 223.
[278] ibid 119.
[279] ibid 211.
[280] ibid 17, 34, 98.
[281] ibid 99–100.
[282] ibid 103.
[283] ibid 101.

with the economic freedom of other market participants. Miksch's approach to competition law, thus, presaged Turner's and Kaysen's controversial market circumstance test, which also allows for direct regulatory intervention against certain monopolistic and oligopolistic forms of market concentration. Whereas Miksch endorsed beyond divestiture a broad range of prescriptive behavioural remedies, Turner and Kaysen instead clearly favoured structural remedies.

6.2.2 The Blueprint of Competition Law by Walter Eucken

Eucken, too, endorsed the concepts of 'complete competition' and 'as if' competition. Eucken agreed with Miksch that the prohibition of cartels would be insufficient to address the monopoly problem. In line with Miksch, he hence advocated the dissolution of monopolies to the extent that this is possible, [284] even if the monopolies are the outcome of performance competition.[285] Unlike Miksch, Eucken remained, however, highly sceptical about subjecting monopolies to state control, let alone solving the problem of monopolisation through nationalisation.[286] He warned that nationalisation of large corporations would entail too much co-mingling between the State and big business. Instead of resolving the problem of private power, it would actually accentuate it.[287] Eucken instead suggested that oligopolies and monopolies whose break up proved impossible should become subject to the supervision of an independent competition authority, which should ensure that they act 'as if' they were subject to complete competition (*wettbewerbsanalog*).[288]

Whereas Miksch suggested that oligopolistic or partially monopolistic markets whose break-up is impossible should be regulated through continuous, proscriptive 'bound competition' or specific competition regulation, Eucken pointed out that supervision by the competition authority does not mean permanent control or regulation.[289] In contrast to Miksch, Eucken argued that prophylactic[290] intervention by the competition authority should not merely depend on the market structure, but only be triggered by powerful firms' actual conduct (*Tatbestände*).[291] While the market structure provides a clear indication of the presence of market power, the competition authority should only intervene if there are clear symptoms of

[284] Eucken (n 13) 290, 294.
[285] ibid 292. He however pointed out that instances of monopolistic market positions would already be reduced by the Economic Constitution and order-oriented general economic policy.
[286] ibid 293.
[287] ibid 293, 298.
[288] ibid 293, 295-296.
[289] ibid 295–296.
[290] ibid 298.
[291] ibid 294–295.

hindrance competition.[292] To preserve performance competition, Eucken posited that along with the prohibition of collusive practices, competition law should lay down a set of legal categories that clearly identify and prohibit conduct that amounts to hindrance competition, as it is geared to foreclose open markets.[293] Hindrance competition encompasses foreclosure practices, boycotts/refusals to deal (*Sperren*), loyalty rebates, discriminatory pricing for equivalent transactions including differentiated price cuts ('dumping'), predatory pricing,[294] privately 'self-created law' in form of terms and conditions which blatantly deviate from legal rules to the benefit of powerful firms,[295] and exploitative pricing.[296]

Whereas Miksch proposed the operationalisation of 'as-if' or 'complete' competition through a situational test combined with prescriptive regulation, Eucken advocated a different mix of situational and conduct standards based on proscriptive rules. On the one hand, Eucken advocated the dissolution of monopolistic firms based on a situational, non-fault standard. On the other hand, for the remaining monopolies that cannot be dissolved, Eucken proposed a standard that relies on both situational and conduct elements. The situational element of this standard imposes on firms that hold market power the responsibility to act 'as if' they were subject to and in line with performance competition. The conduct element of the standard defines which form of conduct deviates from 'as-if' competition and thus amounts to hindrance competition. The prohibition of certain forms of hindrance competition also constitutes in Eucken's view an adequate approach towards oligopolistic and partially monopolistic markets because the strict enforcement of legal prohibitions of hindrance competition by the independent competition authority would prevent firms in oligopolistic market settings from engaging in conduct incompatible with performance competition.

Unlike Miksch, Eucken seemed to be more confident that order-oriented policy will be effective in eliminating most forms of oligopolistic and monopolistic market structures.[297] Therefore, he saw no need to address market power through a pure situational standard that imposes specific regulation on members of oligopolistic and monopolistic markets. Eucken instead championed an approach that addresses the problem of market power and ensures open markets[298] by means of a conduct standard, combined with heavy-handed structural and

[292] ibid 295.
[293] ibid 265–267.
[294] ibid 267, 295–296.
[295] ibid 295–296.
[296] ibid 296–297.
[297] ibid 295, 299.
[298] ibid 267.

behavioural remedies such as break up, divestiture,[299] and obligations to deal (*Kontrahierungszwang*).[300] Eucken, however, cautioned against price regulation, suggesting that it should only be applied as a remedy of last resort.[301]

6.3 The Effective or Residual Competition Paradigm

Most of the scholarly literature which associates Ordoliberalism with the complete competition standard coined by Eucken and Miksch,[302] ignores that the complete competition standard has never been unanimously endorsed by all members of the Freiburg School.[303] The conventional account, for instance, obfuscates that Böhm and Mestmäcker acknowledged the shortcomings and distanced themselves from a policy standard of complete competition.[304] They were sceptical about the 'as-if competition' standard and objected to Miksch's and, to some extent also, to Eucken's idea of subjecting powerful firms under the direct control of the state or the competition authority. Such an approach, they cautioned, would cure the disease of excessive concentration of private power through potentially arbitrary and excessive use of public economic power. This would be equally detrimental to the rule of law and democracy.[305]

While sharing the view that concentration of economic power is incompatible with competition and a domination-free society, Böhm and Mestmäcker pointed out that this does not automatically mean that any degree of market power must also entail concrete legal consequences.[306] Rather, they assumed that competition law could – or even has to – tolerate a certain degree of market power, as long as it does not undermine the capacity of the competitive process to limit, disperse and hold market power accountable.[307] At the same time, Böhm and Mestmäcker, however, insisted that competition policy must ensure that positions of market power are eroded and reduced by residual competition or new market entry.[308] They, therefore, stressed the need to protect the remaining competitive structure and residual rivalry in the market.[309] From this vantage point, a market would have to be considered workably or effectively competitive, as long as the residual competition would be sufficient to impose

[299] ibid 295.
[300] ibid 279, 296.
[301] ibid 296, 298–299.
[302] Gerber (n 10), 43, 50; Gerber (n 7) 245; Padilla and Ahlborn (n 11) 56, 61, 62-66; P. Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (CCP Working Paper, University of East Anglia 2007) 7.
[303] See in this regard Mestmäcker's preface in Böhm (n 4) 6. Mestmäcker (n 30) 42; Böhm (n 1) 279.
[304] Mestmäcker's introduction Böhm (n 4) 12.
[305] Böhm (n 1) 280.
[306] Böhm (n 4) 65.
[307] Böhm (n 1) 279.
[308] Böhm (n 24) 259.
[309] ibid 259–260.

restraints and checks on the economic power of powerful undertakings and to corrode their positions of market power in the medium- to long-term.[310] Competition law is, thus, directed towards restoring or replacing the functioning of the competitive process as an accountability mechanism, by reducing the instances where there is insufficient competition to restrain the scope of arbitrary action (*Verhaltensspielräume*) of individually or collectively powerful players.[311] The central task of competition law and policy is thus to ensure the structural conditions for competition, which guarantee that all market players act freely and independently.[312]

Instead of endorsing a situational standard that would tackle the existence of market power by directly regulating oligopolies or monopolies, Böhm and Mestmäcker argued that competition policy should avert forms of arbitrary domination and interference by adopting a conduct standard. This conduct standard hinges on the distinction between legitimate performance-based (*Leistungswettbewerb*) and illegitimate hindrance (*Behinderungswettbewerb*) competition.[313] Böhm or Mestmäcker, however, did not put forward a pure conduct standard based on which the competition authority would have to assess in a case-by-case analysis the effect of a firm's practice on competitors and consumers. Rather, they also relied on situational elements. Both authors suggested that a powerful firm or group of firms *qua* its individual or collective economic power would have to be made subject to stricter conditions than competitors who are subject to normal competition. As they are not or no longer subject to the constraints of effective competition, powerful firms are more prone to abuse their market power. Owing to the absence of effective competition, certain conduct which would qualify under normal competitive conditions as a common business practice and hence performance-based competition, can in combination with collective or unilateral market power easily turn in to an effective weapon of hindrance competition. [314]

Böhm and Mestmäcker identified two categories of conduct that amount to hindrance competition. The first category of hindrance competition encompasses specific conduct, which is presumed by its very nature to be in breach with the principle of competition on the merits and, thus, *prima facie* unlawful. This *per se* category covers business conduct that experience

[310] Böhm (n 1) 279.
[311] Mestmäcker (n 5) 466.
[312] ibid 466, 477. In a similar vein as the Harvard School, Mestmäcker for instance assumes that there is an 'interdependence' between market structure, conduct and performance. ibid 477.
[313] Böhm (n 4) 206, - 210, 213, 240-242.
[314] ibid 263-264, 275.

has shown to harm competition.[315] Those practices do not only have as their clear effect the restriction of competition, but they also exhibit an overt anticompetitive objective.[316] Horizontal cartels, in particular, horizontal price-fixing agreements, group boycotts and market sharing agreements, fall within this *per se* category because they have no other purpose than the elimination competition. [317] The prohibition of cartels is, however, insufficient to protect performance competition and curb market power. Along with cartels, the *per se* category hence also applies to specific unilateral conduct of dominant firms, which is perfectly legal in the absence of market power.[318] The list of unilateral conduct by powerful firms that is *per se* illegal includes exclusivity contracts, fidelity rebates, refusals to deal,[319] margin squeeze,[320] and (secondary-line) price discrimination that distorts competition on down- or upstream markets.[321] The second category of hindrance competition encompasses practices whose anticompetitive effect can only be identified on the basis of a more thorough economic analysis. This category, for instance, encompasses predatory pricing. [322] Böhm and Mestmäcker thus complemented the *per se* category with a second group of conduct, which accounts for the difficulties to draw a clear line between performance and hindrance competition.[323]

Unlike Miksch and Eucken, the conduct-based approach by Böhm and Mestmäcker did not support any form of non-fault regulation or break up of large firms in the absence of anticompetitive conduct. Instead of translating the concern about domination deriving from the concentration of market power into a purely situational test, Böhm and Mestmäcker operationalised it by means of a form-based conduct standard. This approach prohibits *ex ante* certain forms or categories of coordinated or unilateral business behaviour as anticompetitive practice based on the presumption that they are harmful to competition.

This form-based approach relies at least in part on the basis of structural presumptions, which attach a presumption of illegality to specific forms of coordinated and unilateral conduct by dominant firms. [324] Defendant firms can only rebut the presumption that their conduct amounts to hinderance competition if they proffer an objective justification showing that their conduct nonetheless was a genuine attempt to enhance their own performance or to meet

[315] ibid 268.
[316] ibid.
[317] Böhm (n 24) 234–235, 261, 268.
[318] Böhm (n 4) 249.
[319] Böhm (n 24) 64–65, 259, 265, 268, 293.
[320] Böhm (n 4) 259.
[321] ibid 259, 265.
[322] ibid 221, 267, 275, 284.
[323] ibid 289.
[324] ibid 295.

competition.[325] In this respect, market power plays a crucial role as it may give rise to a presumption of illegality against certain unilateral conduct that is normally considered to be in line with performance-based competition. To rebut the presumption, it is for the dominant firm to show that a certain practice does not amount to hindrance competition. Instead of talking concentrated economic power directly through a situational test, Böhm and Mestmäcker translated the concern about domination through the use of structural presumptions, which are triggered by the finding of market power. Whereas experience suggests that, apart from horizontal agreements, under normal competitive conditions instances of hindrance competition remain unlikely and sporadic,[326] economic power entails that certain conduct, which otherwise is in line with performance competition and hence perfectly legal, is tainted with a presumption of domination and hence hindrance competition[327] This presumption is justified since market power allows firms to use conduct that is normally in line with competition on the merits to engage in hindrance competition and exert domination,[328] as they are no longer constrained by residual competition.[329]

In line with the concept of republican liberty and the situational tests advocated by Miksch and Eucken, this form-based approach does not require the showing of any actual interference with the private autonomy of other market participants or adverse effects on welfare. Rather, it assumes that certain business conduct amounts to domination because it has the potential to foreclose or hinder residual competition. This approach hence makes certain types of conduct inaccessible to powerful firms on the basis of the potential harm and domination that they may entail if implemented by powerful firms.

The form-based approach thus forces powerful firms to act as if they do not have any market power.[330] To prevent domination, it imposes on firms with market power a stricter responsibility than on firms in unconcentrated markets.[331] Ultimately, the difference between the 'as-if' competition approach championed by Eucken and Miksch and the conduct test advocated by Böhm and Mestmäcker is less important than it might at first glance appear. To tackle domination, Eucken and Miksch support more intrusive and proscriptive forms of

[325] ibid 288-289, 293.
[326] ibid 292, 296.
[327] ibid 64-65, 249.
[328] Böhm (n 24) 32; Mestmäcker (n 5) 124.
[329] Mestmäcker (n 5) 125–126. Böhm (n 4) 264, 268, 292, 296.
[330] Depending on how strictly the as-if competition test is defined, the *per se* rule may even be more intrusive since it prohibits a dominant firm from engaging in certain practices that it could carry out if it were a normal competitor.
[331] ibid 65. Mestmäcker (n 5) 125–126.

regulation to ensure that powerful firms act as if they were subject to complete competition. Böhm and Mestmäcker achieve a similar goal through a form-based approach which relies on negative rule-like presumptions of illegality to protect residual competition.

6.4 The Ordoliberal Understanding of the Costs and Benefits of Competition Law

While the Ordoliberals put forward different designs for competition law, all three designs have in common that they rely on similar calculus of the costs and benefits of antitrust intervention. This calculus, which can be understood as an error-cost framework, tips the scales in the case of doubt in favour of antitrust intervention.

The situational approaches advocated by Miksch and Eucken clearly reflect the assumption that concentrated economic power should be made subject to behavioural regulation or structural remedies regardless of the losses in efficiencies such intervention may entail. The conduct-based approach championed by Böhm and Mestmäcker in case of doubt also leans towards antitrust intervention. This bias towards antitrust intervention is, on the one hand, the consequence of the form-based approach which shifts in the presence of certain conduct and market power the burden of proof on the defendant to provide an objective justification for their *prima facie* hindrance competition conduct. [332] The form-based and its reliance on presumptions of illegality thus ensures that in the case of doubt the risk and costs of errors are borne by the powerful firms rather than by the rest of the society. On the other hand, it also results from the fact that Böhm and Mestmäcker rejected the notion of an efficiency defence. They pointed out that hindrance competition cannot be justified by any increase of efficiency or welfare. Rather than balancing the welfare effects of a specific conduct, Mestmäcker, for instance, suggested that competition law should balance the competing rights and interests of market participants in light of the paramount goal of protection of free competition.[333] Böhm seemed even less inclined towards a balancing approach as he argued that economic concentration, which distorts the competitive process, poses a problem for competition and a democratic society alike, even if it enhances efficiency.[334]

[332] Böhm (n 4) 288-289, 293.
[333] Mestmäcker (n 30) 48. Böhm (n 4) 267, 303.
[334] Böhm (n 24) 214. Yet, Böhm recognised, that concentration might also yield efficiencies in terms of economies of scale. Moreover, he assumed that economic concentration which harms competition is also most likely to have adverse welfare effects.

The Ordoliberals thus relied on an error-cost framework, which clearly favours type I errors over type II errors and which seems to tolerate a considerable amount of efficiency sacrifices. [335] This design of the error-cost framework can, on the one hand, be explained by the underpinning economic assumptions. The Ordoliberals were doubtful about any positive correlation between firm-size, economies of scale and efficiency.[336] On the contrary, they assumed that in most of the cases the prevention and elimination of industry concentration would not only protect economic liberty but also enhance efficiency.

The second explanation for this bias in favour of competition law intervention can be found in the concept of republican liberty itself. Unlike *laissez-faire* liberals, the Ordoliberals did not perceive any state interference with market participants or legal rule as a reduction of liberty. In line with the republican distinction between arbitrary and non-arbitrary interference, they instead assumed that state intervention, for instance, through competition law, is legitimised as non-arbitrary interference because it is in line with the principles of the Economic Constitution. To Ordoliberals, the application of competition law does not necessarily reduce the liberty (as non-domination) of the defendant firms, even if it interferes with their choices or property rights. On the contrary, competition law was perceived as being constitutive of economic liberty, as it enhances the liberty of other market participants by preventing instances of domination and thus reducing the overall level of domination prevailing in the market. Unlike modern antitrust, Ordoliberals did not only focus on the adverse effects of potential domination in the economic sphere, but they also accounted for its adverse effect in the political sphere on democracy. Ordoliberals, therefore, assume that the magnitude of harm resulting from the arbitrary exercise of market power is high because it goes beyond mere economic welfare losses. This explains why the Ordoliberal error costs framework attributes more weight to the potential harm of private economic power than to the potential harm resulting from state intervention through competition law.

On this account, the members of the Freiburg School challenged the assumption endorsed by *laissez-faire* liberals that state intervention to correct distortions of competition would create more costs than it would generate benefits.[337] In effect, the Ordoliberals clearly rejected a purely consequentialist, utilitarian understanding of competition and competition

[335] P. Larouche and M. P. Schinkel, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act' (TILEC Discussion Paper No. 2013-02, Tilburg University 2013)) 13.
[336] Böhm (n 4) 231. Böhm (n 24) 214; Eucken (n 13) 226–236.
[337] Böhm (n 24) 220.

law,[338] according to which intervention is only warranted if its welfare gains exceed its welfare losses. Since for Ordoliberals the harm flowing from excessive economic concentration is not only confined to interference with the negative economic liberty that gives rise to welfare losses but also calls into doubt the very basis of a democratic society and polity, they attributed less weight to the potential welfare losses ensuing from state intervention.

7 Conclusion

This chapter traces the genesis of the idea of a competition-democracy nexus in Europe. On this side of the Atlantic, the idea that there is a link between competition and democracy has been famously coined and articulated by the Ordoliberal paradigm from the 1930s onwards. Scholarly literature usually portrays Ordoliberalism and their claim of a competition-democracy as a historical reaction to the traumatic experience of totalitarianism under the Nazi regime and as a response to the role large conglomerates and cartels played in the rise of fascism in Germany. Having a fresh look at the Ordoliberal school of thought, this chapter shows that this account is misleading and fails to grasp how the Ordoliberals conceived the relationship between competition and democracy.

Instead of being merely a response to the close ties between big business and the Nazi regime, Ordoliberalism emerged in the first place as a critique of the predominant schools of thought about industry consolidation and cartelisation of the time: namely, *laissez-faire* liberalism and corporatism. Both schools had in common that they questioned the usefulness of any legal intervention against cartels, conglomerates and industry concentration. While corporatism idealised the growing cartelisation and the rise of large-scale corporations as a step towards a higher, hierarchical form of societal and economic organisation akin to the Medieval guilds, *laissez-faire* liberalism approached cartels, conglomerates and industry concentration as the legitimate emanation of negative freedom of contract and property rights.

The Ordoliberals not only rejected corporatism but also fiercely rejected the negative, single-edged version of negative liberty cultivated by *laissez-faire* liberals. They criticised this *laissez-faire* notion of negative liberty for perceiving only state intervention as a source of unfreedom while ignoring the adverse effect of arbitrary private power on the economic liberty

[338]See Mestmäcker's preface to Böhm (n 4) 12. Interestingly, the Ordoliberals ascribe this deontological understanding of competition directly to Adam Smith, asserting that Smith has been erroneously labelled as representative 'utilitarianism' for instance by Rawls ibid 11.

of other market participants. Against this backdrop, Ordoliberals formulated an alternative concept of economic liberty that clearly builds on the republican understanding of liberty as non-domination. This republican understanding of economic liberty becomes apparent from the fact that Ordoliberals perceived concentrated economic power not only as anathema for liberty because they were concerned that cartels and dominant firms would exercise their power in a way that actually or likely interferes with the economic liberty of other market participants. Rather, they argued that concentrated economic power is incompatible with competition as basic organising principle of an economic order that promotes and preserves liberty by ensuring the coordination of economic transactions through heterarchical coordination rather than hierarchical subordination and dependence. The Ordoliberals antagonised concentrated economic power because it vested private players with the capacity to interfere arbitrarily with the liberty of other market participants. In line with the republican tradition, the Ordoliberals argued that by making the liberty of other market participants contingent on the goodwill of powerful firms, economic concentration creates relationships of economic subordination akin to master-slave relationships.

The members of the Freiburg School, therefore, perceived concentrated economic power as being in conflict with their ideal of a private law society as domination-free social order that ensures economic liberty as equal status and equal opportunity. Indeed, Ordoliberals objected the elimination of competition and the rise of concentrated economic power as a catalyst of the neo-feudalisation of a republican society. To Ordoliberals, concentrated economic power adversely affects republican democracy through two channels. First, by undermining the equal status and freedom of all individuals, economic concentration undermines the normative foundations of a republican democracy and society. Second, as powerful economic players succeed in converting their economic into political power, economic concentration also erodes the non-arbitrary nature of democratic political institutions.

The fact that the Ordoliberal concept of economic liberty is rooted in a republican rather than negative understanding of liberty has been so far widely ignored by the scholarly literature. As a consequence, the existing literature fails to grasp the striking similarities between how Ordoliberals and the antitrust movements in the US conceived the link between competition and democracy. This chapter shows that the emergence of the idea of a competition-democracy nexus coincided in the US and in Europe with rapid industrialisation, growth in firm size and surging levels of industry concentration. Like in the US, the Ordoliberal idea of a competition-democracy nexus and the calls for the adoption of a robust competition law constituted a

response to the 'Behemoth problem' that had acquired new urgency with the growth of the large-scale corporation.

This chapter also points out that the common denominator of the idea of a competition-democracy nexus on both sides of the Atlantic lies in the concept of republican liberty as non-domination and its hostility against the existence of concentrated economic power, not only its exercise. The Ordoliberals and the proponents of US antitrust were primarily concerned about the potential domination ensuing from the mere existence of concentrated economic power, rather than the fear about actual or likely interference. In a similar vein as the proponents of the competition-democracy nexus in the US perceived competition as a safeguard of the Jeffersonian ideal of a society composed by small, independent economic operators, the Ordoliberals underscored the role of competition in preserving the ideal of a heterarchical private law society which ensures the equal status and equality of opportunity of all market participants. Most importantly, the US and Ordoliberal proponents of a competition-democracy nexus also advocated a similar institutional solution to resolve the 'Behemoth problem' and prevent the domination flowing from concentrated economic power. Akin to the US framers of the Sherman Act and later antitrust movements, the Ordoliberals reverted to the Smithian ideal of competition as a polycentric market structure in which economic power is diffused amongst many small, independent players. The proponents of antitrust law in the US and the Ordoliberals thus shared an understanding of competition as a mechanism of antipower and a safeguard of liberty as non-domination.

The role of republican liberty as the common denominator of the idea of a competition-democracy nexus coined by US antitrust movements and the Freiburg School also becomes apparent in the republican idea that the presence, rather than the absence of republican laws is constitutive of economic liberty. This insight is manifest in the often-cited idea that the Sherman Act and other antitrust laws statutes constitute a quasi-constitutional charter of liberty. Along similar lines, the Ordoliberal concept of the 'Economic Constitution' underlined the importance of legal rules in constituting and preserving economic liberty and competition as polycentric process. The concept of an Economic Constitution refers, on the one hand, to a set of rules and policy principles, providing the legal framework for a competitive economic order. It ensures that state intervention in the economy takes the form of neutral, principled, non-discriminatory and non-arbitrary interference. On the other hand, the Economic Constitution elevates private economic power to a constitutional problem. The Economic Constitution tries to address this 'Behemoth problem' of concentrated private power through two complementary strategies.

First, the Ordoliberals suggested that the basic principles of the Economic Constitution, which seek to ensure that legislation and legal rules are to the largest extent possible in line with the goal of promoting competition, will lead to a de-concentration of economic power. Second, Ordoliberals suggested that the remaining instances of economic power must be addressed through competition law.

While they agreed that competition law should ensure that competition takes the domination-free form of performance-based competition, Ordoliberals – unlike what is suggested in the conventional literature – did not put forward a monolithic set of policy proposals. On the contrary, there were divergent views amongst the members of the Freiburg School as to how to operationalise the ideal of republican liberty and the concept of performance-based competition through competition rules. Some members, such as Miksch and Eucken, advocated the break-up of oligopolistic and monopolistic firms or their regulation under the 'as-if competition' standard. Others, such as Böhm and Mestmäcker, favoured a conduct standard. This conduct standard rests on the distinction between performance-based and hindrance-competition and creates presumptions of illegality for specific conduct that is assumed to have the potential of leading to arbitrary interference and undermine residual competition. Both approaches had, however, in common that they sought to protect competition as a polycentric market structure that prevents and erodes the domination resulting from concentrated economic power. To this end, they were willing to sacrifice in the case of doubt efficiencies to preserve republican liberty and hence democracy.

In a similar vein as the Harvard School, the Ordoliberals thus underscored that the legitimacy of competition and the economic order does not only depend upon output-oriented legitimacy in the form of efficiency gains but is contingent upon the extent to which the competitive process also ensures its input-oriented legitimacy by guaranteeing the equal opportunity and liberty of the market participants. Unlike contemporary welfarist theories of competition, the Ordoliberals did not enthrone efficiency and welfare as the unique goal of competition but rather conceived it as an important by-product of economic liberty, which is enhanced and guaranteed by the competitive process.[339] Ordoliberals, in the same vein as Harvard scholars, generally assumed that the input- and output-oriented legitimacy and the related goals of competition law are complementary. Accordingly, by promoting economic freedom and equality of opportunity competition under normal circumstances also enhances

[339] Möschel (n 148) 146.

welfare and efficiency.[340] Conversely, the members of the Freiburg School also believed that whenever economic concentration harms equality and liberty, it will also be economically harmful.[341] In case of conflict between efficiency and liberty, the Ordoliberals, however, clearly prioritised the input-oriented legitimacy goals of economic freedom and equality of opportunity over the consequentialist goal of welfare maximization.[342] This balance has been most poignantly articulated by Böhm:

> *If it should prove that serious dangers to freedom and justice will ensue, we must resolve to place any conceivable obstacle in the way of the establishment of economic power, and must not allow ourselves to be deterred from this resolution by a regard for the possible useful effects of this power any more than we would waver in our resolution to defend our democratic system, should anybody try to show us how many wonderful projects could be realized if only we decided to replace our democracy by a totalitarian dictatorship. Nothing in this world can be had without paying for it, including freedom. If we want freedom we have no option but to sacrifice some advantage which we could obtain only by employing concentrated power.*[343]

[340] ibid.
[341] Böhm (n 24) 214.
[342] Foucault (n 5) 81. Eucken (n 13) 14. Foucault (n 5) 81.
[343] Böhm (n 1) 271.

CHAPTER IV – GRUMBLING BEEHIVE INSTEAD OF BEHEMOTH: THE STRUCTURALIST APPROACH AS THE COMMON DENOMINATOR OF REPUBLICAN ANTITRUST

Behold now Behemoth, which I made with thee; he eateth grass as an ox.
Lo now, his strength is in his loins, and his force is in the navel of his belly.
He moveth his tail like a cedar: the sinews of his stones are wrapped together.
His bones are as strong pieces of brass; his bones are like bars of iron.[1]

1 Introduction

In the previous chapters, we have discussed the intellectual pedigree and basic conceptual presuppositions of the idea of a competition-democracy nexus and its relationship with the concept of republican liberty. This account of the crucial link between competition, republican liberty and a democratic form of government shows that competitive markets have not only been perceived as a mechanism that optimizes the allocation of resources, generates growth and ensures economic welfare. Rather, at different points in time, the proponents of competitive markets underlined the role of competition in enhancing liberty as non-domination by dissipating power and emancipating individuals from relationships of subjugation.

Chapter I described how early political economists, such as Adam Smith, championed competitive markets not only because of their economic but, more importantly, because of their political virtues. Early proponents of competitive markets perceived the centrifugal forces of competition between roughly equally sized players and factions as a system of antipower that preserves the republican liberty of all market participants against domination and, thus, tackles the 'Behemoth problem' of private government. Chapters II and III have canvassed how the ideal of republican liberty and its linkage with competitive markets coined by early political economists has informed the understanding of competition, competition law and their role in taming industrial Behemoths in the US and in Europe.

[1] *The Bible: Authorized King James Version* (Oxford University Press 2008) Job 40:15-18.

This and the following chapter break down the discussion of the competition-democracy nexus and the role of competition in preserving republican liberty from the conceptual macro-level to the micro-level of the concrete design, application and judicial interpretation of antitrust law on both sides of the Atlantic. To this end, this chapter assesses how the competition-democracy nexus and the concern about republican liberty have been translated into a concrete antitrust policy.

Competition law in the US and in Europe consists of three basic sets of substantive rules or pillars. The first set of rules, which is enshrined in § 1 of the Sherman Act and Article 101 TFEU, prohibits anticompetitive agreements. The second set of rules imposes checks on the market power of powerful firms. In the US, monopoly power is regulated by the prohibition of monopolization and the attempt to monopolize under § 2 of the Sherman Act, as well as a set of other antitrust provisions such as § 2 and 3 of the Clayton Act (1914),[2] as subsequently amended by the Robinson-Patman Act (1936).[3] In the European Union, monopoly power is regulated through Article 102 TFEU, which prohibits the abuse of a dominant position. The third substantive pillar of antitrust law is provided for by § 7 of the Clayton Act, which prohibits mergers that substantially lessen competition ('SLC'). Along similar lines, the EU Merger Regulation 139/2004[4] outlaws mergers, which lead to a significant impediment of effective competition ('SIEC').

The relationship between these three sets of legal rules, liberty and democracy is anything but obvious. This chapter sets out why and how all three sets of rules were at different points in time perceived as being linked with the ideals of republican liberty and democracy. Far from being merely concerned about the adverse effect of certain business conduct on welfare, prices or output, all three substantive pillars of antitrust law were perceived as safeguards of the ideal of republican liberty by adverting and taming the power of industrial Behemoths. Until the 1970s in the US and the late 1990s in the EU, the prohibition of anticompetitive agreements, the regulation of monopoly power and merger rules were interpreted as crucial safeguards of the liberty of competitors and consumers against the domination firms may derive from the combination and concentration of their economic power.

[2] 15 U.S. Code § 14. Sale, etc. on agreement not to use goods of competitor.
[3] 15 U.S. Code § 13. Discrimination in price, services, or facilities.
[4] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. OJ [2004] L 24/1.

In so doing, this chapter purports to enhance our understanding of how antitrust and competition law contributed to democracy by translating the ideal of republican liberty into a concrete antitrust policy. The existing literature has mostly stressed how concerns about private power and democracy guided antitrust prior to the Chicago School revolution in order to challenge the Chicagoan argument that consumer welfare constituted since the adoption of the Sherman Act the central goal of antitrust law. Yet, most scholarly writing on the role of those political goals fails to provide a comprehensive and systematic account of how antitrust law has actually contributed to the realization of the ideal of democracy. It simply asserts that US antitrust and EU competition law prior to the Chicago School revolution pursued not only economic goals, such as consumer welfare, but also societal or political goals, such as the guarantee of liberty and equality, through the limitation and deconcentration of private power.[5] This analysis, however, fails to fully grasp the impact of the idea of a competition-democracy nexus on competition law. It does not really explain how the concrete application of competition law contributed to the preservation of democracy. Most importantly, it omits to spell out how the decentralization of economic power promoted republican liberty and, ultimately, democracy.

This chapter addresses this shortcoming by shedding light on how US and EU competition law operationalised the ideal of liberty as non-domination and the related goal of preserving a republican or democratic polity. This chapter argues that US and EU competition law gave effect to the ideal of republican liberty as non-domination as the core value of republican antitrust primarily by pursuing the structuralist goal of ensuring a polycentric, deconcentrated market structure. This structuralist interpretation of all three pillars of antitrust law constituted the common denominator and distinctive feature of republican antitrust on both sides of the Atlantic.

[5] R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051 1053–1056 <http://www.jstor.org/stable/3311791>. E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140 1141-1142, 1151. L. A. Sullivan, *Antitrust* (West Publishing 1977) 942. E. M. Fox, 'The Battle for the Soul of Antitrust' (1987) 75(3) California Law Review 917 917. E. M. Fox, 'The Symbiosis of Democracy and Markets: OECD - Directorate for Financial and Enterprise Affairs Competition Committee - Global Competition Forum - Competition and Democracy' (2017) 1–6 <https://www.oecd.org/daf/competition/democracy-and-competition.htm>. L. M. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harv. L. & Pol 235 265–268. L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710 739–740. T. Wu, *The Curse of Bigness: Antitrust in the new gilded age* (Columbia Global Reports 2018) 53–58. L. M. Khan, 'The Ideological Roots of America's Market Power Problem' [2018] Yale Law Journal Forum 960, 966-968, 971; G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) 2-4, 96-99.

Based on this structural approach, the US Supreme Court and EU Courts[6] did not interpret the antitrust rules as warranting intervention only in cases where anticompetitive agreements, monopoly conduct or mergers led to actual or posed the threat of likely interference with the economic liberty of competitors or consumers. Rather, all three sets of rules followed a precautionary rationale which sought to prevent economic power from being amalgamated in the hands of a single or a few private companies. All three pillars of antitrust law aimed at averting situations where a single or a few firms by joining their power could subject industries under their control and thereby exercise private government by imposing their self-interest upon other market participants. In short, all three substantive competition rules were viewed by US and EU courts as a safeguard of competition as a polycentric market structure that operated as a system of antipower.[7] By protecting a polycentric market structure, in which economic power was diffused to the largest extent possible amongst a multitude of players, the structural approach sought to avert the emergence of and constrain the already existing Behemoths. This structural approach thereby brought into effect, on the one hand, a negative dimension of republican liberty, which is in the first place directed against the domination deriving from the concentration of economic power. At the same time, this structural approach also sought to enhance the positive, emancipatory or egalitarian dimension of republican liberty.[8] All three pillars were instrumental in preserving and promoting the independent status and economic opportunities of market participants as free and equals.

The analysis of this chapter unfolds in three steps. The chapter, first, discusses how republican antitrust in the US and Europe translated the goal of republican liberty as non-domination into concrete antitrust policy by adopting a structuralist interpretation of the prohibition of anticompetitive agreements. This structural approach enhanced republican liberty by ensuring that markets followed the polycentric logic of beehives instead of degenerating into Behemoths (Section 2). The chapter, then, examines how the US and EU courts relied on a structural approach towards monopoly power to operationalize the ideal of republican liberty under §§1 and 2 of the Sherman Act and §§ 2 (a) and 3 of the Clayton Act, as well as Art. 102 TFEU. The structuralist approach towards monopoly power thus set out a

[6] The Court of Justice of the European Union is composed by the Court of Justice (‚the Court') and the General Court (previously ‚Court of First Instance').
[7] For the role of competitive markets as system of antipower, see P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576 591–592.
[8] For the role of competitive markets in empowering individuals and, thereby, enhancing republican liberty ibid 592.

number of rules and principles to 'shackle'[9] already existing corporate Behemoths and prevent them from abusing their power. (Section 3). Finally, the chapter also explores how US and EU competition law put into effect the concern about republican liberty through a structuralist merger policy. This structural approach was geared towards averting that mergers lead to the weakening of the polycentric structure of markets and the building up of Behemoths capable of exerting domination (Section 4).

2 The Preservation of a Polycentric Market Structure at the Heart of the Prohibition of Anticompetitive Agreements

The republican concern about liberty as non-domination revealed itself under § 1 of the Sherman Act and Art. 101 TFEU, which both prohibit anticompetitive agreements, in the goal of preserving a polycentric market structure. The republican approach to anticompetitive agreements was not guided by the narrow goal of outlawing agreements which have adverse effects on consumer or total welfare. Rather, US and EU Courts interpreted the prohibition of anticompetitive agreements as a tool to prevent market players from giving up their independent decision-making in order to gang up and pool their economic forces by building coalitions. This goal of preserving a polycentric market structure as the underpinning rationale of the first pillar of antitrust law mirrors the two dimensions of republican liberty. On the one hand, this structuralist interpretation sought to prevent individual market players from entering into contractual or other forms of collective action with a view to exerting control and domination over the market (2.1). On the other hand, the objective of safeguarding a polycentric market structure also pursued the positive, emancipatory goal of promoting equal opportunities and the independent status of market players (2.2).

2.1 The Negative Dimension of Polycentric Competition as a System of Antipower and the Prohibition of Anticompetitive Agreements

A common thread of the republican interpretation of § 1 of the Sherman Act (2.1.1) and Article 101 TFEU (2.1.2) was the objective to ensure that market players act independently.

[9] I draw here inspiration from the concept of the 'Shackled Leviathan' coined by D. Acemoglu and J. A. Robinson, *The Narrow Corridor* (Viking-Penguin 2019) 27.

Both provisions were geared towards preventing market participants from building coalitions or factions with a view to bundling their economic power and impose their self-interest on other market participants. The preservation of a polycentric structure and functioning of markets guaranteed that the independent decision-making of all market participants imposed some impersonal constraints on each other's capacity to exert domination. This negative dimension polycentric competition as a bulwark against domination or a system of antipower drew upon the insights of Adam Smith and James Madison, discussed in Chapter I. Both authors had coined the idea that economic[10] and political[11] domination could be averted by dividing power into multiple independent decision-making centres and thereby increasing the costs of building coalitions and combining economic power. In short, the mission of the first pillar of antitrust law was to 'break and control the violence of faction.'[12]

2.1.1 The Negative Dimension of Polycentric Competition as a System of Antipower and the Interpretation of § 1 of the Sherman Act

Historically, in the early days of the Sherman Act, US courts perceived contractual restraints of trade and other forms of coordinated conduct as the primary source of the concentration of economic power and monopoly. This can be explained by the fact that the formative antitrust case law was deeply rooted in a pre-industrialised, Smithian conception of the economy. During the formative era, the US Supreme Court understood competition as a process driven by numerous, roughly equally sized and small-scale businesses.[13] This understanding of competition hence fully dovetailed with Mandeville's imaginary of the Grumbling Beehive. In this world, it was inconceivable that economic concentration and monopoly power resulted from the endogenous growth of large-scale firms. The formative case law, instead, only envisaged two exogenous sources of economic concentration and monopoly: either monopoly was created by the State through the grant of privileges and exclusive rights,[14] or it was the result of contracts or the combination between competitors. [15]

[10] A. Smith, *An inquiry into the nature and causes of the wealth of nations [1776]* (Oxford University Press 1976) II,v, § 7, pp. 361-362.
[11] A. Hamilton, J. Madison and John Jay, *The Federalist Papers: ed. Lawrence Goldman* (Oxford University Press 2008) The Federalist No 10, pp. 48-55.
[12] ibid The Federalist No 10, p. 48.
[13] J. A. Rahl, 'Conspiracy and the Anti-trust Laws' (1950) 44(6) Indiana Law Journal 743 746.
[14] *United States v. E. C. Knight Co.* 156 U.S. 1 (1895) 9, and Justice Harlan dissenting, 31. *Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1911) 52.
[15] Rahl (n 13), 746; *Standard Oil Co. of New Jersey v. United States* (n 14) 62; *National Cotton Oil Co. v. Texas* 197 U.S. 115 (1905) 129.

The formative case law by the Supreme Court drew upon this pre-industrialist, Smithian understanding of competition. It echoed the Smithian idea that the polycentric nature of the competitive process prevents domination by separating and diffusing power amongst equally sized independent decision-makers. In line with this understanding of competition as an institution of antipower, Justice Harlan, for instance, observed that '[s]o long as competition was free', the 'interest of the public' is safe.[16] For in the presence of polycentric competition, '[a]ny one man, or any one of several men acting independently, is powerless'.[17]

This understanding of polycentric competition as a system of antipower was grounded in the faith that the interaction of a multitude of self-interested players will impose impersonal constraints upon each other's power to exert domination. This is the case is as long as their economic power is decentralised and firms independently decide upon the course of action they will take. Polycentric competition thus takes the form of an accountability mechanism, which ensures that the 'individual error or folly will generally find a correction in the conduct of others.'[18] The role of polycentric competition in constraining power can, therefore, be likened to the constitutional principles of separation of powers and checks-and-balances.[19] Polycentric competition creates an 'equilibrium' of power between antagonizing, equally sized players.

The Supreme Court's early interpretation of the prohibition of anticompetitive agreements under § 1 of the Sherman Act reflects, however, the awareness that this fragile balance of power is easily unsettled if firms escape the constraints of polycentric competition by entering into coordinated action and building coalitions to pursue their self-interest. Justice Harlan, for instance, warned that

> *when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. … Its power for evil increases as its numbers increase. […] The combination becomes dangerous and subversive of the rights of others, and the law wisely says it is a crime.*[20]

The republican approach under § 1 of the Supreme Court thus attached to the preservation of polycentricity a negative, defensive dimension. This defensive dimension was

[16] *United States v. E. C. Knight Co.* (n 14) Justice Harlan, dissenting, 28-29; *Northern Securities Co. v. United States* 193 U.S. 197 (1904) 340.
[17] *United States v. E. C. Knight Co.* (n 14) Justice Harlan, dissenting, 35.
[18] *United States v. E. C. Knight Co.* (n 14) Justice Harlan, dissenting, 26; *Northern Securities Co. v. United States* (n 16) 339.
[19] *United States v. E. C. Knight Co.* (n 14) Justice Harlan, dissenting, 35. 'There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole.'
[20] ibid Justice Harlan dissenting, 35.

grounded in the concern that firms by eliminating polycentricity and thereby combining their power would become able to impose their interest upon other market participants.[21] By preserving a polycentric market structure against anticompetitive coordination, the § 1 case law sought first and foremost to avert situations of domination, which emerge when firms substitute cooperation or collective action to their independent decision-making in order to bundle their interests and combine their economic power.[22]

This concern about domination resulting from the elimination of polycentricity through the combination of previously independent players was not only a central element of the formative case law but shaped the interpretation of § 1 until the 1970s. Take, for instance, the Supreme Court's application of the *per se* prohibition of horizontal price-fixing agreements under § 1 of the Sherman Act. The Court noted that it is immaterial whether parties to a price-fixing agreement actually interfere with the choices of other market players by setting their prices at an unreasonable level.[23] The *per se* rule was instead directed against 'the power to fix prices, whether reasonably exercised or not [as it] involves power to control the market and to fix arbitrary and unreasonable prices.'[24]

The Court indeed perceived price-fixing agreements as a source of domination and unfreedom because they allow economic operators to eliminate the polycentric functioning of competition and to control markets by combining their power.[25] The finding of a *per se* violation did not require the showing that the price-fixing agreement led to negative welfare effects. Nor did it exclusively rely on an understanding of economic liberty as negative freedom, which presupposes the absence of actual or likely interference with the economic choices of market participants. It was the situation of arbitrary power and potential domination the parties derive from their price-fixing agreement, rather than the actual or likely setting of unreasonable prices, which the Court tried to tackle by adopting a strict *per se* rule approach against minimum and maximum[26] price-fixing agreements.

[21] *United States v. Topco Assocs. Inc.* 405 U.S. 596 (1972) 610.
[22] *United States v. E. C. Knight Co.* (n 14) Justice Harlan dissenting, 35; *National Cotton Oil Co. v. Texas* (n 15) 129; *Chicago Board of Trade v. United States* 246 US 231 (1918) 238.
[23] This was confirmed by the Court as late as in 1982 *Ariz. v. Maricopa County Medical Soc.* 457 U.S. 332 (1982) 348.
[24] *United States v. Trenton Potteries Co.* 273 U.S. 392 (1927) 397. *United States v. Socony-Vacuum Oil Co.* 310 U.S. 150 (1940) 221, 223, 226 fn 59.
[25] ibid 221.
[26] *Kiefer-Stewart Co. v. Seagram & Sons* 340 U.S. 211 (1951) 213; *Ariz. v. Maricopa County Medical Soc.* (n 23) 348.

The fear of domination and private government arising from the combination of previously independent competitors through agreements also constituted the underlying rationale of the *per se* prohibition of market division agreements. [27] In *Topco,* the Court, for instance, condemned market division agreements as *per se* violations of § 1, because they enable private parties to eliminate other market participants' 'freedom to compete'.[28] Market division agreements, the Court objected, bestow 'certain private citizens or groups' with the power to foreclose competition in a given sector because they 'believe that such foreclosure might promote greater competition in a more important sector of the economy.'[29]

This concern about domination resulting from the collective elimination of polycentric competition through agreements or other forms of coordinated conduct also informed the *per se* rule against collective refusals to deal or so-called 'group boycotts'.[30] The Court consistently outlawed collective boycotts as *per se* restraints, although they did not have any adverse welfare effects,[31] or were aimed against free-riders who engaged in what the parties perceived as 'unfair' methods of competition.[32] The Court insisted that even if an individual entrepreneur would have the 'unquestioned right to stop dealing with [another economic operator] for reasons sufficient to himself', he 'goes beyond his personal right' when he combines his power with that of other players to agree on a collective refusal to deal.[33] Where market players substitute joint action or combination to polycentric independent conduct an 'act harmless when done by one may become a public wrong when done by many.'[34] The *per se* rule against group boycotts thus clearly sought to prevent market players from pooling their economic forces in order to exercise 'coercive influence'[35] and undermine the economic freedom and opportunities of competitors.[36] In the *Fashion Originator's Guild* case, the Supreme Court harshly

[27] *United States v. Addyston Pipe & Steel* 85 F. 271 (6th Cir. 1898); *Addyston Pipe & Steel Co. v. United States* 175 U.S. 211 (1899); *Timken Roller Bearing Co. v. United States* 341 U.S. 593 (1951) 598; *United States v. Sealy, Inc.* 388 U.S. 350 (1967) 355–357; *Northern Pac. Ry. Co. v. United States* 356 U.S. 1 (1958) 5.*United States v. Topco Assocs. Inc.* (n 21) 608.
[28] ibid 610.
[29] ibid.
[30] *Montague & Co. v. Lowry* 193 U.S. 38 (1904) 48; *Eastern States Lumber Ass'n v. United States* 234 U.S. 600 (1914) 608-609, 612; *Kiefer-Stewart Co. v. Seagram & Sons* (n 26) 214; *Times-Picayune Pub. Co. v. United States* 345 U.S. 594 (1953) 625; *Fashion Originators' Guild, Inc. v. FTC* 312 U.S. 457 (1941) 465; *Northern Pac. Ry. Co. v. United States* (n 27) 5; *Klor's, Inc. v. Broadway-Hale Stores, Inc.* 359 U.S. 207 (1959) 211–213; *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963) 348–349; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.* 364 U.S. 656 (1960) 659–660.
[31] *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (n 30) 210.
[32] *Eastern States Lumber Ass'n v. United States* (n 30) 608–609, 612; *Fashion Originators' Guild, Inc. v. FTC* (n 30) 463.
[33] *Eastern States Lumber Ass'n v. United States* (n 30) 614; *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (n 30) 212.
[34] *Eastern States Lumber Ass'n v. United States* (n 30) 614.
[35] *Eastern States Lumber Ass'n v. United States* (n 30) 614; *Fashion Originators' Guild, Inc. v. FTC* (n 30) 468.
[36] *Kiefer-Stewart Co. v. Seagram & Sons* (n 26) 213; *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (n 30) 212.

condemned a group boycott that manufacturers of women garments had adopted in order to fight competitors who allegedly copied their designs as an exercise of private government and assault on the rule of law. The Court blamed the Fashion Originators' Guild with having established 'an extra-governmental agency' and thus 'trenche[d] upon the power of the national legislature'.[37]

This defensive dimension of polycentric competition as a system of antipower radiates far beyond the early days of the Sherman Act and constitutes a recurrent theme in the interpretation of § 1. This becomes, for instance, apparent in *Copperweld*, where the Court aptly summarized the relationship between polycentric competition and the diffusion of power. The Court observed that

> *[c]oncerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centres of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power aimed but suddenly increases the economic power moving in one particular direction.*[38]

In line with a republican understanding of liberty, the early interpretation of § 1 of the Sherman Act thus viewed the potential domination flowing from the 'mere existence of […] a combination and the power acquired'[39] as a source of unfreedom. It treated agreements and combinations which restricted polycentric competition with hostility irrespective of whether the combining parties actually abused their power and interfered with the economic choices of other market participants. Instead of being merely geared towards the preservation of the negative liberty of market players against actual or likely interference, the early case law expressed strong disquietude about the tendency of combined corporate power to create situations of hierarchical subjugation and dependency.[40]

This concern about republican freedom materialises most clearly in the republican imaginary of a master-slave relationship, which the formative case law used to describe the

[37] *Fashion Originators' Guild, Inc. v. FTC* (n 30) 465. Quoting *Addyston Pipe & Steel Co. v. United States* (n 27); *Addyston Pipe & Steel Co. v. United States* (n 27).
[38] *Copperweld Corp. et al. v Independence Tube Corp.* 467 U.S. 752 (1984) 768–769. See also Justice Stevens' dissent agreeing with this statement *Copperweld Corp. et al. v Independence Tube Corp.* (n 47) 790 fn 20; *American Needle, Inc. Petitioner v. National Football League, et al.* (560 U.S. 183 (2010)) 5.
[39] *Northern Securities Co. v. United States* (n 16) 339, 343, 357; *United States v. Trans-Missouri Freight Asso.* 166 U.S. 290 (1897) 319; *United States v. E. C. Knight Co.* (n 14) Justice Harlan, dissenting 43.
[40] *United States v. E. C. Knight Co.* (n 14) Justice Harlan dissenting, 26. *United States v. Trans-Missouri Freight Asso.* (n 39) 323.

domination created by anticompetitive agreements and combinations. It was argued that anticompetitive agreements and combinations would put market participants 'entirely at the mercy of combinations which arbitrarily control' markets.[41] Even if the combining firms were to refrain from actually exercising their power, all other market participants would be nonetheless unfree, as they are subjected to the 'oppression'[42] and 'human slavery' resulting from the concentration of economic power.[43]

This perception of combinations of economic power as a source of domination and unfreedom explains why the republican approach under § 1 did not only oppose the elimination of polycentric competition and the combination of economic power through anticompetitive agreements because of its negative economic consequences. Rather, it perceived anticompetitive agreements allowing market players to escape from the constraints and to form factions as a source of private government, which is incompatible with a republican form of government. Justice Harlan, for instance, warned that

> *[m]onopoly … is odious to our form of government […] destructive of free institutions and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution.*[44]

This republican concern about the concentration of economic power resulting from the combination of previously independent players continued to shape the interpretation of § 1 of the Sherman Act until the 1970s. Economic considerations, while playing an important role in the interpretation of § 1 of the Sherman Act, remained subordinate to the overarching concern of preserving polycentric competition as a central safeguard of liberty.[45] The Supreme Court indeed insisted that ‚antitrust rules serve, among other things, to protect competitive freedom, i.e. freedom of individual business units to compete unhindered by the group action of others.'[46] To identify when a restraint of trade unlawfully restricts competition and runs afoul of § 1 of

[41] *United States v. E. C. Knight Co.* (n 14) Justice Harlan dissenting, 43.
[42] *Standard Oil Co. of New Jersey v. United States* (n 14) Justice Harlan dissenting, 84.
[43] ibid Justice Harlan dissenting, 83.
[44] ibid Justice Harlan dissenting 31 quoting Richardson v Buhl.
[45] *United States v. Trenton Potteries Co.* (n 24) 397.
[46] *Silver v. New York Stock Exchange*, (n 30) 359. For examples highlighting the importance of antitrust law in preserving economic liberty. *Eastern States Lumber Ass'n v. United States* (n 30) 611. *United States v. Socony-Vacuum Oil Co.* (n 24) 221; *Northern Pac. Ry. Co. v. United States* (n 27) 4; *United States v. Topco Assocs. Inc.* (n 21) 610.

the Sherman Act, the Court focused on the tendency of the agreement to restrict the freedom[47] of commerce and to jeopardise the freedom of market participants.[48]

The Court also continued to perceive the preservation of economic liberty as the connecting piece between polycentric competition and a democratic society and polity. In *Northern Pacific Railroads Company*, the Court famously held:

> *The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.*[49]

2.1.2 The Negative Dimension of Polycentric Competition as a System of Antipower and the Interpretation of Art. 101 TFEU

Until recently, the interpretation of Article 101 TFEU followed a similar rationale as the republican case law of the US Supreme Court. For a long time, the Court of Justice of the European Union identified the preservation of a polycentric market structure as the basic rationale of Article 101 TFEU. According to this interpretation, Art. 101 (1) TFEU was directed against forms of coordination that allowed competitors to escape the constrictions that their independent, rivalrous interaction imposed on one another. This structural goal of preserving a polycentric competitive structure as the underlying rationale of Art. 101 TFEU was clearly articulated in the case law. The Court consistently held that Article 101 (1) TFEU prohibits agreements that are not in line

> *with the concept inherent in the [EU] Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article [101 (1) TFEU] is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition.* [50]

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[47] *Eastern States Lumber Ass'n v. United States* (n 30) 611.
[48] *Kiefer-Stewart Co. v. Seagram & Sons* (n 26) 213; *United States v. Topco Assocs. Inc.* (n 21) 610; *Kiefer-Stewart Co. v. Seagram & Sons* (n 26) 211.
[49] *Northern Pac. Ry. Co. v. United States* (n 27) 4.
[50] Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* ECLI:EU:C:2008:643 para. 34. Case 40/73 *Suiker Unie and Others v Commission* ECLI:EU:C:1975:174 para.173; Case 172/80 *Züchner v Bayerische Vereinsbank* ECLI:EU:C:1981:178 para. 13; Joint Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission 'Woodpulp II'* ECLI:EU:C:1993:120 para.

Instead of focusing on the adverse effects of collusion on prices or output, the Court, thus, identified the preservation of polycentric, independent interaction between market players as the central goal of Art. 101 TFEU. The Court consistently emphasized that Article 101 (1) TFEU creates a 'requirement of independence'[51] for market participants that obliges them to act as independent decision-makers. This is most clearly articulated by Advocated General Kokott, who identified polycentricity in the form of 'independence of economic participants [as] one of the basic requirements for competition to function'.[52]

In a similar vein as its US counterpart, the Court thus linked the preservation of a polycentric market structure in the first place with the negative dimension of republican liberty. Polycentric competition was championed as an institution of antipower which prevents instances of collective domination. The purpose of Article 101 TFEU was thus to prohibit coordinated strategies whereby market participants manage to escape the constraints of polycentric competition and will be in the position to exert control over and impose their interest upon other market participants. Advocate General Kokott, for instance, argued that the existence of polycentric competition itself is the best safeguard of the interests of consumers and competitors.[53] This understanding of competition assumes that consumers and society are safe as long as competition is preserved; 'where competition as such is damaged, disadvantages for consumers are also to be feared'[54] and society may be harmed.[55]

63; Case C-199/92 P *Hüls v Commission* ECLI:EU:C:1999:358 para. 159; Case C-49/92 P *Commission v Anic Partecipazioni* ECLI:EU:C:1999:356 para. 116; Case T-14/89 *Montedipe v Commission* ECLI:EU:T:1992:36 para. 232; Case C-7/95 P *Deere v Commission* ECLI:EU:C:1998:256 para. 86; Case T-202/98 *Tate & Lyle and Others v Commission* ECLI:EU:T:2001:185 para. 55; Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:343 para. 32.

[51] Case 40/73 *Suiker Unie and Others v Commission* (n 50) para. 174; Case 172/80 *Züchner v Bayerische Vereinsbank* (n 50) para. 14; Case C-199/92 P *Hüls v Commission* (n 50) para. 160; Case C-49/92 P *Commission v Anic Partecipazioni* (n 50) para. 117; Case T-14/89 *Montedipe v Commission* (n 50) para. 232; Case C-7/95 P *Deere v Commission* (n 50) para. 87; Case T-202/98 *Tate & Lyle and Others v Commission* (n 50) para. 56; Case C-8/08 *T-Mobile Netherlands BV and Others* (n 50) para. 33.

[52] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:110 para. 52.

[53] ibid para. 58. See for a similar argument *Opinion of Advocate General Kokott Case C-293/13 P Fresh Del Monte Produce* ECLI:EU:C:2014:2439 para. 215; Opinion of Advocate General Kokott in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2014:2437 para. 113; Case C-8/08 *T-Mobile Netherlands BV and Others* (n 50) para. 38; Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2015:184 para. 125.

[54] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 52) para. 58. See for a similar argument *Opinion of Advocate General Kokott Case C-293/13 P Fresh Del Monte Produce* (n 53) para. 215; Opinion of Advocate General Kokott in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* (n 53) para. 113.

[55] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 52) paras. 58-59.

This republican concern that market operators might be able to exercise domination by jointly eliminating the constraints that their independent, polycentric interaction would otherwise impose on each other constituted a recurring theme in the Court of Justice's case law. In *BIDS* the Court, for instance, condemned a market sharing and output restriction agreement as a by-object restriction of competition.[56] The fact that the restriction of output was adopted under the blessing of public authorities to overcome a collective action problem and address the externality of overproduction was in the eyes of the Court irrelevant for the legal assessment of the agreement at issue.[57] The Court in *BIDS* observed that, by supplanting collective action to independent, polycentric decision-making, the producers were able to implement a 'common policy' and to pursue their self-interest at the expense of other market participants.[58] The producers thus deviated from the requirement of independence, 'according to which each economic operator must determine independently the policy which it intends to adopt on the common market'[59] Adopting a collective policy brought the producers into a position of control over their industry. This enabled them to 'change, appreciably, the structure of the market'[60] and to arbitrarily interfere with the economic liberty of existing and new competitors.[61]

This concern about arbitrary domination resulting from the combination of market power by agreements became even more apparent in the case law involving collective boycotts.[62] For example, in the recent *Slovakian Banks* case, the Court reaffirmed that group boycotts amount to a restriction of competition by-object, although the parties to the agreement alleged that the collective boycott was necessary to prevent competitors from carrying on an illegal business activity.[63] The Court insisted that the aim of putting an end to the allegedly illegal conduct on the part of competitors does by no means justify private firms to exert private government or self-administered justice[64] by engaging in an anticompetitive group boycott. [65] On the contrary, the Court pointed out that it is not for private undertakings or associations of

[56] Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* (n 50) para. 40. See for a similar holding Case 136/86 *BNIC v Aubert* para. 17.
[57] Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* (n 50) paras. 19-20.
[58] Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* (n 48) para. 34.
[59] ibid para. 34.
[60] ibid paras. 31-33, 38.
[61] ibid paras. 38-39.
[62] Case 96/82 *IAZ v Commission* ECLI:EU:C:1983:310 paras. 25, 38; Case C-189/02 P *Dansk Rørindustri and Others v Commission* ECLI:EU:C:2005:408 paras. 145-146.
[63] Case C-68/12 *Slovenská sporiteľňa* ECLI:EU:C:2013:71 para. 19.
[64] ibid.
[65] ibid.

undertakings, but falls within the responsibility of public authorities to ensure compliance with statutory requirements.[66]

Instead of focusing on their negative consequences on prices or output, the Court and the European Commission stroke down agreements or other forms of coordination that limit the 'decision-making autonomy'[67] of the parties and, thus, deviate from the requirement of independence as restraints of competition.[68] This interpretation of Article 101 TFEU hinged on the premise that, by escaping the checks of polycentric competition, the parties of the agreement would be in the position to exert domination and jeopardise the economic liberty of other market participants. The concept of restriction of competition was, therefore, equated with the limitation of 'commercial freedom' or 'economic freedom' both of the parties to the agreement, as well as the competitors or consumers, which may suffer harm as the result of the agreement.[69]

This concern about economic freedom and the idea of polycentric competition as an institution of antipower considerably echoed Ordoliberal thought. Ordoliberal authors, such as Böhm, had referred to competition as an institution[70] or game,[71] which is based on, and protected by specific rules and principles requiring independent economic decision-making on the part of the players.[72] As we have seen in Chapter 3, the Ordoliberals, stressed that competition by diffusing market power amongst several players ensures a process whereby the

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[66] Case C-68/12 *Slovenská sporiteľňa* (n 63) para. 20; Case 96/82 *IAZ v Commission* (n 62) paras. 25, 38.
[67] Case C-7/95 P *Deere v Commission* (n 50) para. 88.
[68] Case C-7/95 P *Deere v Commission* (n 48) para. 88.
[69] Case 56/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41 p. 343; Case 41/69 *Chemiefarma v Commission* ECLI:EU:C:1970:71 para. 157. Communication relative aux accords, décisions et pratiques concertées concernant la coopération entre entreprises, (No English language version available). OJ [1968] 75/3 4; Case No IV/25107 Décision sur les rabais de la Communauté d'intérêts des fabricants allemands de carreaux céramiques de revêtement et de pavement. OJ [1971] L 10/15 p. 18.Commission submissions in Case 19/77 *Miller v Commission* ECLI:EU:C:1978:19 p. 143; Case 32/78 *BMW Belgium v Commission* ECLI:EU:C:1979:191 para. 36. Case C-70/93 *Bayerische Motorenwerke v ALD* ECLI:EU:C:1995:344 para. 19 - 21; Case 86/82 *Hasselblad v Commission* ECLI:EU:C:1984:65 para. 46; Case No IV/25.757 Hasselblad. OJ [1982] L 161/18 paras. 59, 76; Case No IV/35.679 Novalliance/Systemform. OJ [1997] L 47/11 para. 60; Case No COMP/36.516 Nathan-Bricolux. OJ [2001] L 54/1 para. 75; Case T-67/01 *JCB Service v Commission* ECLI:EU:T:2004:3 para. 85. Case C-306/96 *Javico v Yves Saint Laurent Parfums* ECLI:EU:C:1998:173 para. 13; A. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 112, 114-115, 268. The Court also held that Article 101 (1) TFEU is 'designed to guarantee unfettered freedom of competition at all levels'. Case C-238/99 P *Limburgse Vinyl Maatschappij and Others v Commission* ECLI:EU:C:2002:582 para. 494.
[70] F. Böhm (ed), *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden [1933]* (Nomos 2010) 220, 232, 260, 270, 327.
[71] ibid 206, 227, 254, 303.
[72]This institutional understanding of competition as a game is echoed in the French drafting language of the Treaty of Rome and the working language of the Court which both refer to agreements that bring about 'alterations' to the 'game of competition'. The French version refers to 'altérations du jeu de la concurrence' in Case 56/65 *Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:38 p. 359. See for a similar reference to the 'jeu de la concurence' Case 56/64 *Consten and Grundig v Commission of the EEC* (n 69) p. 496.

players constrain each others' power through their independent decision-making.[73] It was eventually a disciple of Böhm, Ernst-Joachim Mestmäcker, who prominently transposed this idea of competition as an institution of antipower into the context of EU competition law. Mestmäcker suggested that EU competition law does not only seek to protect the individual rights and economic freedom of consumers and competitors against anticompetitive practices (*Individualschutz*). In protecting economic liberty and requiring independent decision-making of market participants, competition law also ensures the protection of competition as an institution (*Institutionenschutz*).[74] In line with the Ordoliberal tradition, Mestmäcker thus highlighted the role of polycentric competition as an institutional safeguard of a domination-free economic and societal order, which enhances liberty as non-domination.

This institutional dimension of polycentric competition as a domination-free economic order and system of antipower had an immediate bearing on the interpretation of Article 101 (1) TFEU. Until recently, the Court of Justice rejected a consequentialist interpretation of competition that merely focuses on its outcome and impact on consumer welfare or interests.[75] The Court instead endorsed the view that Article 101 (1) TFEU protects the competitive process as an 'institution' which has an intrinsic value.[76] The Court clearly echoed Mestmäcker's distinction between the protection of individual rights of consumers and competitors and competition as institution by emphasizing that 'Article [101 TFEU], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.'[77] The Court's interpretation of Art. 101 TFEU thus closely followed the Ordoliberal

[73] F. Böhm, 'Democracy and Economic Power in Cartel and Monopoly in Modern Law [1961]' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 279.
[74] E. J. Mestmäcker, 'Die Beurteilung von Unternehmenszusammenschlüssen nach Article 86 des Vertages über die Europäische Witschaftsgemeinschaft: [1965]' 608.
[75] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 50) paras. 36-37. Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 52) para. 56; Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610 paras. 63-64.
[76] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 52) para. 58. See for a similar argument *Opinion of Advocate General Kokott Case C-293/13 P Fresh Del Monte Produce* (n 53) para. 215; Opinion of Advocate General Kokott in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* (n 53) para. 113.
[77] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 50) para. 38; Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* (n 53) para. 125; Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 52) paras. 58, 60; Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* (n 75) para. 63. Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* (n 53) para. 125.

idea that a competitive market structure in which economic decision-making is decentralised amongst many players constitutes an institutional safeguard of liberty as non-domination.[78]

Like in the US, this republican idea that competition as a polycentric market structure operates like a checks-and-balances system that prevents businesses from arbitrarily interfering with the sphere of autonomy of other market players did not only rest on economic considerations. The European Commission, for instance, repeatedly linked the idea that competition as decentralised market structure creates a checks-and-balances mechanism and safeguard against excessive concentration of economic power with broader political considerations about democracy.[79] This has been most clearly articulated in the Commission's XVth annual report on competition policy:

> *The Member States of the European Community share a common commitment to individual rights, to democratic values and to free institutions. It is those rights, values and institutions at the European and national levels that provide necessary checks and balances in our political systems. Effective competition provides a set of similar checks and balances in the market economy system. It preserves the freedom and right of initiative of the individual economic operator and it fosters the spirit of enterprise. […] Competition policy should ensure that abusive use of market power by a few does not undermine the rights of the many.*[80]

The Commission thus cast competition as a protective arrangement that safeguards economic liberty of market participants against the domination and private government of a few and thereby promotes a form of economic interaction in line with democratic values. From this perspective, Art. 101 TFEU plays a crucial role in the preservation of republican liberty and the competition-democracy nexus. By guaranteeing a polycentric market structure and, thus, reducing the capacity of market players to exert domination and private government, Art. 101 TFEU enhances not only economic welfare but preserves liberty as non-domination as a central republican or democratic value.

2.2 The Positive, Emancipatory Dimension of Polycentric Competition and the Prohibition of Anticompetitive Agreements

Along with this negative dimension of republican liberty as a defensive mechanism against domination, the interpretation of § 1 of the Sherman Act (2.2.1) and Art. 101 TFEU

[78] Böhm (n 73) 279. See also W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 50, 237.
[79] Vth Report on competition policy (1975) 13–14; VIIth Report on competition policy (1977) 10–11; VIIIth Report on competition policy (1978) 12; IXth Report on competition policy (1979) 10; Witt (n 69) 95-96, 99.
[80] XVth Report on competition policy (1985) 11.

(2.2.2) also displayed a profound concern about the positive, egalitarian dimension of republican liberty as equality of opportunity and independent status. By preserving open markets and ensuring the independence of market participants, the republican interpretation of § 1 of the Sherman Act and Art. 101 TFEU also sought to enhance the emancipatory and inclusive character of competitive markets.

2.2.1 The Positive Dimension of Polycentric Competition as System of Antipower in the Interpretation of § 1 of the Sherman Act

From its formative case law onwards, the US Supreme Court perceived the protection of a polycentric market structure not only as a bulwark against the combination of economic power by means of agreements or other forms of coordinated conduct. It also viewed § 1 of the Sherman Act as an essential instrument to safeguard the ideal of a Jeffersonian society composed by independent businessmen as free and equals. This egalitarian, Jeffersonian dimension of republican liberty as non-domination[81] was most clearly articulated in *Trans-Missouri Freight*. Justice Peckman warned that combinations created by means of agreements or other forms of collective action would be capable of 'driving out of business the small dealers and worthy men whose lives have been spent therein.[82] By destroying the economic opportunities of an entire class of small, independent entrepreneurs, combinations of economic power would transform the 'independent business man […] into a mere servant or agent of a corporation […]bound to obey orders issued by others'[83] and subject to 'the sole power and […] the sole will of one powerful combination of capital.'[84].

This positive, egalitarian dimension of republican liberty became a recurrent theme in the interpretation of § 1 of the Sherman Act. For instance, in *Fashion Originator's Guild*, the Court observed that the group boycott adopted by the Guild was incompatible with the equality of opportunity and equal status of all market participants. It rejected the Fashion Guild's argument that the group boycott at issue was necessary to tackle a free-rider problem and enhances efficiency. It instead reverted to Justice Peckham's holding in *Trans-Missouri* to conclude that these alleged efficiency gains would come at the cost of destroying the

[81] Pettit points out that liberty as non-domination is grounded in structural egalitarianism in so far as it assumes that the intensity of liberty as non-domination an individual enjoys is a function of other individuals' power, as well as the individual's own power. For further discussion P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997) 110–120.
[82] *United States v. Trans-Missouri Freight Asso.* (n 39) 323.
[83] ibid 324.
[84] ibid.

opportunities and livelihood of small businesses.[85] Until the 1970s, equality of opportunity and the Jeffersonian ideal of a republican society composed of small independent entrepreneurs continued to play a prominent role in the Court's application of § 1 of the Sherman Act to horizontal restraints. On numerous occasions, the Court indeed emphasised the importance of protecting the competitive process as a safeguard of procedural fairness by ensuring that 'every business, no matter how small' can take part in the competitive race.[86]

The egalitarian objective of preserving the economic opportunity and independent status of small dealers also importantly shaped the application of § 1 of the Sherman Act to vertical agreements. Vertical restraints were indeed for a long time perceived by the Supreme Court as an illegitimate form of subordination and domination, which subjugates retailers to the arbitrary will of manufacturers. This emerged most clearly in *Dr. Miles,* where the US Supreme Court condemned vertical resale price maintenance (RPM) as *per se* violation of § 1 of the Sherman Act.[87] The Supreme Court grounded this strict approach towards vertical RPM in the ancient common law doctrine of restraints upon alienation. This doctrine, coined by the 16th century English common law jurist Sir Edward Coke,[88] postulates that a seller of an article or product from cannot rely on his right to property and contractual freedom to impose restraints on the future sales of a product, once it has been sold on the market against remuneration.[89] The common law tradition, indeed, opposed restraints on alienation as a legal remnant of the feudal legal order.

By approaching resale price maintenance as a restraint of alienation, *Dr. Miles* cast vertical restraints on competition as an undue expansion of control and dominion by the producer of a product on his retailers. The strict attitude towards resale price maintenance in *Dr. Miles* suggested that a manufacturer cannot legitimately rely on his right to property or contractual freedom to exert control over independent dealers, which are not part of his firm and which have obtained ownership of the product they sell.[90] The prohibition of RPM in *Dr. Miles* aimed to prevent manufacturers from subjecting retailers to a hierarchical relationship of control and subordination, which goes beyond the perimeters of their property rights or their

[85] *Fashion Originators' Guild, Inc. v. FTC* (n 30) 467.
[86] *United States v. Topco Assocs. Inc.* (n 21) 610. See for a similar concern about the opportunities and status of small, independent businesses *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (n 30) 212; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.* (n 30) 660.
[87] *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U.S. 373 (1911) 408.
[88] E. Coke, *Institutes of the Laws of England [1628]* .
[89] *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (n 87) 403, for a full discussion 403-406. See also *White Motor Co. v. United States* 372 U.S. 253 (1963) Justice Brennan concurring, 264.
[90] *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (n 87) 408.

firm. The ruling was thus grounded in a profound hostility against hierarchies and private government, which would jeopardise the liberty and equal status of independent retailers. The imposition of vertical restraints on retailers' ability to set prices appeared to be fundamentally at odds with the egalitarian dimension of the republican understanding of competition as equal 'bargaining and contracting between man and man.'[91] The Supreme Court, therefore, did not only seek to preserve polycentric competition between horizontal competitors but also perceived vertical competition between manufacturers and retailers as beneficial.[92] Despite attempts to significantly curtail the implications of *Dr. Miles*,[93] the Court continued to rely on the common law doctrine of restraints on alienation to condemn maximum resale price maintenance[94] and vertical non-price restraints as undue forms of domination and *per se* violations of § 1.[95]

The republican rationale underpinning this strict approach towards vertical restraints manifests itself even more clearly in the distinction drawn by the Court between independent distribution agreements on the one hand, and agency, or so-called 'franchise' agreements on the other. The Court held that price and non-price restraints included in agency agreements are not caught by the *per se* rule,[96] but should be analysed under the rule of reason.[97] The Court justified this differential approach by the fact that under an agency agreement, unlike under a distribution agreement with independent retailers, the manufacturer does not give up his dominion and ownership over the product he sells with the support of his distributor-agents. As the principal, the manufacturer retains the ownership in those products and continues to bear the risk of losses, even if its agents are commissioned with the task of distributing the product. The manufacturer, therefore, has a legitimate interest in maintaining some form of control over its agents, without limiting the degree of independence distributors would otherwise enjoy. The control exerted by the manufacturer over his distributor-agents through agency agreements is hence akin to the hierarchy between the manager and employers within the perimeters of the firm.

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[91] ibid 405. See for this reading also *Cont'l T.V. v. GTE Sylvania* 433 U.S. 36 (1978) Justice White dissenting 67.
[92] R. J. Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2000) 54. For post-Chicago analysis of the importance of vertical competition R. L. Steiner, 'The Nature of Vertical Restraints' (1985) 30 Antitrust Bulletin 143 156–160.
[93] *United States v. Colgate & Co.* 250 U.S. 300 (1919).
[94] *Albrecht v. Globe-Democrat Publishing Co.* 390 U.S. 145 (1968) 152–153.
[95] *United States v. Arnold, Schwinn & Co.* 388 U.S. 365 (1967) 377–379, 380. See, however, for the adoption of a rule of reason approach to vertical non-price restraints three years prior to *Schwinn*: *White Motor Co. v. United States (n 89) 261-262, Justice Brennan concurring 264-265.*
[96] *United States v. Arnold, Schwinn & Co.* (n 95) 379.
[97] ibid 381.

By contrast, in the case of distribution agreements, the manufacturer gives up the 'dominion' over the product it sells to independent retailers.[98] As a consequence, the manufacturer does not retain any legitimate interest in imposing additional restraints upon the future sale of the product by the retailers. Attempts to control the destination or condition of future resales by including vertical restraints in independent distribution agreements, the Court held, 'are so obviously destructive of competition that their mere existence is enough' to bring them within the prohibitive scope of § 1.[99] The Court insisted that '[g]ood business reasons'[100] alone cannot justify manufacturers' attempts to restrict independent dealer's 'freedom as to where and to whom it will resell products'.[101] The Court thus perceived vertical restraints imposed by manufacturers once they have parted with their dominion over the product as undue domination that undermines the autonomy, equal status and economic opportunities of independent retailers.[102]

Until the 1970s, the egalitarian dimension of republican liberty thus had a significant bearing on the interpretation of § 1 of the Sherman Act and the goal of preserving competition as a polycentric market structure. The Supreme Court condemned not only horizontal agreements that undermine the economic opportunities and equal status of small, independent competitors but also vertical restraints that subjugate independent retailers to hierarchical relationships as an assault against the republican ideal of a Jeffersonian society of free and equals.

2.2.2 The Positive Dimension of Polycentric Competition as a System of Antipower in the Interpretation of Art. 101 TFEU

Just as the interpretation of § 1 of the Sherman Act by the Supreme Court was until the 1970s guided by the egalitarian dimension of republican liberty, so too testified the interpretation of Article 101 (1) TFEU by the EU Courts to a concern about the preservation of equality of opportunity amongst competitors. Until today, the EU Courts, for instance, underline that price-fixing agreements and information exchange may harm competitors who are outsiders to a price-fixing conspiracy.[103] This egalitarian concern also explains the strict stance of the Court of Justice against cooperative efforts of industry members to engage in self-

[98] ibid 379.
[99] ibid.
[100] ibid 375.
[101] ibid 378.
[102] See the discussion of District Court Judge Browning's interpretation of *Schwinn* in *Cont'l T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) 53 fn 21 and Justice White dissenting, 67.
[103] Case T-180/15 *Icap and Others v Commission* ECLI:EU:T:2017:795 paras. 70, 75, 80-81.

regulation, which forecloses or hinders competitors. EU Courts have generally treated forms of private regulation whereby private incumbents impose their interests upon the rest of the industry players and reduce the openness of markets to newcomers with great suspicion.[104]

In a similar way as in the US, this egalitarian republican dimension of republican liberty also took the form of a profound hostility against hierarchical relationships of subordination. The concern about preserving the independent status and competitive opportunities of small traders emerged most clearly in the approach of the Commission and EU judicature towards vertical restraints. As early as in *Consten and Grundig*, the Court held that vertical non-price restraints, which led to the creation of a *de facto* ban on parallel imports by independent distributors, amounted to a restriction of competition by object.[105] The Court came to this conclusion, although the parties and interveners had argued that the vertical restraints at issue were comparable to the internal organisation of distribution within a vertically integrated firm or through agency agreements.[106] As vertical restraints enable firms to internalise transaction costs and overcome free-riding problems, it was argued that vertical restraints should be assessed under a rule of reason approach.[107]

The Court, however, rejected this argument. It, instead, endorsed the EU Commission's position, which closely replicated the doctrine of restraints of alienation that had guided the Supreme Court's republican approach towards vertical restraints.[108] The Commission argued that, in the context of agreements with independent distributors, attempts by a manufacturer 'to exercise any influence over the resale of the goods once they have been sold by means of an agreement with his purchasers' would run afoul of Art. 101 TFEU.[109]

The Court followed the Commission's argument that a manufacturer may not retain any control or influence over the distribution of its products once it has sold them to an independent distributor. The Court drew a clear distinction between integrated distribution within a firm or distribution through commercial agents on the one hand, and distribution through independent retailers on the other. Though it acknowledged that both forms of distribution might enhance

[104] Case 96/82 *IAZ v Commission* (n 62) para. 25. Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* (n 50) para. 38. See also more recently Case C-172/14 *ING Pensii* ECLI:EU:C:2015:484 paras. 44, 47, 51.
[105] Case 56/64 *Consten and Grundig v Commission of the EEC* (n 69) p. 344.
[106] ibid pp. 307-309.
[107] Opinion of Advocate General Roemer in Case 56/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:19 358–359.
[108] *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (n 87); *Albrecht v. Globe-Democrat Publishing Co.* (n 94).
[109] Case 56/64 *Consten and Grundig v Commission of the EEC* (n 69) p. 309.

the efficiency of distribution, the Court rejected the proposition that contractual restraints between independent manufacturers and distributors should, by mere reason of economic analogy, be treated in the same way as the internal organisation of distribution within an integrated firm or through an agency model.[110] While vertical restraints that form part of an agency agreement between a principal and its agents usually fall outside Article 101 (1) TFEU, the same restraints, if imposed by a manufacturer on its independent distributors, are caught by Article 101 (1) TFEU.[111]

This distinction between agency and independent distribution agreements has fundamentally shaped the approach of the Courts and the Commission towards vertical restraints. The EU Commission and Courts likened agency agreements with internal agreements between different units of a firm. On most occasions, agency agreements were therefore treated in the same way as intra-firm agreements, which under the so-called 'single economic entity doctrine' fall outside the remit of Article 101 (1) TFEU.[112] This carve-out followed a similar logic as the lenient approach of the US Supreme Court towards agency agreements. It was based on the assumption that, under an agency agreement, the principal has legitimate reasons to exercise control over the distribution and pricing policy of his agent.[113] As the agent acts on behalf and under the instructions of the principal, restrictions on their economic decision-making do not reduce the amount of independence and competition that would otherwise have existed in their absence.[114]

By contrast, Article 101 (1) TFEU applies to vertical restraints, which form part of an independent distribution agreement. In analogy with the doctrine of restraints on alienation, the Commission and the Court affirmed that under an independent distribution agreement, the manufacturer parts with his title over the product once it is sold to independent distributors who

[110] ibid p. 340.
[111] Notice on exclusive dealing contracts with commercial agents. OJ [1962] 139/2921, 2921–2922. Case 311/85 *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* ECLI:EU:C:1987:418 paras. 19-21.
[112] Notice on exclusive dealing contracts with commercial agents (n 111) 2921–2922. Case 56/64 *Consten and Grundig v Commission of the EEC* (n 69) p. 340. *Opinion of Advocate General Mayras in* Case 40/73 *Suiker Unie and Others v Commission* ECLI:EU:C:1975:78 pp. 2101–2103.Case 40/73 *Suiker Unie and Others v Commission* (n 50) paras. 480, 539; Case C-266/93 *Bundeskartellamt v Volkswagen and VAG Leasing* ECLI:EU:C:1995:345 para. 19; Case T-66/99 *Minoan Lines v Commission* ECLI:EU:T:2003:337 paras. 125-128; Case T-325/01 *DaimlerChrysler v Commission* ECLI:EU:T:2005:322 paras. 81-119; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* ECLI:EU:C:2006:784 paras. 38-43; Case T-418/10 *voestalpine and voestalpine Wire Rod Austria v Commission* ECLI:EU:T:2015:516 paras. 138-139. See also R. Whish and D. Bailey, *Competition law* (Oxford University Press 2018) 634–637.
[113] Notice on exclusive dealing contracts with commercial agents (n 111) 2922.
[114] Case T-325/01 *DaimlerChrysler v Commission* (n 112) para. 88; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* (n 112) para. 38.

resell the product on their own account and bear the risk of distribution.[115] This stricter approach towards restraints in independent distribution agreements turns on the implicit assumption that as soon as the manufacturer has sold his product at the market price, he has no more a legitimate interest to interfere with the independent judgment of the distributors in order to exercise control over its re-sale. Vertical restraints in independent distribution agreements were hence considered as instances of illegitimate domination whereby the manufacturer subjects the otherwise independent distributors to a relationship of subordination and projects his power beyond the perimeters of his property rights and or the boundaries of the firm.

It is this concern about the adverse effect of vertical restraints upon the freedom and status of distributors as independent market operators, which informed the strict application of Art. 101 TFEU to vertical restraints. The Commission and the Court consistently treated vertical non-price[116] and price restraints[117] through which the manufacturer reduce the freedom of action of retailers as restrictions of competition in breach of Art. 101 TFEU,[118] even in cases where the retailers themselves asked the manufacturer to adopt the restraints. [119]

This concern about preserving the independent status and equality of opportunity of traders played a prominent role in cases involving vertical and horizontal restraints that hindered distributors from engaging in parallel trade between Member States. Following *Consten and Grunding*, the Commission and the EU Courts have consistently condemned vertical restraints, which entailed a *de facto* ban on parallel imports by independent distributors

[115] Notice on exclusive dealing contracts with commercial agents (n 111) 2921–2922; Case 56/64 *Consten and Grundig v Commission of the EEC* (n 69) 338 and 340; Case C-266/93 *Bundeskartellamt v Volkswagen and VAG Leasing* (n 112) para. 17.
[116] See for instance the Commission submissions in Case 19/77 *Miller v Commission* (n 69) p. 143; Case 32/78 *BMW Belgium v Commission* (n 69) para. 36. Case C-70/93 *Bayerische Motorenwerke v ALD* (n 69) para. 19 - 21; Case 86/82 *Hasselblad v Commission* (n 69) para. 46; Case No IV/25.757 Hasselblad (n 69) paras. 59, 76; Case No IV/35.679 Novalliance/Systemform (n 69) para. 60; Case No COMP/36.516 Nathan-Bricolux (n 69) para. 75; Case T-67/01 *JCB Service v Commission* (n 69) para. 85; Case C-306/96 *Javico v Yves Saint Laurent Parfums* (n 69) para. 13.
[117] Case No IV/26.912 Hennessy-Henkell. OJ [1980] L 383/11 para. 20; Case 107/82 *AEG v Commission* ECLI:EU:C:1983:293 paras. 43, 60, 107-135; Case No IV/28.748 AEG-Telefunken. OJ [1982] L 117/15 para. 68. Case 311/85 *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* (n 111) para. 17. Case 161/84 *Pronuptia* ECLI:EU:C:1986:41 para. 25; Case No IV/35.679 Novalliance/Systemform (n 69) para. 61; Case No COMP/36.516 Nathan-Bricolux (n 69) paras. 86-88; Case No COMP/36.693 Volkswagen (Volkswagen II). OJ [2001] L 262/14 para. 76; Case 27/87 *Erauw-Jacquery v La Hesbignonne* ECLI:EU:C:1988:183 para. 25.
[118] See for instance the Commission submissions in Case 19/77 *Miller v Commission* (n 69) p. 143; Case 32/78 *BMW Belgium v Commission* (n 69) para. 36. Case C-70/93 *Bayerische Motorenwerke v ALD* (n 69) para. 19 - 21; Case 86/82 *Hasselblad v Commission* (n 69) para. 46; Case No IV/25.757 Hasselblad (n 69) paras. 59, 76; Case No IV/35.679 Novalliance/Systemform (n 69) para. 60; Case No COMP/36.516 Nathan-Bricolux (n 69) para. 75; Case T-67/01 *JCB Service v Commission* (n 69) para. 85.
[119] Case 19/77 *Miller v Commission* (n 69) para. 7.

as a restriction of competition by object.[120] Along similar lines, the EU Courts and Commission have adopted a particularly harsh stance against horizontal agreements, which foreclosed parallel importers and new entrants from other Member States.[121] This hostile approach against vertical and horizontal restrictions of parallel trade reflects the fundamental role of small, independent traders as 'heroes'[122] and drivers of European economic integration. In just the same way as the Jeffersonian goal of preserving the opportunities of small, independent entrepreneurs importantly influenced the interpretation of § 1 of the Sherman Act, so too lay the protection of the opportunities and independent status of traders, parallel importers and foreign competitors at the heart of the interpretation of Art. 101 TFEU. While the Supreme Court idealised the small, independent entrepreneur as the prototype citizen in the Jeffersonian republic, the independent parallel importer became the epitome of the republican 'free-man' or 'market citizen'[123] of a nascent European polity. By making use of their free movement rights and by interpenetrating national markets, independent dealers and parallel traders were perceived as key players for the achievement of a genuine European Internal Market and the underpinning political project of a European polity.[124]

2.3 Polycentric Competition and the Republican Approach towards Coordinated Conduct

Under the republican approach prevailing until the 1970s in the US and until the 2000s in Europe, the interpretation of § 1 of the Sherman Act and Art. 101 TFEU was hence not only grounded in a concern about the adverse effects of restrictive agreements on total and consumer welfare, in the form of higher prices or lower output. Rather, US and EU courts and enforcers considered the prohibition of anticompetitive agreements as being primarily aimed at preserving a polycentric structure and functioning of markets as an institution of antipower and safeguard of liberty as non-domination. With respect to horizontal agreements, republican antitrust focused on the collective power that suddenly emerges when previously independent market players join their forces by contract or other forms of coordinated action. Republican

[120] Case 56/64 *Consten and Grundig v Commission of the EEC* (n 69) p. 344; Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* (n 75) paras. 59-61; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* ECLI:EU:C:2011:649 paras. 47, 53-54.
[121] Case 96/82 *IAZ v Commission* (n 62) para. 25; Case C-68/12 *Slovenská sporiteľňa* (n 63) para. 19; Case C-172/14 *ING Pensii* (n 104) para. 51.
[122] L. Gyselen, 'Vertical Restraints in the Distribution Process: Strength and Weakness of the Free-Rider Rationale under EEC Competition Law' (1984) 21 Common Market Law Review 647.
[123] For a critical discussion of the prominent role of the concept of market citizenship for the construction of EU citizenship N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(6) Common Market Law Review, Issue 1597.
[124] Gyselen (n 122), 649.

antitrust also displayed a hostile stance against vertical price and non-price restraints, when they serve manufacturers to subject their retailers into a hierarchical relationship of subordination and to exert control beyond the boundaries of the firm. By preserving a polycentric market structure and interaction between competitors, the republican interpretation of § 1 of the Sherman Act and Art. 101 TFEU pursued a two-fold rationale. On the one hand, the application of § 1 of the Sherman Act was informed by a negative, defensive rationale that sought to prevent market players from eliminating competition with a view of exerting domination and imposing their interests upon other market participants. On the other hand, the republican interpretation of § 1 and Art. 101 TFEU also perceived polycentric competition as a catalyst of the positive, emancipatory dimension of republican liberty. By protecting the polycentric structure and operation of markets against coordinated conduct, the republican interpretation of § 1 of the Sherman Act and Art. 101 TFEU was geared towards preserving the equality of opportunity and independent status of small entrepreneurs against instances of subordination and hierarchy. It thus strived to guarantee competition as a heterarchical, domination-free mode of economic interaction and coordination of economic activity between independent, free and equal market participants. The republican interpretation of § 1 of the Sherman Act and Art. 101 TFEU thus enhanced republican liberty by making sure that firms interact, like bees, in a polycentric manner, instead of degenerating into Behemoths who, by grouping their forces through secret agreement or other forms of coordinated action, become capable of exerting private government and imposing their idiosyncratic interests upon other market participants.

3 Republican Liberty and the Regulation of Monopoly Power

The operationalization of republican liberty as non-domination and the concept of the competition-democracy nexus through a structuralist approach was, however, not only confined to the first pillar of competition law which prohibits anticompetitive agreements. The goal of preventing the concentration of economic power and preserving a polycentric market structure as a safeguard of republican liberty as non-domination played an even more prominent role under the second pillar of antitrust law which regulates monopoly power. Until the 1970s, the application of US antitrust rules, such as § 2 of the Sherman Act, § 3 of the Clayton Act[125] and § 2 (a) of Clayton Act subsequently amended by the Robinson-Patman Act,[126] to powerful firms

[125] 15 U.S. Code § 14. Sale, etc. on agreement not to use goods of competitor (n 2).
[126] 15 U.S. Code § 13. Discrimination in price, services, or facilities (n 3).

was clearly informed by a hostile stance towards economic concentration and firm size. To preserve republican liberty, the application of US antitrust rules to powerful firms was geared towards securing a market structure in which economic power is decentralized amongst multiple players. Until the early 2000s, the interpretation of Article 102 TFEU displayed a similar concern about economic concentration and the preservation of competition as a decentralized market structure. This hostility against the concentration of economic power in the hands of a single firm and the goal of preserving a polycentric market structure of the republican approach towards monopoly also followed the negative, defensive (3.1) and positive, emancipatory logic of republican liberty (3.2.).

3.1 The Negative Dimension of Polycentric Competition as a System of Antipower and the Regulation of Monopoly Power

In a similar vein as under the first pillar of competition law, US antitrust (3.1.1) and EU competition rules (3.1.2) regulating monopoly power operationalised the ideal of republican liberty through a structural approach that seeks to preserve a polycentric market structure as an institution of antipower. This structural approach, hence, followed the primarily negative, defensive dimension of republican liberty. It pursued the goal of safeguarding polycentric competition as a protective barrier against potential domination emanating from the concentration of economic power within the hands of a single firm.

3.1.1 The Negative, Defensive Dimension of Polycentric Competition and the Regulation of Monopoly Power under US Antitrust Law

Throughout the formative era of the Sherman Act, monopoly was primarily perceived as the outcome of collective or collusive elimination of rivalry through agreement or combination (merger) by competing firms. As a consequence, § 2 of the Sherman Act played only a subsidiary role to § 1 of the Sherman Act. [127] The Court often held that by combining their forces to eliminate competition, the parties had not only violated § 1of the Sherman Act but also engaged in joint monopolization in breach of § 2. Early rulings suggested that the Supreme Court perceived concentration of economic power in the hands of a single firm as a source of unfreedom and condemned it as a breach of the Sherman Act, without inquiring into

[127] See for instance Rahl (n 13), 747.A. Director and E. H. Levi, 'Law and the Future: Trade Regulation' (1956) 51 Nw. U. L. Rev. 281 282–283.

whether the monopolist had engaged in any conduct which interfered with other market participants.[128]

Throughout the first half of the 20th century, the interpretation of antitrust rules against monopoly power centred upon the question of whether the possession of monopoly power and, hence, the excessive concentration of economic power is in and of itself prohibited under antitrust laws or whether some exclusionary conduct must be demonstrated in addition.[129] The Supreme Court remained divided upon this issue. The majority in *US Steel*, for instance, intimated that § 2 of the Sherman Act does not 'make mere size […] or the existence of unexerted power an offence'.[130] By contrast, the dissenting opinion in *US Steel* affirmed that the Sherman Act had not only been adopted to outlaw 'unfair practices' by dominant firms.[131] Rather, Congress, by passing the Sherman Act, had also intended to address the 'scope of such combinations, and their power to suppress and stifle competition and create or tend to create monopolies'.[132] In the 1932 *Swift* case, the Court further qualified the sweeping statement of *US Steel*. It insisted that 'mere size […] is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly […] but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilised in the past.'[133] The Court here reverted to the republican position against monopolies, insisting that Section § 2 serves to keep 'a check upon their power'[134] by preserving a polycentric market structure and averting the excessive concentration of economic power in the hands of a single firm.

At the same time, Congress also sought to tackle the continuous problem of industry concentration through the adoption of the 1914 Clayton Act, which imposed additional constraints upon powerful Behemoths. § 3 and § 2 (a) of the 1914 Clayton Act and its amendment by the 1936 Robinson Patman Act established a prohibition of certain forms of exclusive dealing, tying and price discrimination. These prohibitions hinged on the assumption that exclusive dealing, tying and geographic price cuts were tainted by a natural tendency

[128] *Northern Securities Co. v. United States* (n 16) 351-352, see also 335, 337-338, 340; Sullivan (n 5) 34–35; E. H. Levi, 'The Antitrust Laws and Monopoly' (1947) 14 U. Chi. L. Rev. 153 157.
[129] *Standard Oil Co. of New Jersey v. United States* (n 14) 62.
[130] *United States v. U. S. Steel Corp.* 251 U.S. 417 (1920) 451. See also *United States v. Int. Harvester Co.* 274 U.S. 693 (1927) 708.
[131] *United States v. U. S. Steel Corp.* (n 130) Justice Day dissenting, 463.
[132] ibid Justice Day dissenting 461, 464.
[133] *United States v. Swift & Co.* 286 U.S. 106 (1932) 116.
[134] ibid.

towards monopoly and market concentration.[135] In keeping with this Congressional concern about industry concentration, the Supreme Court subsequently the prohibition of business conduct whose 'effect […] may be to substantially lessen competition or tend to create a monopoly'[136] under § 2 (a) and 3 of the Clayton Act as a sign for the Congressional intent to prevent monopoly and, hence, market concentration in its incipiency, that means before it reaches the stage of a violation of § 1 and § 2 Sherman Act. [137]

The republican hostility and the structural approach against concentrated economic power and size on the interpretation of § 2 reached its pinnacle with the *Alcoa* judgment in 1945. In *Alcoa*, Judge Learned Hand resurrected the republican notion that size and monopoly power in themselves – regardless of the legality of their acquisition – were sufficient to find unlawful monopolization in breach of § 2 Sherman Act.[138] Learned Hand, indeed, held that no showing of 'exclusion' of competitors or 'something else than "natural" or "normal" growth' would be necessary to find a breach of § 2.[139] Nor would any evidence of 'specific intent' to monopolise be required to trigger the application of § 2, 'for no monopolist monopolizes unconscious of what he is doing.'[140] Rather, to sustain a finding of illegal monopolization in breach of § 2 of the Sherman Act, it would be enough for the plaintiff to show that a firm held a monopoly position. The onus, then, falls on the defendant to show that it had not abused the monopoly power[141] or that it is the outcome of superior efficiency.[142]

Alcoa explicitly dispensed with the showing that the monopolist's conduct actually or likely interfered with the negative liberty of other market participants by charging higher prices or excluding competitors. Instead, Judge Hand perceived monopoly and, hence, excessive concentration of economic power in the hands of a single firm as objectionable in itself. To Judge Hand, the mere capacity of a monopolist to arbitrarily interfere with competition subjected other market participants into a state of dependence and unfreedom. The *Alcoa*

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[135] H. R. Rep. No 627, 63d Cong. 2d Sess. 11–12. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* 466 U.S. 2 (1984) 10–11. Sullivan (n 5) 677-684; *Moore v. Mead's Fine Bread Co.* 348 U.S. 115 (1954) 119; *F. T. C. v. Anheuser-Busch, Inc.* 363 U.S. 536 (1960) 539-540, 543 fn. 8.
[136] 15 U.S. Code § 13. Discrimination in price, services, or facilities (n 3).15 U.S. Code § 14. Sale, etc. on agreement not to use goods of competitor (n 2).
[137] *Standard Fashion Company v. Magrane-Houston Company* (346 U.S. 258 (1921)) 356; Sullivan (n 5) 432. See also with respect to price discrimination H. C. Hansen, 'Robinson-Patman Law: A Review and Analysis' (1983) 51 Fordham Law Review 1113 1134; *Utah Pie Co. v. Continental Baking Co.* 386 U.S. 685 (1967) 703.
[138] See in this respect the apt summary of the evolution of the § 2 case law by Judge Wyzanski in *United States v. United Shoe Machinery Corp.* 110 F. Supp. 295 (D. Mass. 1953) 341. Director and Levi (n 127), 281, 284-286.
[139] *United States v. Alcoa* 148 F.2d 416 (2d Cir. 1945) 429.
[140] ibid 429, 432.
[141] ibid 427.
[142] ibid 429.

judgment thus clearly re-established the concern about preserving a de-concentrated market structure as an institution of antipower and essential safeguard of republican liberty as central rationale of § 2 of the Sherman Act.

This republican turn in the application of § 2 of the Sherman Act against monopolistic firms was not a singular phenomenon, but it was subsequently endorsed by the Supreme Court.[143] Referring to *Alcoa* in the affirmative,[144] the Supreme Court reaffirmed only one year later in *American Tobacco* that no 'proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors' was necessary to sustain a finding of unlawful monopolization.[145] The Court held that it was irrelevant whether monopoly power was actually exercised to raise prices or foreclose competitors.[146] What mattered was the existence of such power combined with 'the intent and purpose to exercise such power'.[147] In a string of cases involving the distribution and exhibition of motion pictures, Justice Douglas writing for the majority reiterated the test adopted in *American Tobacco*. Justice Douglas took the view that not only the use of monopoly power but the mere existence of power '"to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power.'[148] In *Griffith,* Justice Douglas insisted that

> *monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even it remains unexercised. For § 2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control.*[149]

While the Court stopped short of condemning firm size as being in itself unlawful, it nonetheless held that size is 'of course an earmark of monopoly power',[150] which is, in turn, illegal. Although *Alcoa*[151] and *American Tobacco*[152] recognised an efficiency defence for monopoly power which is not actively 'achieved' but 'thrust upon', monopoly power and size were viewed as 'inevitably suspect'.[153] The US courts thus endorsed the republican position

[143] See in this regard also Judge Wyzanski's account of the evolution of the § 2 case law *United States v. United Shoe Machinery Corp.* (n 138) 341.*United States v. United Shoe Machinery Corp.* (n 112) 341.
[144] *American Tobacco Co. v. U.S.* 328 U.S. 781 (1946). 813–814.
[145] ibid 809.
[146] ibid 811.
[147] ibid 809, 814-815.
[148] *United States v. Griffith* 334 U.S. 100 (1948) 107; *United States v. Paramount Pictures* 334 U.S. 131 (1948) 173–174; *Schine Theatres v. United States* 334 U.S. 110 (1948) 129–130.
[149] *United States v. Griffith* (n 148) 107. *United States v. Paramount Pictures* (n 148) 137. *Schine Theatres v. United States* (n 148) 130. *United States v. Columbia Steel Co.* 334 U.S. 495 (1948) 524 fn 24.
[150] *United States v. Griffith* (n 148) 107 fn. 10; *United States v. Paramount Pictures* (n 148) 174.
[151] *United States v. Alcoa* (n 139) 429.
[152] *American Tobacco Co. v. U.S.* (n 144) 786, 800-804.
[153] *United States v. United Shoe Machinery Corp.* (n 112) 347.

that ‘market control is inherently evil and constitutes a violation of § 2 unless economically inevitable, or specifically authorized and regulated by law.’[154]

This structural concern about the concentration of economic power in the hands of gigantic Behemoths was primarily animated by the defensive dimension of republican liberty. This defensive dimension perceives a polycentric market structure in which power is dispersed amongst the many as checks-and-balance mechanism preventing powerful firms from exerting domination. From the republican vantage point, § 2 of the Sherman Act was, therefore, not exclusively directed against specific conduct whereby powerful firms interfere with the negative liberty of other market participants, for instance, by driving competitors from the market and raising prices. Rather the republican reading of § 2 of the Sherman Act also sought to tackle the situation of ‘effective control’ and ‘domination’[155] that emanates from the concentration of economic power in the hands of a few players. The proponents of this republican approach affirmed that ‘concentrations of power, no matter how beneficently they appear to have acted’ were ‘inherently dangerous’.[156] This republican reading of § 2 Sherman Act thus assumed that the Sherman Act ‘is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.’ [157]

Republican antitrust thus championed an application of § 2 of the Sherman Act which would reduce the exposure and subjugation of market participants to concentrated economic power in order to ensure ‘that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.’[158] To preserve republican liberty as non-domination economic power should be ‘decentralised’ and ‘scattered into many hands’ with a view to avoiding unfreedom resulting from the fact of being subjugated and defencelessly exposed to the ‘whim’ and ‘caprices’ of a few all-powerful masters.[159]

In stressing this protective dimension of republican liberty as non-domination, the proponents of republican antitrust also reanimated the idea of a link between competition and

[154] *United States v. United Shoe Machinery Corp.* (n 138) 345.
[155] *United States v. Columbia Steel Co.* (n 149) Justice Douglas, Black, Murphy, Rutledge dissenting 540; *United States v. Paramount Pictures* (n 148) 165.
[156] *United States v. United Shoe Machinery Corp.* (n 138) 347.
[157] *United States v. Columbia Steel Co.* (n 149) Justice Douglas, Black, Murphy, Rutledge dissenting 536. In their dissent, the Justices bemoaned that the ‚Court forgot this lesson‘ in US Steel and International Harvester, as well as the majority opinion in Columbia Steel ibid 536.
[158] ibid Justice Douglas, Black, Murphy, Rutledge dissenting 536.
[159] *United States v. Columbia Steel Co.* (n 149) Justice Douglas, Black, Murphy, Rutledge dissenting 536; *United States v. United Shoe Machinery Corp.* (n 138) 347.

democracy. Judge Hand, for instance, highlighted that the Sherman Act does not only seek to prevent firms from charging higher prices to consumers, but pursues 'wider purposes'.[160] He claimed that Congress 'did not condone "good trusts" and condemn "bad" ones [but] forbad all'.[161] This categorical, *per se* prohibition of trusts, Judge Learned asserted, was grounded in concerns about the 'indirect social or moral' effects of monopoly.[162] The Sherman Act is grounded in the 'belief that great industrial consolidations are inherently undesirable regardless of their economic results.'[163] To Judge Hand, the key message of the Sherman Act was that the concentration of economic power leads to a 'kingly prerogative, inconsistent with our form of government'.[164] *Alcoa* thus remobilised the republican theme that the concentration of economic power is at odds with a republican polity and society of free and equals. It thus reaffirmed the concern underpinning the competition-democracy nexus, which presumes that private economic power by undermining republican liberty will ultimately also corrode democracy. The proponents of republican antitrust viewed competition law as a bulwark against private government. To them, antitrust law stood for the proposition that '[p]ower that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy.'[165]

3.1.2 The Negative Dimension of Polycentric Competition and the Regulation of Monopoly Power under Art. 102 TFEU

Unlike the US Courts, the EU judicature has never adopted an interpretation of the prohibition of abuse of dominance in Article 102 TFEU which would outlaw monopoly power and economic concentration as such. Its interpretation of Article 102 TFEU was nonetheless profoundly animated by a concern about the concentration of economic power and the goal of preserving a polycentric market structure as a protective mechanism against domination.

To fully grasp this structural concern underpinning the prohibition of abuse of dominance, it is worthwhile to briefly reconsider the interpretative history of Art. 102 TFEU. Soon after the signature and ratification of the Treaty of Rome in 1957, an intensive debate on

[160] *United States v. Alcoa* (n 139) 427.
[161] ibid.
[162] ibid.
[163] ibid 428.
[164] ibid 428 fn 1.
[165] *United States v. Columbia Steel Co.* (n 149) Justice Douglas, Black, Murphy, Rutledge dissenting 536, 539-540.

the proper interpretation of the prohibition of abuse of a dominant position had seen the day.[166] This debate crucially revolved around the two conflicting notions of republican and negative liberty. On the one hand, Professor Joliet – later Judge at the Court of Justice – prominently argued that the express reference in Art. 102 TFEU to specific abuses of a dominant position was a clear sign that the provision was not directed against the mere existence of a dominant position as such. Judge Joliet affirmed that the

> *approach taken by [Art. 102] is based upon an attitude of neutrality toward the existence of dominant positions. It does not try to break up monopolistic positions, but instead, is confined to supervising the conduct and performance of dominant firms.*[167]

Instead of seeking to protect a competitive market structure, the purpose of Art. 102 TFEU consisted only of regulating the behaviour of dominant firms. Judge Joliet, moreover, insisted that Art. 102 only outlawed exploitative abuses of market power that harm consumers. Unlike § 2 of the Sherman Act, Art. 102 TFEU, therefore, could not be used to take action against exclusionary abuses whereby the dominant firm drives other competitors from the market.[168] Judge Joliet, thus, clearly endorsed a reading of Art. 102 that rested on a negative concept of liberty. Joliet did not view the existence of concentrated market power as a problem as such. Rather, he insisted that Art. 102 TFEU only applies to conduct by dominant firms that actually or likely interferes with the liberty of and harms consumers.[169]

On the other hand, Professor Ernst-Joachim Mestmäcker, who, as a special advisor to the Directorate General for Competition within the European Commission,[170] influentially shaped the development of Art. 102 TFEU, took a diametrically opposed view. As a disciple of Franz Böhm, Mestmäcker was closely associated with the Ordoliberal school, which perceived the concentration of economic power in itself as a source of domination and unfreedom. The Ordoliberal concern about concentrated economic power, as we have discussed in Chapter 3, was rooted in the republican notion of liberty as non-domination. It perceived the existence of dominant market players as a cause of dependence and subordination, which was incompatible

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[166] H. Schweitzer, 'Parallels and Differences in the Attitudes towards Single-Firm Conduct: What are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC' . EUI Law Working Paper 32/2007 18–19 <http://cadmus.eui.eu/handle/1814/7626> accessed 30 September 2018.
[167] R. Joliet, *Monopolization and abuse of dominant position : a comparative study of the American and European approaches to the control of economic power* (1970) 127–128.
[168] ibid 131.
[169] ibid. See also E. J. Mestmäcker, 'Towards a Concept of Workable European Competition Law: Revisiting the Formative Period' in K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* 201–202.
[170] Schweitzer (n 166) 18.

with the republican ideal of a society of free and equals. Unlike Eucken and Miksch, who called for the break-up of monopolies and the regulation of dominant and oligopolistic firms based on the principle of 'as-if' competition,[171] Mestmäcker endorsed the more moderate position of Franz Böhm. Instead of attacking market power directly, Böhm had suggested that the ideal of republican liberty could be protected by prohibiting dominant firms from further strengthening their market power through conduct that forecloses smaller competitors.[172]

While conceding that Art. 102 is not prohibiting the existence of concentrated economic power or the possession of a dominant position as such, Mestmäcker insisted that it nonetheless sought to preserve an effectively competitive market structure.[173] He, therefore, repudiated Joliet's claim that Art. 102 TFEU was only concerned about exploitative abuses that harmed consumer welfare directly. Mestmäcker, instead, asserted that Art. 102 TFEU is primarily directed against exclusionary conduct whereby dominant firms eliminate the remaining, residual competition in the market.[174] On this basis, Mestmäcker advanced the view that the existence of an abuse of dominance could not be determined based on the immediate effect of single-firm conduct on third parties, that is, consumers and competitors.[175] What matters is rather the extent to which certain conduct allows the dominant firm to control the market and insulate or strengthen its dominant position by eliminating actual or potential competitors that might constrain or diffuse its market power.[176] In other words, Mestmäcker disputed the view that Art. 102 TFEU, in line with the logic of negative liberty as non-interference, exclusively prohibits dominant firm conduct, which actually or likely interferes with consumers and competitors. On the contrary, he suggested that the prohibition of abuse of dominance is, above all, concerned about the potential domination that dominant firms may exert by reason of the weakening of a competitive market structure.[177]

This republican concern about domination surfaces most clearly in Mestmäcker's claim that EU competition law should protect competition as an institution, which, as discussed in the

[171] Mestmäcker (n 74) 607–608.
[172] This strand of Ordoliberalism is often ignored by existing scholarship which explores the influence of Ordoliberalism on Art. 102 TFEU. Most commentators, erroneously associate Ordoliberalism with direct intervention against monopoly power advocated by Eucken and Miksch. P. Larouche and M. P. Schinkel, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act' (TILEC Discussion Paper No. 2013-02, Tilburg 2013)) 11; P. Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (CCP Working Paper, 2007) 20, 24.
[173] Mestmäcker (n 74) 604; Schweitzer (n 166) 18–19.
[174] Schweitzer (n 166) 18.
[175] ibid 19.
[176] Mestmäcker (n 74) 606, 608.
[177] ibid.

previous section, also shaped the interpretation of Art. 101 TFEU. Mestmäcker affirmed that Art. 102 TFEU does not only seek to ensure the protection of individual rights of third-parties, that is, competitors and consumers (*Individualschutz*). Rather, by protecting the rights of competitors and consumers, Art. 102 also aims to preserve a competitive, polycentric market structure as an institution (*Institutionenschutz*).[178] This emphasis on the importance of protecting competition as an institution is yet another expression of the Ordoliberal understanding of economic liberty in its republican sense as non-domination. Polycentric competition, from this vantage point, operates as a defensive institution of antipower, which ensures economic liberty by guaranteeing a domination-free economic order. Indeed, competition ensures that economic power is dispersed amongst a multitude of players who, through their independent interaction, impose impersonal checks upon their capacity to exert domination.[179] On the basis of this notion of competition as an institution of antipower, Mestmäcker suggested that while Art. 102 is not outlawing the existence of a dominant position as such, it nonetheless follows a structural rationale: it prohibits as abuse the maintenance and further strengthening of a dominant position through the elimination of residual competition.[180]

In *Continental Can,* the Court of Justice settled the academic debate between Judge Joliet and Professor Mestmäcker by siding with the latter. It held that the provision of Art. 102 TFEU must be read as pursuing, in the same way as Art. 101 TFEU, the goal of protecting 'effective competition' in the market.[181] Accordingly, Art. 102 TFEU 'is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.'[182] The Court in *Continental Can*, thus, endorsed a reading of Art. 102 TFEU that mirrors Mestmäcker's understanding of the two-fold role of competition law: on the one hand, competition law protects the individual rights of market participants (*Individualschutz*); on the other hand, by it also protects a polycentric market structure as an institution of antipower (*Institutionenschutz*).[183] The Court warned that the goal of preserving an effectively competitive market structure would be seriously jeopardised, were Article 102 TFEU to permit that firms 'reach such a dominant position that any serious chance of competition is practically rendered

[178] ibid 608.
[179] Böhm (n 73) 279.
[180] Mestmäcker (n 74) 605–608; Schweitzer (n 166) 18–19.
[181] Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* ECLI:EU:C:1973:22 para. 25.
[182] ibid para. 26. See for similar holdings Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36 para. 126; Case C-95/04 P *British Airways plc v Commission of the European Communities* ECLI:EU:C:2007:166 para. 106.
[183] Mestmäcker (n 74) 608.

impossible.'[184] Drawing upon this structural understanding of competition, the Court clarified that an

> *[a]buse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.*[185]

Remarkably, in *Continental Can* the Court did not associate the abuse of dominance with any specific conduct by which the dominant firm interferes with the liberty of other market participants. Echoing the republican imaginary of unfreedom as dependence or master-slave relationship, the Court defined abuse as a strengthening of a position of economic power which subjects the remaining market participants into a relationship of dependence on the dominant firm. Instead of referring to any specific conduct, this definition of abuse of dominance rather focused on the situation of domination, subordination and dependence market participants are subject to in the presence of the excessive concentration of economic power within the hands of a dominant firm. The Court, moreover, took the view that that the concept of abuse of dominance does not presuppose a link of causality between the dominant position and the abuse[186] and clarified that the provision applies to conduct by dominant firms ‚irrespective of any fault'.[187] Such a non-fault abuse of dominance may occur if an 'undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer's freedom of action in the market.'[188] This is the case if competition is eliminated to the extent that 'remaining competitors could no more provide a sufficient counterweight.'[189]

In line with the republican notion of liberty, *Continental Can* cast the strengthening of a dominant position and, hence, an increase of economic concentration as a source of unfreedom. The Court did not locate the harm the provision of Art. 102 TFEU is supposed to prevent in the fact that the dominant firm actually interfered with the liberty of consumers or competitors. Rather, the Court seemed to suggest that liberty of market participants is compromised, once the concentration of economic power reaches a level where the dominant

[184] Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* (n 181) para. 25.
[185] ibid para. 26. Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:2000:132 para. 113; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:1998:518 para. 131.
[186] Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* (n 181) para. 27.
[187] ibid para. 29.
[188] ibid.
[189] ibid.

firm is no longer sufficiently constrained by competitors. Accordingly, instances of domination emerge if powerful firms are no more subject to some form of counterweight or checks and balances that residual competitors would otherwise impose on their power. Clearly, the Court thus located the cause of this domination in the fettering of competition by a change in the market structure. This structural approach assumed that the weakening of a polycentric market structure increases the overall level of domination prevailing in a market through two channels. On the one hand, it leads to an increased concentration of economic power in the hand of the dominant firm. On the other hand, it also marginalizes the counterweight exerted by the remaining competitors.

This republican imaginary of polycentric competition as an accountability-mechanism or system of checks-and-balances, which prevents powerful firms from exercising domination, also resonates in the definition of a 'dominant position' subsequently established in *United Brands* and *Hofmann-La Roche*. The Court clarified that the notion of dominant position under Article 102 TFEU

> *relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*[190]

The concept of a dominant position coined by the Court of Justice was hence not confined to a purely economic definition of market power as the ability to profitably raise prices or restrict output.[191] Rather, the Court coined a relational definition, which perceived dominance as a situation where the market structure and degree of polycentric rivalry are weakened to the extent that rival competitors or consumers are no longer imposing countervailing constraints on the discretion of the dominant firm. This is yet another example of the fact that the Court, in the same way as under Art. 101, primarily associated competition with a polycentric market structure in which economic power is dispersed among multiple players.

The structural and republican thrust of *Continental Can* clearly set the tone for the subsequent interpretation of Art. 102 TFEU. The structuralist understanding of competition was

[190] Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22 para. 65; Case 85/76 *Hoffmann-La Roche v Commission* (n 182) para. 38.
[191] G. Monti, 'The Concept of Dominance in Article 82' (2006) 2(sup1) Euro Comp J 31 39–40.

not only confined to the definition of 'dominant position' but also had an important bearing on the concept of 'abuse of a dominant market position'. The Court's interpretation of the concept of 'abuse of dominance' closely followed Mestmäcker's Ordoliberal position that Art. 102 TFEU should outlaw dominant firm conduct that strengthened the power of dominant firms by foreclosing residual competition. In *Hoffmann-La Roche*, the Court held that

> *[t]he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.* [192]

In linking the concept of abuse with 'behaviour' and 'methods different from […] normal competition', *Hoffmann-La Roche* made plain that something more than the mere possession of dominant position must be shown to sustain the finding of a breach of Art. 102 TFEU. Indeed, *Hoffmann-La Roche* and its progeny fashioned a conduct-test for the application of Art. 102 TFEU to dominant firms, which only prohibits dominant firm conduct that adversely affects the competitive market structure through methods other than 'normal competition'[193] or 'competition on the merits'.[194]

Although the conduct test adopted in *Hofmann-La Roche* does not outlaw dominance or the concentration of economic power as such, it is nonetheless clearly grounded in a republican concern about the domination emanating from the concentration of economic power. Instead of focusing on the adverse impact of single-firm conduct on consumer welfare, the definition of abuse in *Hoffmann-La Roche* lays the emphasis on the adverse impact of the dominant firm conduct on residual competition and, hence, the remaining market structure. By protecting residual competition, the concept of abuse of dominance is grounded in the assumption that the remaining rivals should be able to hold the dominant firm in check and, in the long term, to assail and erode its economic power. This suggests that Article 102 TFEU is directed towards conduct by which the dominant firm lessens the constraints that the remaining degree of

[192] Case 85/76 *Hoffmann-La Roche v Commission* (n 182) para. 91; Case C-62/86 *AKZO v Commission* ECLI:EU:C:1991:286 paras. 69-70.
[193] Case 85/76 *Hoffmann-La Roche v Commission* (n 182) para. 90.
[194] Case T-228/97 *Irish Sugar v Commission* ECLI:EU:T:1999:246 para. 111; Case T-203/01 *Michelin v Commission (Michelin II)* ECLI:EU:T:2003:250 para. 97; Case C-202/07 P *France Télécom v Commission* ECLI:EU:C:2009:214 paras. 44-45; Case C-280/08 P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603 para. 177.

polycentric competition would otherwise impose on its power. In other words, it tries to prevent dominant firms from adopting conduct that maintains or furthers the concentration of economic power in its hands and thereby increases the degree of dependence of the remaining market players.[195]

The Court, moreover, supplemented the structuralist definition of 'abuse of dominant position' with the concept of special responsibility. In *Michelin I*, the Court insisted that dominant firms are subject to 'a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.'[196] This principle of special responsibility applies 'irrespective of the reasons for which it has such a dominant position'.[197] The Court thus made plain that even if the concept of Art. 102 TFEU does not prohibit the existence of a dominant position and hence size as such,[198] it nonetheless imposes additional obligations on the dominant firm, even if it has obtained its market power owing to superior efficiency. The dominant firm is hence required to refrain from conduct that has the potential to adversely affect the market structure by hampering or foreclosing residual competition, although the very same conduct does not give rise to any concerns if it is adopted by non-dominant firms.[199]

The principle of special responsibility bears an important relationship with the concept of republican liberty as it is grounded in a prophylactic approach towards economic power. It recognises that by the very reason of its economic power, the conduct of a dominant firm has a greater potential to undermine a polycentric market structure and cause harm than does the same conduct if adopted by a firm devoid of market power. Unlike Art. 101 TFEU, which applies to all market participants alike, Art. 102 TFEU thus establishes a differentiated regime that prophylactically imposes additional obligations on powerful firms. Dominant firms are subject to the principle of special responsibility not because their conduct gives rise to any concrete risk of actual or likely interference, but because of a generalised concern about the potential domination that emanates from the existence of concentrated economic power.

In creating an additional cage of rules to tame dominant Behemoths, the principle of special responsibility seeks to replicate the constraints that polycentric competition would otherwise impose on equally sized firms. It thus accounts for the fact that in the presence of

[195] Mestmäcker (n 74) 606.
[196] Case 322/81 *Michelin v Commission* ECLI:EU:C:1983:313 para. 57.
[197] ibid.
[198] ibid.
[199] H. Schweitzer, 'Das Wettbewerbsrecht und das Problem privater Macht' in F. Möslein (ed), *Private Macht* (Mohr Siebeck 2016) 463–464.

concentrated market power, residual competition may no more be capable of holding the dominant firm fully accountable. The concept of special responsibility, hence, obliges the dominant firm to act 'as if' it was constrained by effective competition. It thus echoes the Ordoliberal idea of 'as-if' competition.[200] The concept of 'as if' competition encoded in the concept of special responsibility, however, differs from how this notion was framed by the Ordoliberals. Members of the Freiburg School, such as Eucken and Miksch, conceived the concept of 'as if competition' as a guiding regulatory principle for some form of public utility-style regulation which imposes on dominant firms the positive obligation to act as if they were constrained by effective competition.[201] The concept of special responsibility, by contrast, operationalises the idea of 'as if competition' in a less intrusive fashion, [202] as it merely imposes a limited number of negative obligations on the dominant firm to refrain from conduct which undermines an effectively competitive market structure.

Under the auspices of this structural understanding of competition and abuse of dominance, as well as the principle of special responsibility, the classical abuse of dominance case law was clearly informed by the negative and prophylactic dimension of republican liberty. The interpretation of Article 102 TFEU by the EU judicature and the European Commission sought to prevent dominant firms from exerting domination by preserving a polycentric market structure as a system of antipower.[203] One example of this defensive and prophylactic dimension is the Court's application of Art. 102 TFEU to predatory pricing. In *Tetra Pak II*, the Court rejected the argument that the showing of likely recoupment constitutes a separate condition for

[200] A. J. Padilla and C. Ahlborn, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) 11, 17; Larouche and Schinkel (n 172) 5,11 f.
[201] W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 293 ff; L. Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (Verlag Helmut Küpper 1947) 147-149, 211-212; L. Miksch, 'Die Wirtschaftspolitik des Als-Ob' (1948) 105(2) Zeitschrift für die gesamte Staatswissenschaft 310 310; L. Miksch, 'Versuch eines liberalen Programms [1949]' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 166.
[202] This has been ignored by numerous authors who see in the Ordoliberal concept of as-if competition one major reason for the in their eyes overly regulatory approach of EU competition law towards single firm conduct D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press; Oxford University Press 1998) 252; Padilla and Ahlborn (n 200) 67; Akman (n 172) 10. The overly simplistic association of Ordoliberalism in the English-speaking literature with the concept of as-if competition has been also been criticised by a number of authors associated with this paradigm E.-J. Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' in L. F. Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar 2011) 42; P. Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' (Discussion Paper N°7/15, 2015) 10, 20.
[203] Case No IV/30.698 ECS/AKZO. OJ [1985] L 374/1 para. 77; Case C-333/94 P *Tetra Pak v Commission* ECLI:EU:C:1996:436 para. 44; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 131; Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* (n 181) para. 26.

the finding of unlawful predatory pricing under Art. 102. In support of the rejection of the recoupment requirement, the Court relied on the need 'to penalize predatory pricing whenever there is a risk that competitors will be eliminated'.[204] This prophylactic approach, the Court argued, is warranted because the goal of maintaining 'undistorted competition rules out waiting until such a strategy leads to the actual elimination of competitors.'[205]

This structural objective of protecting a competitive market structure as a safeguard against domination by powerful firms also explains why the Commission and the EU courts did not shy away from applying Art. 102 TFEU to above-cost price-cutting by dominant firms.[206] The classical case law on exclusionary pricing practices was animated by the Ordoliberal precept that competition can only be guaranteed by preserving a certain degree of residual competition and, hence, competitors.[207] Instead of requiring any showing that the dominant firm conduct will entail likely or actual consumer harm in the form of higher prices or output, the Court perceived its exclusionary effect on competitors and, consequently, its adverse impact on a polycentric market structure as harm to competition. [208] This structural approach accounted for the fact that remaining competitors, irrespective of their efficiency, may impose an important constraint on the power of dominant firms and prevent them from exerting domination.[209] Remaining competitors might, moreover, grow and erode the economic power of the dominant firm.[210] It is this concern about preserving residual competition, which explains why the EU Courts and Commission have often prohibited exclusionary conduct without

[204] Case C-333/94 P *Tetra Pak v Commission* (n 203) para. 44.
[205] Case C-333/94 P *Tetra Pak v Commission* (n 203) para. 44; Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-333/94 P *Tetra Pak v Commission* ECLI:EU:C:1996:256 para. 78.
[206] *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 131.
[207] E.-J. Mestmäcker and H. Schweitzer, *Europäisches Wettbewerbsrecht* (Beck 2014) § 15, Rn. 31–34, pp. 386-387.
[208] Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-333/94 P *Tetra Pak v Commission* (n 205) para. 78. Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 113. *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 131-132, 137. Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* (n 181) para. 26.
[209] Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 117. See for the economic argument that less efficient competitors may exert important constraints on dominant incumbents J. F. Brodley and G. A. Hay, 'Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards' (1980-1981) 66 Cornell Law Review 738 745.
[210] Case No IV/34.621 Irish Sugar plc. OJ [1997] L 258/1 para. 134; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) paras. 137-138; Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) paras. 113-114, 119. For a critical discussion J. Temple Lang and R. O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82' (2002) 26 Fordham Int'l L.J. 83 132–134.

inquiring into whether it forecloses a competitor that is equally efficient[211] and leads to consumer harm.[212]

The classical abuse of dominance case law, hence, hinged on the objective of preserving a decentralised competitive market structure. To this end, the Court devised a structural definition of abuse and coined the concept of special responsibility that prohibited the dominant firm from adopting conduct which undermines residual competition. In a similar vein as the republican approach in the US, this case law thus followed a negative, defensive and prophylactic approach, which aimed at preventing domination by protecting polycentric competition as a system of antipower.

3.2 The Positive, Egalitarian Dimension of Polycentric Competition as a System of Antipower and the Regulation of Monopoly Power

Next to this negative dimension of republican liberty, the case law towards monopoly power on both sides of the Atlantic also turned on the emancipatory, positive dimension of republican liberty as equal status and opportunity. In the US (3.2.1) and, albeit to a lesser extent, in Europe (3.2.2), the preservation of a polycentric market structure was not only perceived as a mechanism to prevent domination resulting from the concentration of economic power within the hands of a single firm, but it was also considered as a safeguard and catalyst of the competitive opportunities of smaller competitors.

3.2.1 The Positive Dimension of Polycentric Competition and the Regulation of Monopoly Power under US Antitrust

This positive dimension of republican liberty became manifest in the prominent role that the goal of preserving a Jeffersonian society composed by small, independent businessmen played for the application of US antitrust rules to monopoly power and single-firm conduct. From the early case law onwards, US courts made out economic concentration and monopoly power as major obstacles to the equality of opportunity and the livelihood of smaller competitors. To proponents of republican antitrust, the amalgamation of economic power in the hands of a few firms jeopardised the equality of status and opportunity of all market players,

[211] See for instance the application of Art. 102 to pricing conduct that leads to the exclusion of an 'perhaps as efficient competitor' Case C-62/86 *AKZO v Commission* (n 192) para. 72; Case No IV/30.698 ECS/AKZO (n 203) para. 77; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 131.
[212] Case C-333/94 P *Tetra Pak v Commission* (n 203) para. 44.

because it created a situation where powerful firms could at any time 'crush their feebler rivals' and wage on them a price 'war of extermination'.[213]

In the US, the egalitarian impetus of republican liberty, encoded in the ideal of a Jeffersonian society, became an essential element of the republican approach towards monopoly power. Proponents of republican antitrust perceived the preservation of a polycentric market structure as a safeguard of the independent status of market participants and, in particular, of 'small, local enterprises'.[214] This egalitarian dimension of economic liberty in its republican sense as an independent status of free and equals has been most clearly articulated by Judge Learned Hand in *Alcoa*. Learned Hand advanced the view that the Sherman Act embodied a clear preference for 'a system of small producers, each dependent for his success upon his own skill and character, to one which the great mass of those engaged must accept the direction of a few'[215] Invoking the independent status of the small producer as the ideal type of the republican free-man or citizen, he affirmed that one of the purposes of antitrust law 'was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.'[216]

The republican goal of preserving the equality of opportunity and independent status of small producers also informed the enactment and interpretation of §§ 2a and 3 of the Clayton Act, later amended by the Robinson Patman Act. The legislative history of § 3 of the Clayton Act, for instance, suggests that the prohibition of tying and exclusive dealing was informed by the concern that they unfairly undermine the 'opportunities of small, independent dealers'.[217] This concern also informed the approach of the Supreme Court towards tying and exclusive dealing. Just as it objected vertical restraints as undue forms of hierarchy and subjugation under § 1, so too considered the Supreme Court exclusive dealing and tying agreements as a source of unfreedom because they undermined the independence and freedom of choice of smaller customers or purchasers.[218] This strict approach towards exclusive dealing and tying agreements was compounded by the concern that a dominant firm could use exclusive dealing and tying agreements to leverage its customers' dependence and its position as an indispensable

[213] *United States v. Swift & Co.* (n 133) 116, 118.
[214] *United States v. Columbia Steel Co.* (n 149) Justice Douglas, Black, Murphy, Rutledge dissenting 538; *United States v. Paramount Pictures* (n 148) 159.162, 164-165.
[215] *United States v. Alcoa* (n 139) 427.
[216] *United States v. Alcoa* (n 139) 429; *United States v. United Shoe Machinery Corp.* (n 138) 342.
[217] H. R. Rep. (n 135) 11–12; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (n 135) 10.
[218] H. R. Rep. (n 135) 13–14.

trading partner to undermine the opportunity of smaller competitors to compete for customer demand.[219]

The egalitarian concern of preserving a Jeffersonian society composed of small and independent was also a key driver of the enactment of the 1936 Robinson-Patman Act, which amended and tightened the prohibition of price discrimination under § 2 (a) of the Clayton Act. The adoption of the Robinson-Patman Act was, in the first place, a reaction to the rise of large chain-stores and their ability to adopt aggressive pricing strategies, which increasingly threatened the competitive opportunities and livelihood of small dealers.[220] This fear that aggressive pricing strategies by nationwide chains will undermine a Jeffersonian society in which economic power and economic opportunity are equally distributed amongst a multitude of small, independent producers also shaped the Supreme Court's interpretation of § 2 (a) of the Clayton Act, as amended by the Robinson Patman Act, in primary-line price discrimination or predatory pricing litigation. Cases, such as *Moore v Mead's Fine Bread* and *Utah Pie*, are imbued by the concern that excessively low pricing by large-scale corporations would undermine the competitive opportunities of smaller, local competitors and lead to a deterioration of the market structure to the benefit of large companies.[221] This case law was driven by the goal of preserving competitive market structure as the economic basis of a Jeffersonian society composed by multiple local and small merchants and of preventing the concentration of economic power in the hands of a few nationwide companies.[222] The US courts translated this concern into a relatively loose test and set the bar to condemn discriminatory price-cutting by powerful firms very low. [223]

The republican approach towards monopoly thus also sought to preserve the emancipatory and egalitarian dimension of republican liberty by promoting a polycentric market structure. From this republican vantage point, the decentralized allocation of economic power not only reduced instances of domination but also carried the promise of empowering

[219] ibid.
[220] Sullivan (n 5) 678. D. Geradin and N. Petit, 'Price Discrimination under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?' (2006) 2(3) Journal of Competition Law & Economics 479 487–488; R. Pitofsky, H. Goldschmid and D. Wood, *Trade Regulation: Cases and Materials* (Foundation Press 2003) 1279–1280; van den Bergh, Roger, *Comparative Competition Law and Economics* (Edward Elgar 2017) 354; Hansen (n 137), 1117, 1121-1122.
[221] *Moore v. Mead's Fine Bread Co.* (n 135) 119. *Utah Pie Co. v. Continental Baking Co.* (n 137) 689.
[222] Peritz (n 92) 225–228.
[223] *Moore v. Mead's Fine Bread Co.* (n 135) 118; *Utah Pie Co. v. Continental Baking Co.* (n 137) 694, 696-697; *F. T. C. v. Anheuser-Busch, Inc.* (n 135) 550, 553. J. D. Hurwitz and W. E. Kovacic, 'Judicial Analysis of Predation: The Emerging Trends' (1982) 35 Vanderbilt Law Review 63 86–92.

small businessmen, by preserving their competitive opportunities as the economic precondition of their independent status as free and equal citizens.

3.2.2 The Positive Egalitarian Dimension of Polycentric Competition and Regulation of Monopoly Power under Art. 102 TFEU

Unlike the US Supreme Court, the EU judicature and European Commission have never explicitly endorsed the protection of small and medium-sized companies as a guiding principle for the interpretation of Art. 102 TFEU.[224] Yet, the positive, egalitarian dimension of republican liberty and its realization through a market structure that ensures the quality of competitive opportunities and the independent status of market participants has not been entirely alien to the classical abuse of dominance case law.

One example of the influence of this egalitarian dimension of republican liberty on the judicial exegesis of Art. 102 is the definition of a dominant position as a relationship of dependence. The Court of Justice, indeed, repeatedly highlighted the role of Art. 102 TFEU in preventing dominant firms from undermining the competitive market structure in a way that subjects all other market participants into a relationship of dependence.[225] This, in turn, suggests that the Court perceived a polycentric market structure in which economic power is decentralized amongst a multitude of roughly equally sized players as a safeguard of the equality of opportunities and of the independent status of all market participants.

This egalitarian objective of ensuring a level playing field and the equality of opportunity between dominant firms and smaller competitors also informed the concept of special responsibility. The principle of special responsibility, indeed, accounts for the asymmetry in power and inequality of arms that exists between dominant firms and non-dominant rivals. It assumes that certain forms of conduct in the hands of dominant firms may have an exclusionary effect on other market participants, while this is not the case if non-dominant firms adopt the same conduct. [226] The principle of special responsibility thus

[224] Schweitzer (n 199) 456–457.
[225] Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 113. *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 131-132, 137. Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* (n 181) para. 26.
[226] Case 27/76 *United Brands v Commission* (n 190) para. 189. Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* ECLI:EU:T:1994:246 paras. 114–115, 122, 136-137. Case C-333/94 P *Tetra Pak v Commission* (n 203) paras. 24-32, 37. See for a critical discussion C. Ahlborn, D. S. Evans and A. J. Padilla, 'The Antitrust Economics of Tying: a Farewell to Per se Illegality' (2004) 49(1-2) Antitrust Bulletin 287 315. Case C-62/86 *AKZO v Commission* (n 192) paras. 69-70. Case C-333/94 P *Tetra Pak v Commission* (n 203) para. 73. Case T-203/01 *Michelin v Commission (Michelin II)* (n 194) para. 97. Case T-65/89 *BPB Industries and British Gypsum*

recognises that certain conduct bestows dominant firms with a competitive advantage, that non-dominant firms can impossibly replicate. This inequality of arms is not necessarily the result of different degrees of efficiencies but might be the result of the mere difference in size, scale and financial resources between dominant firms and smaller competitors.

This two-fold concern about preserving the independent status of market participants and addressing the inequality of arms between dominant and non-dominant firms also informed the application of Article 102 TFEU to tying arrangements, exclusive dealing agreements and loyalty rebates. Like early Supreme Court cases, the classical case law cast exclusive dealing agreements, tying, and rebates as devices whereby dominant firms exert domination or coercion over their customers by limiting their status as independent decision-makers and reinforcing their dependence on the dominant firm.[227] At the same time, the classical case law also accounted for the inequality of arms that arises from the ability of dominant firms to entrench and leverage the dependence of customers through tying, exclusive dealing agreements and rebates. The case law, in fact, recognised that dominant firms, as a consequence of their status as unavoidable trading partner or length of their product lines, can use tying, exclusive dealing and rebates to leverage the non-contestable portion of their customers' demand to obtain a competitive advantage when competing with smaller firms over the contestable portion of demand. The classical case law, therefore, approached tying, exclusive dealing and rebates by dominant firms as obstacles to economic opportunities of smaller, independent competitors.[228]

This concern about the inequality of arms between dominant and non-dominant firms also crystallised in the Court's approach towards predatory pricing and selective price cuts. The Court held that, under certain circumstances, Art. 102 TFEU also prevents dominant firms from charging prices which exceeded Average Variable Costs (AVC)[229] and, at times, even Average

v Commission ECLI:EU:T:1993:31 paras. 67-69. Case 322/81 *Michelin v Commission* (n 196) para. 57. Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-333/94 P *Tetra Pak v Commission* (n 205) para. 50. Case C-202/07 P *France Télécom v Commission* (n 194) paras. 105-106.

[227] Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* (n 226) para. 137; Case 85/76 *Hoffmann-La Roche v Commission* (n 182) paras. 89-90; Case 322/81 *Michelin v Commission* (n 196) para. 73; Opinion of Advocate General Verloren van Themaat in Case 322/81 *Michelin v Commission* ECLI:EU:C:1983:168 3542; J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 25(5) European Competition Law Review 263 267–268.

[228] Case 40/73 *Suiker Unie and Others v Commission* (n 50) para. 502; Case 85/76 *Hoffmann-La Roche v Commission* (n 182) paras. 89-90; Case 322/81 *Michelin v Commission* (n 196) paras. 84-85; Case C-62/86 *AKZO v Commission* (n 192) para. 149; Case T-65/89 *BPB Industries and British Gypsum v Commission* (n 226) para. 68.Case No IV/31043 Tetra Pak II. OJ [1992] L 72/1 paras. 106,108 118, 146. Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* (n 226) paras. 135, 137 140. Case 40/73 *Suiker Unie and Others v Commission* (n 69) para. 502; Case C-95/04 P *British Airways plc v Commission of the European Communities* (n 200) para. 75.

[229] Case C-62/86 *AKZO v Commission* (n 192) para. 72.

Total Costs (ATC).[230] The Court justified this strict approach towards aggressive pricing by dominant firms by the fact that pricing in excess of AVC

> *can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.*[231]

The classical case law attributed little consideration to the question as to whether the competitors foreclosed by the above-AVC pricing were equally or less efficient than the dominant firm. [232]

The classical case law thus expressed a strong egalitarian concern about the preservation of the independent status market participants, the openness of markets and a level playing field.[233] As it did not necessarily make the equality of opportunity and right of smaller competitors to compete conditional upon equal efficiency, the classical case law endorsed an inclusive notion of the competitive process.

3.3 Polycentric Competition and the Republican Approach towards Monopoly Power

Under republican antitrust, the application of US and EU antitrust rules to monopoly power clearly followed a structural approach. Instead of merely preventing powerful firms from indulging into conduct, which forecloses competitors and eventually might lead to higher prices, US and EU competition rules regulating monopoly power sought, at least in part, to tackle the problem of concentrated economic power as such. This structuralist approach towards monopoly power and single-firm conduct, thus, operationalised the ideal of republican liberty through the preservation of a polycentric market structure.

In the heydays of republican antitrust, the US Courts went as far as prohibiting the possession of monopoly power and hence the concentration of economic power as such. The EU judicature, by contrast, opted for a less radical approach. To operationalize the concern about domination resulting from the concentration of economic power, the Court focused on the protection of residual competition. Instead of fully outlawing the possession of monopoly power or a dominant position, the structural definition of abuse and the principle of special

[230] Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) para. 116-117.
[231] Case C-62/86 *AKZO v Commission* (n 192) para. 72.
[232] Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 185) paras. 116-117.
[233] Case 40/73 *Suiker Unie and Others v Commission* (n 50) para. 505.

responsibility rather forged a tight cage of principles, which was geared towards subjecting dominant firms in the long-run to the constraints of polycentric competition.

By tackling concentrated economic power of monopolists and preserving a polycentric market structure, republican antitrust on both sides of the Atlantic, on the one hand, followed the negative dimension of republican liberty, which sought to protect market participants against the domination on the part of powerful large-scale corporations. At the same time, the application of antitrust rules to powerful firms also sought to promote equal opportunities and the independent status of small businesses by ensuring a market structure in which economic power is distributed equally. The republican interpretation of the second pillar of antitrust law implemented the republican goal of liberty as non-domination by shackling the economic power of Behemoths in a tight cage of principles and rules which complemented the constrains polycentric competition imposes on powerful firms. It thus was designed to limit the ability of industrial Behemoths to exert private government and to enable residual competitors to erode their power in the long-run.

4 Republican Liberty and Merger Policy

Arguably, no other field of antitrust has been more marked by the idea of a link between a deconcentrated market structure and republican liberty than merger policy. Indeed, merger policy has always been not only influenced by economic considerations but also epitomised social and political values associated with a polycentric market structure.[234] The idea that the preservation of a polycentric market structure constitutes an important safeguard of republican liberty and, ultimately, democracy thus fundamentally shaped the attitude of US antitrust towards exogenous growth and industry concentration through combination and merger. Though EU competition law has never displayed a similar degree of hostility against merger-driven industry concentration as its US counterpart in the heydays of republican antitrust, the EU merger regime has been until recently equally animated by the goal of averting excessive industrial concentration. In striving to prevent an excessive level of industry concentration, the structural merger policy on both sides of the Atlantic implemented both the negative, defensive (4.1), and the positive, egalitarian dimension of republican liberty (4.2).

[234] Sullivan (n 5) 577, 581, 599.

4.1 The Negative Dimension of Polycentric Competition and Merger Policy

The concern about republican liberty as non-domination shaped the structural merger policy on both sides of the Atlantic. The courts and enforcers in the US (4.1.1) and in Europe (4.1.2) followed a defensive rationale as they sought to prevent domination flowing from instances of excessive concentration of economic and to preserve a polycentric market structure as an institution of antipower.

4.1.1 The Negative Dimension of Polycentric Competition and US Merger Policy

In light of the central role that merger control plays for modern antitrust policy, it always comes as a surprise that merger control had a rather a rocky start in the US. In *Knight*, the first Sherman Act case decided by the US Supreme Court, the majority refused to apply § 1 of the Sherman Act to enjoin a merger, which consolidated the sugar industry to near-monopoly.[235] This ruling was one of the reasons why, despite the enactment of the Sherman Act, the US economy underwent from 1887 to 1904 one of the most important merger waves in its history.[236] This surge in mergers and industry consolidation, however, came to an abrupt halt in 1904 when the Supreme Court applied § 1 of the Sherman Act to block a merger of two large railway companies in *Northern Securities.*[237] The broad language of *Norther Securitie*s suggested that § 1 of the Sherman Act would prohibit any merger that eliminated competition between previously independent competitors, irrespective of its actual or likely effects on output and prices.[238] It was, however, only in 1914 that Congress eventually established a specific regime of merger control by passing the Clayton Act. § 7 of the Clayton Act prohibited all mergers leading to a substantial lessening of competition ('SLC').[239] Yet, § 7 was worded in such a way that it applied only to stock acquisitions, but not to asset acquisitions. Vertical

[235] *United States v. E. C. Knight Co.* (n 14) 16; Sullivan (n 5) 579–580.
[236] F. M. Scherer and D. Ross, *Industrial market structure and economic performance* (Houghton Mifflin 1990) 153–156; Sullivan (n 5) 581.
[237] *Northern Securities Co. v. United States* (n 16) 331. See also Sullivan (n 5) 581-583; T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018) 45–53.
[238] Sullivan (n 5) 582–583.
[239] Scherer and Ross (n 236) 175.

mergers, moreover, fell outside the scope of § 7. As a consequence, §7 of the Clayton Act remained for a large part of the first half of the 20th century, largely under-enforced. [240]

In 1950, Congress eventually adopted the Celler-Kefauver amendment to the Clayton Act to fill this 'asset acquisition loophole' and revamp merger control. The Congressional debates leading to the enactment of the Celler-Kefauver amendment were animated by strong fears about a looming merger wave and the increase in industry concentration.[241] The recent totalitarian experience in Europe, which had revealed the close ties between big business and the totalitarian state in Nazi Germany, also lent new support to the republican view that the concentration of economic power in the hands of a few firms constitutes a threat to democracy.[242] Against this backdrop, one of the two sponsors of the Act, Representative Celler, insisted that the amended Clayton Act sought 'to preserve a society of small, independent, decentralized business in order to disperse economic and political power and to assure that a Hitler could never rise to power in the United States'.[243]

This republican concern about the adverse economic, social and political consequences of excessive concentration of economic power fundamentally shaped the subsequent interpretation of the amended merger statute by the US Supreme Court during the Warren Court era (1953-1969). The Warren Court put the preservation of a polycentric, decentralised market structure at the centre of US Merger Policy. In *Brown Shoe,* the first case decided by the Supreme Court after the enactment of the Celler-Kefauver amendment, the Supreme Court acknowledged that the amendment of the merger act was informed by the 'fear of [...] a rising tide of economic concentration in the American Economy.'[244] This fear about 'accelerated concentration of economic power', was not only driven by economic considerations, but also by the 'threat to other values a trend toward concentration was thought to pose.'[245] Congress, thus, gave the Government and courts the mandate to arrest mergers 'when the trend to a

[240] W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago University Press 1981 [1959]) 276. Scherer and Ross (n 236) 175. For a discussion of the relevant case law Sullivan (n 5) 589–591.
[241] For a comprehensive discussion of the legislative history of the Celler-Kefauver amendment see *Brown Shoe Co. Inc. v. United States* 370 U.S. 294 (1962) 311-323 and footnotes.
[242] T. A. Freyer, *Antitrust and global capitalism, 1930-2004* (Cambridge University Press 2006) 55–58; L. B. Schwartz, '"Justice" and Other Non-Economic Goals of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1076 1078.
[243] Quotation of Representative Celler in Fox (n 5), 1151.
[244] *Brown Shoe Co. Inc. v. United States* (n 241) 315, 317; *United States v. Philadelphia National Bank* 374 U.S. 321 (1963) 362; *United States v. Philadelphia National Bank* (n 244) 363.
[245] *Brown Shoe Co. Inc. v. United States* (n 241) 316.

lessening of competition in a line of commerce was still in its incipiency' to stop the tendency towards economic concentration 'before it gathered momentum'.[246]

Akin to the two other pillars of antitrust, this republican interpretation of the amended § 7 of the Clayton Act was primarily motivated by the goal of preserving a polycentric market structure as an institution of antipower that prevents and keeps in check the domination that might emanate from instances of concentrated economic power. The Supreme Court, indeed, assumed that § 7 of the Clayton Act was directed against all mergers, which lead to a significant increase in concentration.[247] This structuralist approach hinged upon a republican understanding of liberty that perceives instances of concentrated economic power as a source of unfreedom, irrespective of whether it was actually or likely to be used to interfere with the liberty of market participants. The Court clearly identified the 'concentration of economic power in the hands of a few'[248] as the major evil against which the Clayton Act was enacted.[249] This hostile stance towards industry concentration through merger was firmly anchored in the 'premise that mergers are a major cause of domination'.[250] This negative, defensive dimension of republican liberty, which apprehends a polycentric market structure as an institution of antipower, also found its expression in the incipiency doctrine. The Warren Court, indeed, developed a preventive or precautionary approach towards economic concentration through mergers, which was in keeping with the congressional intent to put a halt to the growing trend towards industry concentration.[251]

The republican case law of the Warren Court era also shaped the Department of Justice's 1968 Merger Guidelines. Instead of putting the emphasis on price or welfare effects, the Merger Guidelines clearly followed the structuralist approach the Warren Court had relied upon to operationalise Congress' republican goal of preventing industry concentration in its incipiency. According to the Guidelines, 'the primary role of Section 7 enforcement [was] to preserve and promote market structures conducive to competition.' [252] To this end, merger policy should 'prevent significant increases in concentration in a market' and maintain 'significant possibilities for eventual deconcentration in a concentrated market'.[253]

[246] ibid 317. See also for the re-affirmation of the incipiency *United States v. Philadelphia National Bank* (n 244) 362.
[247] ibid 363.
[248] *United States v. Von's Grocery Co.* 384 U.S. 270 (1966) 274.
[249] ibid 274.
[250] *United States v. Pabst Brewing Co.* 384 U.S. 546 (1966) 552.
[251] *United States v. Philadelphia National Bank* (n 244) 363.
[252] Merger Guidelines - 1968 1968 para. 2.
[253] ibid para. 4.

Merger policy during the Warren Court era was hence clearly shaped by a structuralist, Smithian understanding of competition that perceived competition as a polycentric market structure in which economic power is split amongst a multitude of players. By preserving a decentralised market structure, republican merger policy aimed at ensuring that the market players impose on each other impersonal constraints that prevent them from exerting domination. This structuralist understanding of competition underpinning the republican approach of the Warren Court tallied with the economic theory of the time, which assumed that 'competition is greatest where there are many sellers.'[254] Republican merger policy was thus anchored in the notion of a perfect consonance between the political and economic understanding and goals of competition law. The republican ideal of preserving a polycentric market structure in which power is diffused amongst many decentralised players accorded well with the prevailing economic view of the time – supported not only by the members of the Harvard School but also early Chicago School economists[255] – that the preservation of competition and the protection of a deconcentrated economy was one and the same thing. The republican merger policy turned on the assumption that 'concentration [is] inimical to the free play of competition.'[256] The Warren Court, therefore, treated increases in industry concentration and the substantial lessening of competition as synonyms.[257]

4.1.2 The Negative Dimension of Polycentric Competition and EU Merger Policy

In Europe, too, merger policy, after a rather difficult start, followed a structuralist approach. Whereas Art. 66 of the Treaty of Paris establishing the European Coal and Steel Community had bestowed the High Authority, as the predecessor of the European Commission,

[254] *United States v. Philadelphia National Bank* (n 244) 363 and fn 38 and 39. The Court referred in support of this statement for instance to Comment, 'Substantially to Lessen Competition: Current Problems of Horizontal Mergers' (1959) 68(8) Yale Law Journal 1627 1638–1639. J. Bain, *Barriers to New Competition* (Harvard University Press 1956) 27; F. Machlup, *The Economics of Sellers' Competition: Model Analysis of Sellers' Conduct* (The Johns Hopkins Press 1952) 84-93, 333-334; E. S. Mason, 'Market Power and Business Conduct: Some Comments' (1956) 46(2) The American Economic Review 471.

[255] The Court referred in support of this structural test to C. Kaysen and D. F. Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) 133; G. J. Stigler, 'Mergers and Preventive Antitrust Policy: Reprinted from University of Pennsylvania Law Review, Vol. 104, No 2 (1955)' ; J. M. Markham, 'Merger Policy Under the New Section 7: A Six-Year Appraisal' (1957) 43(4) Virginia Law Review 489 521–522; D. C. Bok, 'Section 7 of the Clayton Act and the Merging of Law and Economics' (1960) 74(2) Harvard Law Review 226 308-316, 328. This structural understanding of competition dovetailed with the concept of workable competition which was broadly endorsed by leading economists and antitrust experts, including for instance the Chicago economist George Stigler, in the The Attorney General's National Committee to Study the Antitrust Laws, *1955 Report* 318–321.

[256] *United States v. Philadelphia National Bank* (n 244) 369.

[257] *United States v. Von's Grocery Co.* (n 248) 278.

with the competence to review mergers,[258] the Treaty of Rome establishing the European Economic Community (EEC Treaty)[259] did not provide for a legal basis for Merger Control by the European Commission.[260] One reason for the absence of a European system of merger control in the Treaty of Rome was the fact that the Member States were initially more concerned about cartels and abuse of dominance than mergers. Indeed, mergers were perceived as an instrument to boost economic growth and enhance European integration after the Second World War.[261] Some Member States, in particular France, also feared that merger control at the European level would prevent them from building up national champions through mergers and thus deprive them of an important instrument of industrial policy.[262]

Already as early as in 1966, the European Commission, however, perceived the absence of merger control at the European level as an important chink in Europe's competition law armour. Certainly, the Commission did not display the same degree of hostility towards industry concentration as did US merger policy during the Warren Court era. It, for instance, recognised that mergers might contribute to the creation of an internal market and the international competitiveness of the European industry.[263] Yet, the Commission certainly did not endorse a 'big is beautiful' attitude,[264] which celebrated industry concentration as the way forward to foster market integration or boost European competitiveness through the creation of European champions. On the contrary, the 1966 Memorandum on the Concentration of Enterprises in the Common Market underscored the need to control the growing trend towards industry concentration through merger[265] in order to preserve effective competition in the internal

[258] Treaty Establishing the European Coal and Steel Community.
[259] Treaty establishing the European Economic Community.
[260] ibid.
[261] I. Kokkoris and H. A. Shelanski, *EU merger control: A legal and economic analysis* 16–17; E. Schwartz, 'Politics as Usual: The History of European Community Merger Control' (1993) 18(2) Yale Journal of International Law 607 613.
[262] T. Käseberg and A. van laer, 'Competition Law and Industrial Policy: Conflict, Adaptation, and Complementarity' in K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* 186–188; Schwartz (n 261), 610–614; G. Monti, *EC Competition Law* (Cambridge University Press 2007) 246–248.
[263] European Commission, 'Le problème de la concentration dans le marché commun: The problem of concentration in the Common Market.' (1966). Information Memo P-1/66 5,7,8 <http://aei.pitt.edu/40303/> accessed 28 September 2019.
[264] This is, for instance, suggested by P. Akman and H. Kassim, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy*' (2010) 48(1) JCMS: Journal of Common Market Studies 111 116, 127. See for a recent example of this claim N. Petit, 'Competition Cases Involving Platforms - Lessons from Europe: Comment on Federal Trade Commission ("FTC")Hearing #3 on Competition and Consumer Protection in the 21st Century' (2018) 3 <https://www.ftc.gov/system/files/documents/public_comments/2018/10/ftc-2018-0088-d-0011-156146.pdf> accessed 22 December 2019.
[265] European Commission (n 263) 9–11.

market.[266] During the 1970s, the Commission also repeatedly warned that the growing tendency towards concentration undermined the maintenance of a decentralised market structure and led to a substantial increase of economic power in the hands of a few firms.[267] Drawing upon the theoretical framework of the S-C-P paradigm,[268] the Commission also assumed that an excessive increase in industry concentration would have detrimental effects on the economic performance of markets The Commission, therefore, claimed for itself the competence to assess the compatibility of mergers with EU competition law.[269] The first proposal for a European merger regulation tabled in 1973, however, failed to enlist sufficient support amongst the Member States and was eventually aborted.[270]

The Commission's competence to review mergers has, therefore, been the creature of judicial fiat. In *Continental Can* and *BAT Reynolds,* the Court of Justice recognised that the Commission possesses the competence to analyse the compatibility of mergers with and, when need be, to block mergers under Arts. 102 and 101 TFEU.[271] In *Continental Can,* the Court of Justice of the European Union upheld the Commission's argument that Art. 102 TFEU can be used to bock a merger, which enables a dominant firm to strengthen its dominant position. It held that the goal of the then European Economic Community to ensure the 'institution of a system ensuring that competition in the Common Market is not distorted.'[272] would be seriously jeopardised if the Treaty provisions of Art. 101 or Art. 102 TFEU could not be used to prevent a dominant firm from gaining a degree of market power through merger, which would make competition impossible in the market.[273] The Court thus clarified that mergers might run afoul of Article 102 TFEU by mere reason of their adverse effect on market structure, even if they do not lead to immediate harm to consumers and/or competitors.[274] In *BAT Reynolds*, the Court of

[266] Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings 1973. COM (73) 1210 final 1,4,5 and rec. 2.
[267] European Commission (n 263) 9, 11; Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings (n 266) 6, 8.Vth Report on competition policy (1975) (n 79) 13–14; VIIth Report on competition policy (1977) (n 79) 10, 17; IXth Report on competition policy (1979) (n 79) 10; Witt (n 69) 95.
[268] B. Leucht and M. Marquis, 'American Influences on EEC Competition Law: Two Paths, How much dependence?' in K. K. Patel and H. Schweitzer (eds), *The Historical Foundations of EU Competition Law* 142.
[269] European Commission (n 263) 21–26.
[270] Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings (n 266).
[271] European Commission (n 263) 21, 24-26; Case No IV/26 811Continental Can Company. OJ [1972] L 7/25. Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* (n 181); Joined Cases 142 and 156/84- *BAT and Reynolds v Commission* ECLI:EU:C:1987:490.
[272] Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* (n 181) para. 23.
[273] ibid para. 25.
[274] Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* (n 181) para. 26; Case 85/76 *Hoffmann-La Roche v Commission* (n 182) para. 126.

Justice clarified that Art. 101 TFEU can be applied to mergers in oligopolistic markets,[275] which may lead to collusion between the remaining firms.[276] It held that in highly concentrated 'oligopolistic and stagnant' [277] markets 'any attempted takeover … is liable to result in restriction of competition'[278] and could be addressed by Art. 101 TFEU.[279]

This structuralist approach in *Continental Can* and *BAT Reynolds* suggested that mergers in concentrated markets could be blocked under Arts. 101 and 102 without there being the need to carry out a detailed economic analysis. Yet, the judicial recognition of the Commission's competence to tackle mergers under the two existing pillars of competition law did not fully remove concerns about an enforcement gap on the part of the Commission. Indeed, Art. 102 is only applicable to situations where a merger strengthens an existing dominant position, but not to a situation where it contributes to the creation of a dominant position. The Commission, therefore, grew increasingly wary that neither Art. 101 nor Art. 102 would enable it to prevent all mergers that brought about a change in the market structure, which undermined effective competition.[280]

In 1989, after one of the longest legislative procedures in EU history, the Council agreed on the Merger Control Regulation (EEC) 4064/89[281] that entered into force in 1990.[282] The Merger Regulation clearly was in the mold of the structural understanding of EU competition law that had underpinned *Continental Can*. The Merger Regulation identified as the overarching purpose EU merger policy to assess mergers with respect to their 'effect on the structure of competition'.[283] The Regulation was hence directed towards mergers, which bring about 'significant structural changes' in the market.[284] This structuralist approach also shaped the legal test of the Merger Regulation. Instead of referring to adverse effects on output or prices, the Regulation identified the structural question of whether a merger created or strengthened a dominant position as the requisite test to determine the legality of mergers. Accordingly, 'any concentration which creates or strengthens a dominant position as a result of

[275] Joined Cases 142 and 156/84- *BAT and Reynolds v Commission* (n 271) para. 43.
[276] ibid paras. 43-44 and 37-64.
[277] ibid para. 43.
[278] ibid paras. 43-44.
[279] Schwartz (n 261), 640–643.
[280] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ [1989] L 395 rec. 1 and 6; Kokkoris and Shelanski (n 261) 22. See also
[281] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (n 280).
[282] For a comprehensive analysis of the negotiations and the positions of the various Member States Schwartz (n 261), 643–662.
[283] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (n 280) rec. 7.
[284] ibid rec. 9.

which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.'[285]

In keeping with the structuralist approach, the Commission and EU Courts, therefore, focused primarily on how a merger affects market structure. To this end, they assessed based on the analysis of market shares the extent to which a proposed merger might lead to a dominant position. The Commission and the Courts, then, inferred from the creation of a dominant position that the merger leads to a significant impediment to competition without engaging in any further assessment of its anticompetitive effects. This structuralist approach, for instance, guided the Commission's first decision to block a merger in *Aerospatiale-Alenia/de Havilland*. The Commission, in this case, based its finding of a SIEC primarily on the fact that the merger would lead to a significant increase in concentration, as it would strengthen the dominant position of the merged entity in a number of relevant markets.[286] The concept of a significant impediment of effective competition was thus not specifically linked with any concrete anticompetitive behaviour that would lead to the increase in prices or restriction of output and, thus, would interfere with the negative liberty of consumers. Rather, it was the creation of a situation of a dominant position as such, not its likely abuse, that the Commission perceived as SIEC.[287] Indeed, the overarching concern of the *deHavilland* decision was that the merger would bestow a market player with sufficient strength to exert domination on competitors and consumers without being constrained by the remaining competitors.[288] The Commission's structural approach clearly followed the defensive logic of republican liberty. It sought to prevent a merger that would lead to a situation of domination by increasing the concentration of economic power in the hand of the merged entity, while, at the same time, reducing the number of competitive players and hence the constraints imposed by the residual competition on the merged entity. In other decisions, too, the Commission inferred the potential anticompetitive effects from the 'sheer size'[289] of the merged entity and its concomitant ability to act to an appreciable extent independently from the constraints that competitors and consumers would have imposed on it in the absence of the merger.

This republican objective of preserving a polycentric market structure as a safeguard against potential domination resulting from an increase of economic concentration also

[285] ibid Art. 2 (3).
[286] Case No IV/M.053 Aerospatiale-Alenia/de Havilland. OJ [1991] L 334/42 para. 27.
[287] ibid paras. 27, 34, 43, 51-52.
[288] ibid paras, 52, 34, 43.
[289] Case No COMP/M.1741 MCI WorldCom/Sprint. OJ [2003] L 300/1 para. 145. Annulled on procedural grounds in Case T-310/00 *MCI, Inc. v Commission* ECLI:EU:T:2004:275.

prompted the EU Commission and judicature to expand the application of the SIEC test beyond mergers that led to the creation or strengthening of a single dominant firm. During the negotiation of the first Merger Regulation, Member States had failed to agree upon whether the Regulation should also apply to oligopolistic markets. [290] As a consequence, the Regulation only referred to the creation of a (single-firm) dominant position as a source of a SIEC. At the same time, the Merger Regulation also stated that mergers leading to the creation of a merged entity with a combined market share of less than 25% are unlikely to give rise to a SIEC.[291] The Merger Regulation thus left an apparent enforcement gap for mergers, which lead to further concentration of an already oligopolistic market without creating a merged entity with a market share large enough to be considered dominant.

To address this gap of mergers in oligopolistic markets, the Commission transposed in *Nestlé/Perrier*,[292] *Kali&Salzl*[293] and *Gencor*[294] the concept of collective dominance from Art. 102 TFEU to the field of merger control. It observed that the mergers further weakened the competitive market structure by bringing about a significant increase in concentration in an already oligopolistic market, thereby reinforcing the tendency towards oligopolistic dominance.[295] On appeal, the Court of Justice and the then Court of First Instance endorsed the Commission's transplant of the concept of collective dominance from Art. 102 TFEU to merger control.[296]

The Court justified the application of the Merger Regulation to mergers which fell short of creating a single-firm dominant position by the overarching goal of EU merger control to prevent all mergers which 'because of their effect on the structure of competition […] prove incompatible with the system of undistorted competition envisaged by the Treaty.'[297] The Court also held that the presumption of compatibility of mergers leading to a combined market share of less than 25%, enshrined in rectial 15 of the Merger Regulation, could not prevent the finding

[290] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* ECLI:EU:C:1998:148 paras. 159 - 168; Case T-102/96 *Gencor v Commission* ECLI:EU:T:1999:65 para. 129.
[291] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (n 280) recital 15.
[292] Case No IV/M.190 Nestlé/Perrier. OJ [1992} L 356/1 paras. 108-116.
[293] ibid paras. 62-63.
[294] Case No IV/M.619 Gencor/Lonrho. OJ [1997] L 11/30 paras. 138-159, 179-192.
[295] Case No IV/M.190 Nestlé/Perrier (n 292) para. 108-116; Case No IV/M.619 Gencor/Lonrho (n 294) para. 142.
[296] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 290) paras. 159–169, 176-177. Case T-102/96 *Gencor v Commission* (n 290) paras. 125-129, 134-136, 149.
[297] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 290) paras. 170; Case T-102/96 *Gencor v Commission* (n 290) para. 150.

of a SIEC based on the concept of collective dominance.[298] On the contrary, the Court emphasized that the goal, and the effectiveness of the Merger Regulation, would be frustrated if the Merger Regulation would only apply to mergers creating or strengthening the dominant position of a single firm, while leaving mergers creating a collective dominant position unchallenged.[299] The EU Courts, thus, relied on the need to ‚prevent anticompetitive market structures from arising or being strengthened'[300] to broaden the scope of the Merger Regulation and allow the Commission to challenge mergers which did not lead to a single-firm dominant position under the concept of collective dominance.

EU Merger Policy was hence clearly driven by the negative, defensive rationale of averting the excessive concentration[301] of economic power as a cause of domination. The European judicature and Commission consistently insisted on the need to prevent mergers, which adversely affected the polycentric competitive structure. Far from being merely concerned about the protection of individual rights of competitors and consumers against actual or likely interference, the nascent merger policy was, like the other pillars of EU competition law, informed by what Professor Mestmäcker referred to as the goal of protecting a competitive market structure as an institution.[302]

This institutional and structural thrust of merger control reverberated the concern that mergers leading to the strengthening of a single-firm and collective dominant position would jeopardise the ability of an effective, polycentric competitive structure to operate as check-and-balances and accountability mechanism. The goal of preserving an effective competitive structure through merger control aimed to prevent the merging and non-merging parties from exerting domination and to safeguard the constraints through which the process of polycentric competition imposes checks on economic power. Concrete adverse impact on consumers and consumers only played a secondary role in the assessment of mergers by the European Commission and the EU Courts. This negative, defensive dimension of the republican approach towards merger control has been tellingly summarized by Anne Witt. She observes that a majority of the early merger decisions by the European Commission 'revealed a generalized

[298] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 290) para. 176.
[299] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 290) para. 171; Case T-102/96 *Gencor v Commission* (n 290) para. 151.
[300] Case T-102/96 *Gencor v Commission* (n 290) para. 277.
[301] For the argument that concentration constituted the central concern of EU merger policy under the first Merger Regulation Monti (n 262) 249; A. C. Witt, 'From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really About More Economics?' (49) 2012(1) Common Market Law Review 217 225.
[302] Mestmäcker (n 74) 608.

concern about too much economic power in too few hands, but did not explain what danger emanated from such a position or what harm it expected a powerful undertaking to inflict on society.'[303]

4.2 The Positive, Egalitarian Dimension of Polycentric Competition and Merger Policy

This structural approach of merger policy on both sides of the Atlantic was not only informed by the negative, defensive dimension of republican liberty. Rather, US (4.2.1.) and EU merger policy (4.2.2) was also driven by the emancipatory and egalitarian dimension of republican liberty, which perceived polycentric competition as an important safeguard of the economic opportunities of all market participants.

4.2.1 The Positive, Egalitarian Dimension of Polycentric Competition and US Merger Policy

In the US, the positive dimension of republican liberty found its expression in the explicit goal of protecting and promoting small and independent businesses. The merger policy during the Warren Court aspired to preserve a Jeffersonian society of small, independent dealers. The merger policy of the Warren Court era, indeed, celebrated the economically independent businessmen as the epitome of the free and virtuous republican citizen. This became apparent in *Brown Shoe*. In this case, the Court acknowledged that the Brown Shoe merger by vertically integrating a shoe manufacturer and a large distributor would, in all likelihood, generate efficiencies that may lead to lower prices and consumer benefits.[304] Yet, it warned that those efficiencies might eventually put smaller, independent competitors out of business. Although the Court stressed that the Clayton Act sought to protect ‚competition, not competitors'[305], it prohibited the merger holding that it could not

> *fail to recognise Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.*[306]

[303] Witt (n 69) 132.
[304] *Brown Shoe Co. Inc. v. United States* (n 241) 343.
[305] ibid 320. 344.
[306] ibid 344.

The Warren Court case law thus suggested that efficiencies benefiting larger firms may offend the Merger Act when they entrench economic concentration and drive out smaller, less efficient competitors.[307] The Court and the 1968 Merger Guidelines envisaged only two circumstances in which efficiencies generated by merger may play the role of mitigating factors: either the merger ensures the survival of a financially failing firm or the merger would allow two small competitors to more effectively challenge larger industry players.[308] The Court thus clearly suggested that efficiencies of economic integration will only be positively accounted for if they strengthen the competitive force and opportunities of small players.

Under the auspices of republican antitrust, US merger policy thus did not only seek to avert domination by powerful firms (negative dimension) by preventing excessive industry concentration. It also aimed at 'keeping a large number of small competitors in business'.[309] Republican merger policy thus also pursued the egalitarian goal of ensuring a society in which economic opportunity and ownership are distributed amongst the many rather than the few.[310]

4.2.2 The Positive, Egalitarian Dimension of Polycentric Competition and EU Merger Policy

Unlike the US Supreme Court, the EU Commission and Courts have never explicitly endorsed the preservation of the competitive opportunities and livelihood of small dealers as goal of merger policy. This, however, does not mean that the concern about small and medium-sized businesses played no role in EU merger control. Quite the contrary is the case. In calling for the adoption of a European regime of merger control, the Commission expressed the fear that the creation of powerful players through mergers would jeopardise the competitive opportunities of small and medium-sized enterprises (SMEs). The Commission also insisted on the 'specific role' of SMEs for the maintenance of effective competition within the internal market.[311] The Commission thus viewed the preservation of a polycentric market structure not only as a bulwark against the domination of Behemoths created by merger, but also as a tool to promote the competitive opportunities of independent SMEs.[312] Akin to the way that small business played a central role in the Jeffersonian ideal of a republican society in the US, SMEs

[307] *United States v. Continental Can Co.* 378 U.S. 441 (1964) 463–464.
[308] *Brown Shoe Co. Inc. v. United States* (n 241) 319, 346; Merger Guidelines - 1968 (n 252) paras. 9-10.
[309] *United States v. Von's Grocery Co.* (n 248) 275, also 276-277.
[310] ibid 274.
[311] European Commission (n 263) 9–10.IXth Report on competition policy (1979) (n 79) 10; Witt (n 69) 96.
[312] VIIth Report on competition policy (1977) (n 79) 10–11; XIIth Report on competition policy 13.

as key drivers of European market integration lay at the heart of the imaginary of a nascent European economic and political project.

The goal of preserving the competitive opportunities of small and medium-sized enterprises also had an important bearing on concrete merger decisions under the first Merger Regulation. In *Aerospatiale-Alenia/de Havilland* the Commission did not only object the merger between the two leading producers of regional aircraft because it would lead to the creation of a dominant position. The Commission also noted that the merger would adversely affect the competitive opportunities of smaller competitors and customers. The Commission observed that the merger would bestow the merged entity with a considerable competitive advantage, as it would be able to offer airline customers the complete product range of regional civil aircraft. The merged entity would, moreover, benefit from a broad customer base.[313] Smaller competitors would, as a consequence of the merger, face a considerably larger competitor who would be able to leverage its market power over the non-contestable demand of regional airline customers to their contestable demand by offering better conditions, bundled rebates and loyalty rebates.[314]

Instead of approaching the broadening of the product portfolio and the ensuing decrease in transaction costs for airline customers as efficiencies created by the merger, [315] the Commission considered them as unfair competitive advantage the merged entity would gain over competing aircraft manufacturers.[316] It noted that, by giving the merged entity more flexibility to compete on price than its smaller competitors, [317] the merger would enable the merged firm to drive out its competitors from the market by waging a price war against them.[318] Far from being beneficial for consumers, those lower prices would be harmful in the long-run as the merged entity could raise its prices without being subject to any competitive checks once it has eliminated all competitors from the market.[319] The Commission underlined that the weakening of smaller competitors by the merger, would eventually also undermine the competitive opportunities of small and medium-sized customers, namely regional European airlines.[320] Far from recognising an efficiency defence, the Commission here appeared to

[313] Case No IV/M.053 Aerospatiale-Alenia/de Havilland (n 286) paras. 31-33.
[314] ibid para. 30.
[315] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (n 280) Art. 2 (1) (b).Case No IV/M.053 Aerospatiale-Alenia/de Havilland (n 286) para. 69.
[316] ibid.
[317] ibid para. 30.
[318] ibid para. 69.
[319] ibid paras. 69-70.
[320] ibid paras. 46. 70.

endorse an efficiency offence in a similar way as the Warren Court did in *Brown Shoe*. Instead of assessing the proposed merger based on its effects on efficiency or consumer welfare, the Commission in the *deHavilland* decision objected to the merger because it adversely affected an effectively competitive market structure or the openness of the competitive process by eliminating competitors, even though they were less efficient than the merged entity.[321]

4.3 Polycentricity and the Republican Approach towards Mergers

Merger policy on both sides of the Atlantic constituted the field of antitrust on which the goal of preserving a polycentric market structure had its most immediate impact. Arguably, US merger policy, and maybe US antitrust law in general, came never any closer to the ideal of republican liberty than during the 16 years of the Warren Court era (1953-1969). The structuralist approach developed in *Brown Shoe, Philadelphia National Bank* and progeny embodied both the dimensions of the republican concept of liberty as non-domination in their purest form. On the one hand, merger policy was geared towards preserving a polycentric market structure and avert instances of industry concentration to prevent firms from exercising domination. On the other hand, it also sought the protection of a polycentric market structure as a central safeguard of a Jeffersonian society composed by small businessmen in which economic power, opportunity and ownership are shared amongst the many rather than the few. The Court made it plain in *Brown Shoe* that this republican concern of preventing domination and enhancing a Jeffersonian society through the preservation of a decentralised market structure would take precedence over efficiency considerations. [322]

Both dimensions of republican liberty also had, albeit to a lesser extent, bearing on EU merger policy. Although EU merger policy did not display the same hostility against corporate bigness as did its US counterpart during the Warren Court era, the Commission and the EU Courts case apprehended merger control as an important tool to avert domination by preventing excessive market concentration and preserving the ability of markets to operate as mechanisms of antipower. This concern about the defensive dimension of a polycentric market structure also served the Commission and the Court as a basis to expand merger review under the concept of collective dominance to mergers, which fell below the concentration threshold initially identified by the Member States as a safe-harbour. The positive dimension of republican liberty

[321] For the creation of a similar 'efficiency offence' for efficiencies generated through conglomerate and vertical integration Case No COMP/M.2220 General Electric/Honeywell. C(2001) 1746 final paras. 344-427. For a discussion of a tension between a process- and effects-based definition of competition in EU merger control see B. Lyons, 'Reform of European Merger Policy' (2004) 12(2) Review of International Economics 246 256.
[322] *Brown Shoe Co. Inc. v. United States* (n 241) 344.

and the understanding of polycentric competition as a tool to promote competitive opportunities of small businesses had its sway on EU merger policy, too. The Commission repeatedly stressed the importance of merger policy in protecting and promoting small and medium-sized enterprises.

Under republican antitrust, merger policy on both sides of the Atlantic was geared towards preventing the emergence of Behemoths through the combination of previously independent firms. Preserving a deconcentrated market structure was thus perceived as safeguard preventing firms from transforming from bees into Behemoths. At the same time, merger policy also sought to promote the independent status of small businessmen as the economic pillars of a republican society and polity of free and equals.

5 Conclusion

This chapter inquires into how the republican ideal of non-domination and the related concept of a competition-democracy nexus have been operationalized through concrete antitrust policy. It identifies the structural policy objective of preserving a polycentric, competitive market structure as a central channel through which the republican ideal of liberty as non-domination has been implemented by all three pillars of competition on both sides of the Atlantic.

This aim of preserving a polycentric market structure was informed by the Smithian understanding of competition as a system of antipower. On the one hand, this structural approach put into practice the negative dimension of republican liberty. By preventing the concentration of economic power through coordinated conduct, unilateral exclusionary conduct or mergers, all three pillars sought to prevent that markets degenerate into a state of domination where firms act as Behemoths rather than bees. Republican antitrust thus harnessed all three pillars of competition law to promote competition as a checks-and-balances system whereby the independent decision-making of each player imposes impersonal checks on each other's capacity to exert domination. By preserving a polycentric market structure, all three pillars of competition law thus enhanced republican liberty by ensuring that markets operated in line with the ideal of a Grumbling Beehive and by preventing and shackling the economic power of Behemoths.

On the other hand, the structuralist approach also gave effect to the positive, egalitarian dimension of republican liberty. By promoting polycentric competition, the interpretation of all

three pillars of antitrust on both sides of the Atlantic placed itself in the egalitarian tradition of early, republican proponents of competitive markets, such as the English Levellers and Adam Smith, who perceived competition as an institution which enables small businessmen to emancipate themselves from a feudal economic order based on subordination, to grasp economic opportunities and to gain the independent status of free and equal republican citizens. The bees of Mandeville's Grumbling Hive thus had morphed into the imaginary of the small businessmen which republican antitrust on both sides celebrated as pillars of a Jeffersonian or nascent European republic.

CHAPTER V – THE POLICY PARAMETERS OF REPUBLICAN ANTITRUST: PRESUMPTIONS, STANDARD OF PROOF AND THE COST-BENEFIT FRAMEWORK

> *When you are not dominated, then, you enjoy the absence of interference by arbitrary powers, not just in the actual world, but in the range of possible worlds where contingencies […] have a different, less auspicious setting.*[1]

1 Introduction

The previous chapter has described how the republican approach on both sides of the Atlantic gave shape to the ideal of liberty as non-domination through a structuralist interpretation of all three substantive pillars of antitrust law. It shows that the republican ideal of liberty as non-domination has been translated into an approach seeking to ensure competition as a decentralised, polycentric market structure. By guaranteeing a market structure where power is dispersed amongst a multitude of independent players, republican antitrust aimed to advert the domination deriving from the combination and concentration of economic power in the hands of a few or a single player. It thus gave effect to the negative, defensive dimension of republican liberty. At the same time, in safeguarding a market structure composed of many small and independent players, all three pillars of competition law were also used to promote the positive, emancipatory dimension of republican liberty. It promoted economic opportunity and fostered the independent status of market participants as free and equals. The ideal of republican liberty as non-domination has thus been operationalised by elevating the structural, Smithian understanding of competition as a polycentric process and institution of antipower to the overarching policy objective of competition law.

This chapter goes one step further in our analysis of how the ideal of republican liberty and the concept of a competition-democracy nexus has been translated into concrete competition policy. The previous chapter identified the structuralist goal of preserving a

[1] P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997) 25.

polycentric market structure as what one can call the overarching 'target' or 'target variable'[2] of republican antitrust in the US and in Europe. This chapter examines the specific 'policy instruments' or 'parameters'[3] through which republican antitrust put this structuralist policy target into effect in order to operationalise the ideal of republican liberty in concrete cases. It sheds light on how the ideal of republican liberty was given shape through specific legal principles, concepts and tests, which can be considered the main vectors, parameters or levers of republican antitrust policy. This chapter identifies three such legal devices or judicial techniques, which were essential policy instruments or variables for the concretisation of the ideal of republican liberty through antitrust policy.

The first instrument or lever of republican antitrust policy was the extensive use of broadly construed presumptions of illegality. Under all three pillars of competition law, the Supreme Court and the EU Courts implemented the concern about protecting republican liberty through legal presumptions which inferred the legality of certain types of business conduct from its form and impact on a polycentric market structure, rather than inquiring into their actual or likely effects on competition and consumers (Section 2).

A second central policy instrument of the republican approach guiding the application of all three pillars of US and EU competition law was a specific 'capability standard'[4] of proof. In keeping with the republican premise that liberty is frustrated by the mere potential, rather than solely by actual or likely interference, the US and EU Courts for a long time merely required the showing that a specific conduct or merger led to potential, rather than actual or likely, anticompetitive effects for antitrust law to intervene. Accordingly, under the republican approach, it was sufficient to show that a particular business conduct was capable of adversely tampering with the polycentric market structure and of harming competitors or consumers for antitrust intervention to be warranted (Section 3).

The third policy parameter of republican competition policy governing the application of all three pillars of antitrust was a specific understanding of the costs and benefits of antitrust intervention. This republican understanding of the costs and benefits of antitrust law followed

[2] This chapter follows the terminology coined by the seminal work of the economist Jan Tinbergen J. Tinbergen, *On the Theory of Economic Policy* (North-Holland Publishing Company 1952) 1,4,6. Note, that I do not assume here that the antitrust policy must follow the so-called Tinbergen rule which postulates that the number of policy instruments must equal the number of policy targets.
[3] ibid 7.
[4] P. I. Colomo and Lamadrid de Pablo, A. 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' in D. Gerard, M. Merola and B. Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017) 361–363.

an arithmetic of the balance of rights, which in the case of doubts tilted in favour of prophylactic antitrust intervention. The goal of preventing domination resulting from excessive economic concentration, as well as a standard of proof which counselled for antitrust intervention in the light of potential harm, impelled a pro-active application of antitrust rules. This balance of rights was clearly in line with the republican understanding of liberty, which does not perceive republican laws and state interference as an antonym of liberty as long as they were adopted and enforced in a non-arbitrary way (Section 4).

Together with the discussion of the structural policy goal discussed in the previous chapter, this chapter complements our understanding of how the ideal of republican liberty has been translated into competition policy on both sides of the Atlantic. By identifying the common features and central parameters of a republican interpretation of competition law in the US and in the EU, this chapter provides further elements for a clear framework to understand the main parameters or variables of what one can call 'republican antitrust'. It shows how the interplay of all three parameters enabled republican antitrust in the US and EU to ensure a 'probabilistically unweighted' [5] protection of economic liberty as non-domination.

This chapter thus goes far beyond the existing, conventional account of the link between competition and democracy. Existing scholarship usually confines itself to underline that the value of democracy historically played an important role as a goal of antitrust law in the US and Europe.[6] Some authors also point out that this concern about democracy took shape in a hostile approach towards the concentration of economic power.[7] This scholarship, however, tells us little about how the ideal of democracy, or related values of liberty and equality, have been translated into concrete competition policy.

By focusing on policy instruments and judicial devices as primary channels for the implementation of republican liberty, this chapter shows that republican antitrust and the idea

[5] P. Pettit, 'Freedom in the Market' (2006) 5(2) politics, philosophy & economics 131 137–138.
[6] G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) 2-4, 96-99.
[7] R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051 1053–1056. E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140 1141-1142, 1151. L. A. Sullivan, *Antitrust* (West Publishing 1977) 942. E. M. Fox, 'The Battle for the Soul of Antitrust' (1987) 75(3) California Law Review 917 917. E. M. Fox, 'The Symbiosis of Democracy and Markets: OECD - Directorate for Financial and Enterprise Affairs Competition Committee - Global Competition Forum - Competition and Democracy' (2017) 1–6 <https://www.oecd.org/daf/competition/democracy-and-competition.htm>. L. M. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harv. L. & Pol 235 265–268. L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710 739–740. T. Wu, *The Curse of Bigness: Antitrust in the new gilded age* (Columbia Global Reports 2018) 53–58. L. M. Khan, 'The Ideological Roots of America's Market Power Problem' [2018] Yale Law Journal Forum 960, 966-968, 971.

of a competition-democracy is not only about elusive theoretical and normative concepts but has very concrete legal and policy implications. This chapter thus makes three major contributions. It, firstly, provides a better understanding of how the ideal of a competition-democracy nexus shaped the application of antitrust rules until the 1970s in the US and until the late 1990s and 2000s in Europe. Secondly, by identifying the central parameters and channels of the republican approach, it also allows us to pin down a model of what one can call 'republican antitrust'. In so doing, this chapter also signposts the main vectors of change that triggered the decline of republican antitrust and the rise of a *laissez-faire* approach under the auspices of the Chicago School and the More Economic Approach. This transformation will be further discussed in Chapters VI and VII. Third, by pinpointing a number of key elements of the toolkit of republican antitrust law, this chapter also identifies which parameters could be recalibrated or fine-tuned if antitrust policy makers and courts endorsed the current criticism of the consumer welfare standard and contemplate reverting, at least to some extent, to a more republican antitrust law.

The analysis of this chapter is structured around the three principal policy variables or channels of republican antirust. Section 2 discusses the role of presumptions in operationalising the value of republican liberty. Section 3 inquires into the requisite standard of proofing antitrust harm under the republican approach. Section 4 elucidates the understanding of the costs and benefits of competition law intervention underpinning republican antitrust in the US and in Europe.

2 The Operationalisation of Republican Liberty through Presumptions of Illegality

A central legal device through which the US Supreme Court, the EU Courts and Commission gave shape to the ideal of liberty as non-domination was the extensive use of presumptions of illegality. Those legal or so-called substantive presumptions are 'analytical shortcuts'.[8] They allow a decision-maker to infer a certain legal conclusion, such as the anticompetitive nature or illegality of a particular conduct, from a limited set of specific facts without the need of engaging in a full-fledged analysis of case-specific facts and evidence.[9] The

[8] A. Kalintiri, 'Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions' [2020] Journal of Competition Law & Economics [forthcoming].
[9] For recent discussions of different types of presumptions and their role in US antitrust and EU competition law S. C. Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in

reliance on broadly construed legal presumptions was indeed a common thread that characterized the implementation of the republican liberty in the US and in Europe. Presumptions played a primordial role in the interpretation of all three pillars of rule, namely the prohibition of anticompetitive agreements (2.1), the regulation of monopoly power (2.2) and the review of mergers (2.3). The extensive use of legal presumptions accounts for the fact that, from the perspective of republican liberty as non-domination, the mere potential of arbitrary interference is sufficient to give rise to unfreedom. By rendering the access to certain forms of conduct unavailable or more costly for market players, presumptions of illegality also make the enjoyment of liberty as non-domination less contingent and more resilient (2.4).

2.1 Presumptions as Policy Instrument of a Republican Approach towards Coordinated Conduct

Presumptions of illegality played a central role in the implementation of the ideal of republican liberty under § 1 and Art. 101 TFEU. In the US, the concern about domination resulting from the elimination of polycentric competition between competitors and their entering into coalitions first gave shape to a literalist interpretation of § 1 of the Sherman Act. The literalist approach deemed any agreement that restricted rivalry between competitors as unlawful restraint. This literalist interpretation of § 1 of the Sherman Act has, however, been fundamentally challenged by the recognition of the rule of reason. The concern about domination, however, continued to animate a broad interpretation of the *per se* rule under § 1 of the Sherman Act until the 1970s (2.1.1.). Presumptions of illegality also played a crucial role in the implementation of the republican ideal of liberty as non-domination under Art. 101 TFEU. Under the concept of restriction of competition by object, the EU judicature created a broad presumption of illegality against certain agreements carrying a large potential of giving

Formulating Antitrust Legal Standards' (2017) 2–6 <https://scholarship.law.georgetown.edu/facpub/2007/>.S. P. Sullivan, 'What Structural Presumption: Reuniting Evidence and Economics on the Role of Market Concentration in Horizontal Merger Analysis' (2016) 42 J. Corp. L. 403 406–408; J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019) 71–80; D. Bailey, 'Presumptions in EU Competition Law' (2010) 31(9) European Competition Law Review 362 364–366; A. Heinemann, 'Access to Evidence and Presumptions – Communicating Vessels in Procedural Law' in K. Hüschelrath and H. Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives* (ZEW Economic Studies vol 48. Springer Berlin; Springer 2014) 177–178; C. Ritter, 'Presumptions in EU competition law' (2018) 6(2) Journal of Antitrust Enforcement 189 189–200; F. La Castillo de Torre and E. Gippini Fournier, *Evidence, proof and judicial review in EU competition law* (Edward Elgar Publishing 2017) 61–66; A. Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach* (Hart 2019) 142–168. Admittedly, the definition of the concepts of 'presumptions' is far from settled in (EU) competition law. While underlining the importance of distinguishing between questions of law and evidence and suggesting that the concept of 'by object restrictions' relates rather to the scope of the substantive legal rules, Kalintiri, for instance, subsequently departs from her narrow concept of presumptions and also considers the 'by object' category as a presumption. Kalintiri (n 9) 146-147, 165-168. See also Kalintiri (n 8).

rise to domination. Unlike the *per se* rule, this legal presumption of illegality was, however, rebuttable (2.1.2.).

2.1.1 Presumptions of Illegality and Republican Liberty under § 1 of the Sherman Act

The importance of presumptions of illegality as a legal device in giving effect to the republican objective of preserving liberty as non-domination against aggregations of economic power first emerged in the so-called 'literalist' interpretation of § 1 of the Sherman Act during the formative era (1890-1911). In the years following the enactment of the Sherman Act, the Supreme Court gave the notion 'restraint of trade' in § 1 Sherman Act a broad, literal interpretation. Accordingly, under § 1, 'all combinations […] in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.'[10] Put differently, the 'plain language' of § 1 of the Sherman Act '*prohibits all contracts*'[11] that restrict competition.

This literalist reading was grounded in a structural presumption which inferred anticompetitive effects from the mere suppression of rivalry and independent decision-making by means of an agreement or other forms of coordinated conduct. Contracts and other forms of coordination undermining the polycentric structure and functioning of markets were presumed to give rise to a combination of economic power or control in the hand of the parties. The literalist approach, thus, assumed that any elimination of polycentric competition by agreement produces potential harm of such magnitude and scale that one can dispense with any analysis of its actual anticompetitive effects and the likelihood to which they materialise.

This literalist interpretation of the Sherman Act gave shape to the value of republican liberty because it did not only approach coordinated conduct, which actually or likely interfered with other market participants, as an obstruction of liberty. Instead of requiring the showing that an agreement is actually or likely interfering with the economic choices of other market participants in a way that raises prices or decreases output, the literalist approach considered the mere potential of domination resulting from contractual restraints of competition as sufficient basis for finding an agreement to be illegal under § 1 Sherman Act. The Court justified this sweeping scope of the literalist interpretation of § 1, by observing that all agreements in

[10] *United States v. Trans-Missouri Freight Asso.* 166 U.S. 290 (1897) 324, 326.
[11] ibid 327.

restraint of trade must be presumed to have the 'necessary tendency'[12] or 'inevitable tendency' of destroying competition and, thereby, '[being] injurious to the public'.[13]

Unsurprisingly, such a broad, literalist interpretation of § 1 of the Sherman Act was highly controversial and met strong opposition from outside and within the Court.[14] In *Trans-Missouri Freight Association* and subsequent case law, the defendants and dissenting Justices argued that a literal interpretation of § 1 Sherman Act would unduly interfere with businesses' common law property rights and contractual freedom. [15] The broad interpretation of § 1 was perceived as a threat to the negative economic liberty of firms. A growing number of voices asserted that the notion of 'restraint of trade' should be interpreted in line with the common law tradition which did not outlaw all restraints of trade, but only unreasonable ones.[16] The Court, first, rejected this call for a rule of reason.[17] Yet, obiter dicta in T*rans-Missouri* and *Joint Traffic*, [18] as well as Judge Taft's consequential opinion for the Sixth Circuit in *Addyston Pipe* importantly qualified the broad, literal reading of § 1 of the Sherman Act. They suggested that § 1 does not catch agreements that are ancillary to and promote legitimate transactions which have a neutral or overall beneficial effect on competition.[19]

The literalist interpretation of § 1 Sherman Act was finally toppled in 1911. In *Standard Oil* and *American Tobacco*,[20] the Court reversed its previous case law by holding that § 1 should be henceforth interpreted 'in the light of reason'.[21] Radically departing from its previous holdings, the Court asserted that the terms used in § 1 of the Sherman Act have their origin and derive their meaning from common law,[22] which embodies a firm commitment to negative economic freedom.[23] On this basis, the Court took the view that the notion of 'restraints of trade' must be given the same meaning as under the common law. In keeping with the flexible common law approach, the prohibition of § 1 must, therefore, be interpreted as a standard rather

[12] *United States v. E. C. Knight Co.* 156 U.S. 1 (1895) Justice Harlan dissenting 26.
[13] *United States v. E. C. Knight Co*. (n 12) Justice Harlan dissenting 28; *United States v. Trans-Missouri Freight Asso.* (n 10) 336. *United States v. Joint Traffic Ass'n* 171 U.S. 505 (1898) 561–562; *Northern Securities Co. v. United States* 193 U.S. 197 (1904) 332.
[14] For a comprehensive account of this struggle W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago University Press 1981 [1959]) 167–270.
[15] *United States v. Trans-Missouri Freight Asso.* (n 10) Dissent Justice White, 344, 346-351, 354-355. *United States v. Joint Traffic Ass'n* (n 13) 559, 571-572.
[16] *United States v. Trans-Missouri Freight Asso.* (n 10) 327.
[17] ibid 341. *United States v. Joint Traffic Ass'n* (n 13) 571; *Northern Securities Co. v. United States* (n 13) 331.
[18] *United States v. Trans-Missouri Freight Asso.* (n 10) 329; *United States v. Joint Traffic Ass'n* (n 13) 568.
[19] *United States v. Addyston Pipe & Steel* 85 F. 271 (6th Cir. 1898) 282–283.
[20] *United States v American Tobacco* 221 U.S. 106 (1911) 178 ff.
[21] *Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1911) 63, 64, 67, 68.
[22] ibid 51.
[23] ibid 55, 56, 59.

than as a rule.[24] This implied that the legality of a specific agreement must be ascertained in each and every case[25] based on

> *the standard of reason which had been applied at the common law [and which] was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statue provided.*[26]

The recognition of the rule of reason in *Standard Oil* and *American Tobacco* marked a turning point in the struggle between advocates of republican and negative liberty. Those who feared that a broadly construed structural presumption of illegality, which inferred domination from any form of elimination of polycentric rivalry, would annihilate negative economic liberty had, at least for some time, gained the upper hand over those who were concerned about domination by concentrated corporate power.[27] In *Standard Oil*, the Court affirmed that a literal interpretation of the Sherman Act would ultimately frustrate negative economic liberty and property rights, as it would encompass 'every contact, act, or combination of any kind or nature, whether it operated a restraint on trade or not'.[28] This concern was also reiterated a few years later in the perhaps most consequential enunciation of the rule of reason by Justice Brandeis in *Chicago Board of Trade*.[29] The Court, in this case, asserted that the legality of agreements could no longer be 'determined by so simple a test, as whether it restraints competition'.[30] The 'true test' of legality under § 1 of the Sherman Act, Justice Brandeis famously observed, consists of an inquiry into whether 'the restraint imposed is such as it merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'[31]

While *Standard Oil* had set out in sweeping terms that the legality of all restraints of trade would have to be assessed under the standard of reason, which ascertains their actual or likely effects on competition,[32] the Court did not fully jettison the use of legal presumptions

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[24] ibid 60, 64.
[25] *Standard Oil Co. of New Jersey v. United States* (n 21) 60, 63; *United States v American Tobacco* (n 20) 180; R. H. Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1966) 75(3) The Yale Law Journal 775 818–819.
[26] *Standard Oil Co. of New Jersey v. United States* (n 21) 60, 63, 66. See also *United States v American Tobacco* (n 20) 180.
[27] *Standard Oil Co. of New Jersey v. United States* (n 21) 69.
[28] ibid 63.
[29] *Chicago Board of Trade v. United States* 246 US 231 (1918).
[30] ibid 238.
[31] ibid.
[32] *Standard Oil Co. of New Jersey v. United States* (n 21) 60. See in this respect also Hovenkamp '[…] *Standard Oil* made it seem that all restraints should be governed by the rule of reason. H. Hovenkamp, 'The Rule of Reason' (2018) 70 Fla. L. Rev. 81 86.

under § 1. Despite the 'notorious opacity'[33] and 'elusive'[34] style of Chief Justice White's opinions in *Standard Oil* and *American Tobacco*, it is possible to discern at least an implicit distinction between two analytical categories the Court envisaged in both cases to determine when an agreement constitutes an undue restraint of competition. Agreements are deemed unreasonable if they 'operated to the prejudice of the public interest by unduly restricting competition […] either because of their inherent nature or effect or because of the evident purpose of the acts.'[35] Under the umbrella of the standard of reason as the new rule of construction of the Sherman Act, the Court thus introduced a distinction between two types of contracts whose 'nature or effect causes [them] to be in restraint of trade'.[36] On the one hand, unreasonableness of the restraint of trade could be derived from the 'nature and character of the contract or act'.[37] Accordingly, some forms of restraints can be presumed by their very character or nature to be unreasonable due to their inherent 'monopolistic tendency.'[38] On the other hand, the unreasonableness of a restraint can also be identified in a situation 'where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade.'[39] Under this latter category, the 'direct or indirect effect' of a contract on competition must be determined through a more comprehensive analysis of the case-specific facts and effects of the restraint at issue.[40]

To give effect to the overarching standard of reason as the rule of construction of the Sherman Act, the Court in *Standard Oil* and *American Tobacco*, thus, also articulated, along with the 'rule of reason' category, what can be described as an 'embryonic per se rule'[41]. In drawing this distinction between two analytical categories to assess the reasonableness of an agreement, *Standard Oil* and *American Tobacco* built on earlier attempts by Justice Peckman in *Trans-Missouri* and *Joint Traffic* to curtail the sweeping scope of a literalist interpretation of §1 by distinguishing between contracts that directly interfere with trade and those that affect competition only 'indirectly and remotely'. [42] It also picked up on Judge Taft's attempt in

[33] Bork (n 25), 801.
[34] Letwin (n 14) 256.
[35] *United States v American Tobacco* (n 20) 179.
[36] *Standard Oil Co. of New Jersey v. United States* (n 21) 63, 65.
[37] ibid 58.
[38] ibid 62, 64.
[39] ibid 58.
[40] *Standard Oil Co. of New Jersey v. United States* (n 21) 66; *United States v American Tobacco* (n 20) 180.
[41] Sullivan (n 7) 174, 182. See in this sense also Bork (n 25), 804.
[42] *United States v. Trans-Missouri Freight Asso.* (n 10) 329; *United States v. Joint Traffic Ass'n* (n 13) 568; *Standard Oil Co. of New Jersey v. United States* (n 21) 66; Letwin (n 14) 263; Sullivan (n 7) 174; Bork (n 25), 805.

Addyston Pipe to harness the common law doctrine of ancillary restraints[43] to discriminate between agreements that are 'reasonable necessary' to the achievement of 'legitimate ends'[44] and contracts having as their 'sole object' to restrict competition and which 'necessarily have a tendency to monopoly and therefore would be void.'[45]

This *per se* rule/rule of reason divide, elusively sketched out in *Standard Oil* and *Amercian Tobacco,* became the fundamental framework for the analysis of coordinated conduct under § 1. The fundamental difference between the *per se* rule and rule of reason categories is that the *per se* rule operates on the basis of legal presumptions. Unlike the rule of reason, the *per se* rule prohibits certain types of agreements as being by their very nature restrictive of competition and, therefore, in breach of § 1 of the Sherman Act. [46] The *per se* rule thus infers the (il)legality of certain types of agreements from its 'nature and character'[47] alone, whereas, under the rule of reason, the factfinder has to inquire into the actual or likely effects of agreements under investigation. [48]

In developing the *per se* rule, the Court resuscitated an irrebuttable presumption of illegality for certain types of agreements akin to the presumption it had relied upon to implement the ideal of republican liberty under the literalist approach. Under this presumption, the Court considered the existence of certain types of agreements itself as evidence for a restriction of competition and, thus, a violation of the Sherman Act.[49] Instead of outlawing all contracts in restraint of trade, the *per se* rule devised a narrowed, while better targeted and refined category of concerted conduct that is automatically presumed to amount to domination. The recognition of the rule of reason in *Standard Oil* hence did not entirely displace the concern about liberty as non-domination under § 1 of the Sherman Act. On the contrary, the remnants of the concern about potential domination arising from the pooling of economic power through agreement or other coordinated conduct continued to thrive under the category of *per se* rules that the Court developed in parallel to the rule of reason in subsequent cases.[50] Until the end of the 1960s, the Court adhered to a broad application of the *per se* rule, in particular against

[43] *United States v. Addyston Pipe & Steel* (n 19) 280.
[44] ibid 281; further discussion of the conditions 281 - 285.
[45] ibid 282. For a more detail discussion of the continuity and differences between Judge Taft's formulation of the ancillary restraint doctrine and the Chief Justice White's rule of reason Letwin (n 14) 265–267; Bork (n 25), 805.
[46] *United States v. Trenton Potteries Co.* 273 U.S. 392 (1927) 397–398. *United States v. Arnold, Schwinn & Co.* 388 U.S. 365 (1967) 379.
[47] *United States v. Trenton Potteries Co.* (n 46) 399.
[48] *Appalachian Coals, Inc. v. United States* 288 U.S. 344 (1933) 377.
[49] E. S. Mason, 'Monopoly in Law and Economics' (1937) 47(1) The Yale Law Journal 34 41.
[50] *United States v. Trenton Potteries Co.* (n 46).

horizontal and vertical price-fixing agreements, [51] horizontal and vertical market division agreements,[52] and group boycotts. [53] During the same time, the rule of reason analysis had a considerably narrower application.[54]

To fully grasp the role of the *per se* rule as an irrebuttable presumption of illegality in implementing the goal of republican liberty, it is worthwhile recalling the fundamental difference between negative and republican liberty. Negative liberty as non-interference relies on a probabilistic logic because it only views actual or likely interference as a source of unfreedom. Republican liberty as non-domination, by contrast, does not only apprehend actual or likely interference but the mere subjugation to someone else's capacity to interfere arbitrarily with one's choices and action as obstruction of liberty. Republican liberty thus does not follow the same probabilistic logic of negative liberty. For it is not only concerned about actual or likely, but also potential arbitrary interference.

Until the 1960s, the use of the *per se* rule by the Supreme Court was much more in line with a republican rather than with the probabilistic logic of negative liberty. Under the *per se* rule, the Court did not merely prohibit agreements, which actually or likely interfered with the economic liberty of other competitors or consumers. Rather, the Court reverted to presumptions of illegality to outlaw specific forms of agreements that it regarded as a source of domination due to their capacity or potential to adversely affect the polycentric functioning and structure of markets and confer the parties the power to control the market.[55] The *per se* rule thus prohibited certain types of agreements based on the presumption that they have the 'tendency'[56] – not likelihood – to foreclose competitors, restrict competition and allow the parties to 'effectively dominat[e] the market'.[57] The Court repeatedly held that § 1 should automatically outlaw

[51] *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U.S. 373 (1911). *United States v. Trenton Potteries Co.* (n 46) 392; *United States v. Socony-Vacuum Oil Co.* 310 U.S. 150 (1940) 218.
[52] *United States v. Addyston Pipe & Steel* (n 19). *Addyston Pipe & Steel Co. v. United States* 175 U.S. 211 (1899). *United States v. Sealy, Inc.* 388 U.S. 350 (1967) 358. *White Motor Co. v. United States* 372 U.S. 253 (1963) 263. *United States v. Arnold, Schwinn & Co.* (n 46) 390. *United States v. Topco Assocs. Inc.* 405 U.S. 596 (1972) 608–610.
[53] *Eastern States Lumber Ass'n v. United States* 234 U.S. 600 (1914) 609–611. *Klor's, Inc. v. Broadway-Hale Stores, Inc.* 359 U.S. 207 (1959) 210; *Fashion Originators' Guild, Inc. v. FTC* 312 U.S. 457 (1941) 465–467.
[54] Mason (n 49), 42. See for the rare application of the rule of reason *Chicago Board of Trade v. United States* (n 29); *Appalachian Coals, Inc. v. United States* (n 48).
[55] Mason (n 49), 41.
[56] *Fashion Originators' Guild, Inc. v. FTC* (n 53) 468; *Int'l Salt Co. v. United States* 332 U.S. 392 (1947) 396; *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (n 53) 211.
[57] *United States v. Socony-Vacuum Oil Co.* (n 51) 221.

> *certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.* [58]

The *per se* rule thus encapsulated a prophylactic approach that sought to prevent agreements, which lead to a situation where parties 'have it in their power to destroy or drastically impair the competitive system.'[59] The relevant criterion to determine whether an agreement is caught by the *per se* rule was not primarily the likelihood[60] but rather the scale, gravity, or significance of the potential harm to competition, which emanates from a specific agreement. The legal presumptions of illegality developed under the *per se* rule relied on basic structural considerations. The *per se* rule inferred the magnitude of anticompetitive harm of specific types of agreements from the degree to which they tampered with the polycentric structure and functioning of markets. The potential gravity of the negative impact of an agreement on polycentricity, in turn, served as a proxy for the parties' capacity to exercise domination. Unlike under the literalist approach, the presumption of illegality under the *per se* rule did no more apply to all forms of contractual elimination of polycentric competition. The Court, instead, limited this presumption to specific categories of agreements whose negative impact on competition and competitors had been established by long-standing judicial experience and could, therefore, be generalised.[61] This broad *per se* approach against those types of agreements that most directly undermined with the polycentric structure and functioning of competition was also supported by economic thinking championed by the Harvard School and the S-C-P paradigm, which treated collusion primarily as a structural problem.[62]

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[58] *Northern Pac. Ry. Co. v. United States* 356 U.S. 1 (1958) 5. *White Motor Co. v. United States* (n 52) 262; *Leegin Creative Leather Prods. v. PSKS, Inc.* 551 U.S. 877 (2007) 886.

[59] *United States v. Socony-Vacuum Oil Co.* (n 51) 221.

[60] The presumption underpinning republican antitrust thus did not follow the purely probabilistic logic which underpins our contemporary notion of presumptions as being based on the likelihood of anticompetitive effects. For such a probabilistic understanding of presumptions Sullivan (n 9), 405; Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 9) 2.

[61] *United States v. Trenton Potteries Co.* (n 46) 398; *United States v. Socony-Vacuum Oil Co.* (n 51) 218. In Socony Vacuum the Court pointed out that it had ‚[f] or over forty years […] consistently and without deviation adhered' to the per se rule against price-fixing agreements. *United States v. Topco Assocs. Inc.* (n 52) 608. This logic is still articulated in *Ariz. v. Maricopa County Medical Soc.* 457 U.S. 332 (1982) 351.

[62] D. F. Turner, 'The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal' (1962) 75(4) Harvard Law Review 655 665–666; C. Kaysen, 'Collusion Under the Sherman Act 1' (1951) 65(2) The Quarterly of Economics 263 265–266; J. S. Bain, *Industrial Organization* (John Wiley & Sons 1959) 406–423.

2.1.2 Presumptions of Illegality and Republican Liberty under Article 101 TFEU

In a similar vein as the US Supreme Court, the EU judicature also relied on a presumption of illegality of agreements that substantially tampered with the polycentric structure and operation of markets to make operative the value of republican liberty under Article 101 (1) TFEU. This presumption of illegality was first coined in *Société Technique Minière* and *Consten and Grundig.* In both cases, the Court held that, when confronted with an allegedly anticompetitive agreement, the factfinder would have to ascertain, first, whether it has as its object the restriction of competition. To this end, the factfinder has to analyse the 'precise purpose' of the agreement within its economic and legal context.[63] If the clauses or the agreement in its entirety indicate that it is 'sufficiently deleterious' [64] or 'injurious'[65] to competition, the agreement can be presumed to be restrictive of competition and, hence, *prima facie* unlawful under Article 101 (1) TFEU.[66] Once it is established that an agreement has as its object the restriction of competition, 'there is no need to take account of [its] concrete effects' to determine whether it violates Article 101 (1) TFEU.[67]

By contrast, in the event that the examination of the clauses of the agreement does not conclusively reveal that it has as its object the restriction of competition, further analysis of actual consequences of the agreement becomes necessary in order to determine whether it has as its effect the restriction of competition and, thus, runs afoul Art. 101 (1) TFEU. The finding of an anticompetitive effect thus requires a more granular, case-specific analysis of the agreement and its impact on competition.[68] Only if this analysis suggests that competition has been restricted to 'an appreciable extent' it can be concluded that it has as its effect the restriction of competition.[69]

By devising the category of by-object restrictions, the Court created a presumption of illegality for certain forms of agreements, which are deemed to restrict competition and infringe

[63] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:38 p. 249.
[64] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* (n 63) p. 249; Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:343 para. 28; Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* ECLI:EU:C:2008:643 para. 15; Case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160 para. 35.
[65] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 64) para. 29. Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* (n 64) para. 17. Case C-67/13 P *Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204 para. 50.
[66] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* (n 63) p. 249.
[67] Case 56/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41 p. 342, 344.
[68] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* (n 63) p. 250.
[69] ibid p. 249.

Article 101 (1) TFEU without much further case-specific analysis.[70] As the *per se* rule under § 1 of the Sherman Act, the presumption of illegality encoded in the by-object category is directed against the most egregious forms of anticompetitive agreements that can be regarded 'by their very nature as being injurious [or harmful] to the proper functioning of normal competition.'[71]. This presumption underpinning the concept of by-object restrictions follows the logic and puts into practice the concern about republican liberty as non-domination. Indeed, the Court has repeatedly held that for an agreement to be deemed a by-object restriction of competition, it is irrelevant whether it leads to actual or likely harm and interference with other market participants. [72] Rather, in a similar vein as the *per se* rule under § 1, the concept of the restriction by-object focused almost exclusively on the potential scale or magnitude of harm that a particular type of coordination can cause. Instead of requiring that an agreement led to actual or likely interference with the negative liberty of market participants, the category of by-object restrictions encompasses agreements that lead to potential harm to competition.

This point has been pointedly illustrated by Advocate General Kokott, who has observed that the by-object category operates along a similar logic as the so-called 'risk offences' (*Gefährdungsdelikte*) in criminal law.[73] For instance, most legal systems provide for an absolute prohibition to drive a car under the influence of alcohol or drugs.[74] A driver who is caught intoxicated will be sanctioned irrespective of whether he endangered other traffic participants, for instance, because he actually or was likely to cause an accident. This strict prohibition is not informed by the likelihood or concrete threat of (damaging) interference with other traffic participants. Instead, it is the abstract potential of such interference that informs such a strict prohibition of driving under the influence. The same rationale, Advocate General Kokott affirmed, underlies the by-object category, which accounts for the fact that certain forms of coordination between firms have the potential to interfere with and undermine polycentric competition to a serious extent. Advocate General Kokott, therefore, observed that the by-object

[70] Bailey (n 9), 364–365; Ritter (n 9), 192, 198.
[71] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 64) para. 43. See also Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 65) para. 50.
[72] Case C-226/11 *Expedia* ECLI:EU:C:2012:795 para. 37, see also paras. 21-29. *Opinion of Advocate General Kokott in* Case C-226/11 *Expedia* ECLI:EU:C:2012:544 para. 50.
[73] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:110 para. 47.
[74] ibid.

category creates a '*per se* prohibition'[75] against certain forms of coordination that are recognized to be by their very nature capable of being harmful to society.[76]

The presumption encoded in the by-object restriction thus operated, like the US *per se* rule, in a way that is more in line with the ideal of liberty as non-domination than with the concept of negative liberty. Instead of being based on a probabilistic rationale and prohibiting only conduct which is actually or likely to interfere with the economic freedom and choices of other market participants, it *prima facie* outlaws concerted conduct which confers on the parties the capability to arbitrarily interfere with and exert potential domination over other market participants. This concern about liberty as non-domination, for instance, emerges from the numerous cases in which the Court held that parties of a by-object agreement fell afoul of Article 101 (1) TFEU although they had not implemented the restrictions and doing so would have been at odds with their economic interests.[77]

While the view has been widely held that the by-object category should not be given an excessively wide application, [78] the Court repeatedly pointed out that the by-object category is not necessarily limited to the types of anticompetitive agreements listed in Article 101 (1) TFEU).[79] Until recently, the EU adjudicature, hence, adopted a rather broad, or even expansive,[80] reading of the by-object category. This extensive application of the by-object category rested upon the concern that an 'unduly strict' interpretation of the category of by-object restrictions would undermine its 'practical effectiveness'.[81]

The argument that the presumption of illegality underpinning the by-object restriction under Art. 101 TFEU operated like the *per se* rule under § 1 of the Sherman Act as a policy variable to operationalise the concern about domination is not called into question by the critical differences that certainly exist between the by-object/by-effect divide under Art. 101 (1) and the *per se* rule/rule of reason distinction under § 1 of the Sherman Act. [82] The most important

[75] ibid para. 43.
[76] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 73) para. 43; *Opinion of Advocate General Kokott in* Case C-226/11 *Expedia* (n 72) para. 50.
[77] See for instance Case C-238/99 P *Limburgse Vinyl Maatschappij and Others v Commission* ECLI:EU:C:2002:582 paras. 508 - 510. Case C-189/02 P *Dansk Rørindustri and Others v Commission* ECLI:EU:C:2005:408 paras. 144 - 146.
[78] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 73) para. 43.
[79] Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* (n 64) para. 23; *Opinion of Advocate General Kokott in* Case C-226/11 *Expedia* (n 72) para. 51.
[80] See for instance Case C-32/11 *Allianz Hungária Biztosító and Others* (n 64).
[81] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 73) para. 43.
[82] R. Whish and B. Suffrin, 'Article 85 and the Rule of Reason' (1987) 7(1) Yearbook of European Law 1. Case T-691/14 *Servier and Others v Commission* ECLI:EU:T:2018:922 para. 294.EU Courts and Advocate Generals however also referred repeatedly to the by-object category as per se rule and the by-effect analysis as rule of

difference between the by-object category and the *per se* rule is that, unlike the *per se per se* rule under § 1 of the Sherman Act, the concept of the by-object restriction does not create an irrebuttable presumption of illegality. The finding of a by-object restriction creates only a rebuttable presumption, because the agreement may still qualify for the exemption under Article 101 (3) TFEU.[83] The availability of the escape route under Art. 101 (3) TFEU, however, does not weaken the republican rationale of the by-object category. The European judicature and the European Commission have consistently held that by-object restrictions of competition are unlikely to fulfil the four cumulative conditions of Art. 101 (3) TFEU.[84] By object restrictions, create, therefore, often in a similar way as *per se* restrictions a *de facto* irrebuttable presumption of illegality.[85] Most importantly, the institutional design governing the application of the exemption of Article 101 (3) TFEU under Regulation 17/62 EEC[86] and, hence, the rebuttal of the *prima facie* illegality under Art. 101 (1), was profoundly shaped by the logic of republican liberty.

Until the modernization of Article 101 by Regulation 1/2003,[87] the parties to an agreement, which was caught by Art. 101 (1) TFEU, had to notify their agreement to the European Commission to rebut the finding of a by-object (or by-effect) restriction and benefit from the exception of Article 101 (3) TFEU. The Commission, then, possessed the sole competence to decide whether the agreement could benefit from an exemption under Article 101 (3) TFEU. Instead of leaving it to private parties, this authorisation system allocated the task to decide when an agreement can be exempted from the prohibition of Article 101 (1)

reason analysis. See for instance Case T-14/89 *Montedipe v Commission* ECLI:EU:T:1992:36 para. 265. Opinion of Advocate General Cosmas in C-235/92 P *Montecatini v Commission* ECLI:EU:C:1997:362 paras. 46-47, 50. The Court of Justice, unlike the General Court, has also never entirely ruled out the existence of a rule of reason under Article 101 (1) TFEU Case C-235/92 P *Montecatini v Commission* ECLI:EU:C:1999:362 para. 133. See also for the position that the differences between the concept of the per se rule and by-object restriction are of theoretical rather than practical relevance A. Jones and W. E. Kovacic, 'Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework' (2017) 62(254-293) The Antitrust Bulletin 281.

[83] Case 56/64 *Consten and Grundig v Commission of the EEC* (n 67) pp. 347-349; Whish and Suffrin (n 82), 1–2; Opinion of Advocate General Roemer in Case 56/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:19 0. 358; Case T-17/93 *Matra Hachette v Commission* ECLI:EU:T:1994:89 para. 46; Case T-374/94 *European Night Services and Others v Commission* ECLI:EU:T:1998:198 para. 136; Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* (n 64) paras. 21, 29; Case 243/83 *Binon v AMP* ECLI:EU:C:1985:284 para. 45; Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610 para. 78. Bailey (n 9), 365. Ritter (n 9), 198.

[84] Guidelines on the application of Article 81(3) of the Treaty. OJ [2004] C 101/97 para. 46. See also Case C-68/12 *Slovenská sporiteľňa* ECLI:EU:C:2013:71 paras. 35-36; Jones and Kovacic (n 82), 281.

[85] See however for a rare application of Art. 101 (3) TFEU to a price-fixing agreement Case No IV/36.748 Reims II. OJ [1999] L 275/17.

[86] EEC Council Regulation 17/62 implementing Articles 85 and 86 of the Treaty. OJ [1962] L 13/204.

[87] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ [2003] L 1/1.

TFEU to the Commission as a public authority. Unlike in a rule of reason case under § 1 of the Sherman Act, the parties of an agreement also could not rely on Art. 101 (3) TFEU to rebut the presumption of illegality under Art. 101 (1) TFEU in front of national courts, unless the agreement was authorised by the Commission.

The concept of republican liberty offers perhaps the best explanation for the institutional design of the 'old' notification and authorisation system of Art. 101 (3) TFEU, which reserved the decision on whether the finding of a by-object restriction can be rebutted to the Commission as public authority, rather than leaving it to the private parties. The notification system, indeed, embodied the republican distinction between arbitrary and non-arbitrary interference.[88] It reverberated the republican assumption that public decision-making processes, which are compliant with constitutional principles and the rule of law, unlike private decision-making, may ensure the non-arbitrariness of certain forms of interference. The notification regime of 101 (3) TFEU thus, on the one hand, reflected a profound scepticism about the capacity of the private parties themselves to ensure that the interference with competition and the economic liberty of other market participants resulting from their agreements is of a non-arbitrary nature. On the other hand, it stood for the assumption that only the Commission as public, financially-disinterested and politically accountable, decision-making body is capable of ensuring the non-arbitrary nature of the interference that might be caused by an agreement *prima facie* caught by Art. 101 (1) TFEU. This system hence turned on the assumption that any form of interference with other market participants arising from an agreement authorized by the Commission under Art. 101 (3) TFEU must be considered as non-arbitrary and does not give rise to unfreedom because it originates from the non-arbitrary decision-making process by the Commission as a public authority, rather than the initial decision of the private, self-interested parties. The four substantive conditions of Article 101 (3) further ensured that the finding of *prima facie* illegality under Art. 101 (1) could only be rebutted on non-arbitrary grounds. All four conditions thus contributed to the non-arbitrary nature of this decision-making as they provide a clear framework, which required the Commission to trace the interests of all relevant stakeholders and account for the overarching goal of Article 101 TFEU to ensure competition as polycentric market structure.[89]

[88] See on this point, Chapter 1 and P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576 586–587; Pettit (n 5), 135–136.
[89] See in support of this interpretation of the fourth condition under Art. 101 (3) of preserving the residual competition in the market Art. 101 (3) (b).

Until the reform of the application of Article 101 (3) TFEU by Regulation 1/2003 EC,[90] the by-object category, while formally only creating a rebuttable presumption of illegality, thus had a similar effect as the *per se* rule under § 1 of the Sherman Act. It created a presumption of illegality against certain types of agreements on the basis of their mere potential to give rise to domination. Although Art. 101 (3) TFEU provided for a channel to rebut this presumption, any form of rebuttal involved state intervention on the part of the Commission as a public authority. Due to the institutional and substantive design of the application of Article 101 (3) TFEU, the legal presumption underpinning the by-object restriction operated even more than its US counterpart in line with the logic of republican liberty.

Presumptions of illegality, encoded in the *per se* rule and by-object restriction, thus played a pivotal role in translating the concern about republican liberty as non-domination into concrete antitrust policy under § 1 of the Sherman Act and Art. 101 TFEU. Although they differed with respect to their rebuttability, the *per se* rule and the by-object restriction attached a presumption of illegality to specific forms of agreement based on their capacity or potential to entail harmful effects on competition. Instead of focusing on whether certain conduct is actually or likely to interfere with the economic liberty of other market participants in a welfare-decreasing way, these legal presumptions turned on the scale or magnitude of the potential harm certain types of agreements may generate. This scale of harm was directly inferred from the degree to which these agreements affected the polycentric functioning and structure of competition. The more an agreement undermined polycentric competition and the impersonal checks it imposes on market power, the more it was presumed to give rise to domination and, hence, undermine liberty.

2.2 Presumptions as Policy Instrument of a Republican Approach towards Monopoly Power

The role of presumptions of illegality in implementing the goal of republican liberty and the linked objective of preserving a polycentric market structure was, however, not confined to the interpretation of § 1 of the Sherman Act and Art. 101 (1) TFEU. On the contrary, presumptions of illegality were also of importance for the operationalization of the goal of republican liberty for the regulation of powerful, monopolistic firms through the application of US (2.2.1) and EU (2.2.2) antitrust rules.

[90] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 87).

2.2.1 Presumptions of Illegality and the US Anti-Monopoly Rules

In the US, the use of presumptions of illegality with respect to monopoly power took two forms. The first way in which US antitrust relied on presumptions to tackle monopoly power was through a presumption of illegality of the existence of monopoly as such. This situational approach, which focuses on the mere existence of monopoly power, informed the literalist application of antitrust law during the formative era. The literalist interpretation, indeed, hinged on the assumption that the possession of monopoly power in itself amounts to a violation of the Sherman Act, without there being any need to demonstrate unreasonable conduct.[91]

This situational presumption against monopoly was fundamentally challenged by the recognition of the rule of reason in *Standard Oil* and *American Tobacco*. Chief Justice White, writing in both cases for the majority, stressed the complementary role of § 1 and 2 of the Sherman Act. He advanced the view that the recognition of the rule of reason is not limited to the notion of 'restraint of trade' under § 1, but should also guide the interpretation of § 2.[92] The Court insisted that the Sherman Act had not established any 'direct provision against monopoly in the concrete'.[93] Therefore, something more than the mere existence of concentration of economic power and dominance had to be shown for there to be a violation of §§1 and 2.[94] Interpreted under the standard of reason, both provisions of the Sherman Act only outlaw acts which are 'unduly restricting competition'.[95] To be caught by the prohibition of monopolization under § 2, the conduct at issue must disclose some form of intent and purpose of excluding competitors.[96] Such intent, for instance, transpired from conduct which is 'wholly inconsistent' with the usual business methods and is adopted to drive other competitors out of the market.[97]

The recognition of the rule of reason, however, failed to fully dispel concerns about the adverse effect of concentration of economic power on the republican ideal of economic liberty as non-domination. Quite the contrary was the case. After *Standard Oil*, the interpretation of § 2 of the Sherman Act oscillated until the mid-20th century between a situational approach, which would outlaw the existence of monopoly power as such, and a conduct-based approach which only prohibits dominant firms from indulging in conduct that harmed competition. The

[91] *Northern Securities Co. v. United States* (n 13) 351-352, see also 335, 337-338, 340; Sullivan (n 7) 34–35.
[92] *Standard Oil Co. of New Jersey v. United States* (n 21) 62; *United States v American Tobacco* (n 20) 177.
[93] *Standard Oil Co. of New Jersey v. United States* (n 21) 62.
[94] *United States v American Tobacco* (n 20) 182. See also Mason (n 49), 43.
[95] *United States v American Tobacco* (n 20) 179.
[96] *Standard Oil Co. of New Jersey v. United States* (n 21) 75; *United States v American Tobacco* (n 20) 179.
[97] *Standard Oil Co. of New Jersey v. United States* (n 21) 76. *United States v American Tobacco* (n 20) 181.

situational approach towards monopoly reached its climax with *Alcoa* and subsequent case law.[98] Those cases created a presumption of illegality for the possession of monopoly power as such, irrespective of any abusive conduct.[99] This presumption of illegality against the possession of monopoly power clearly followed the logic of republican liberty. It inferred the violation of § 2 of the Sherman Act from the very existence of concentrated economic power on the mere basis of potential harm that it might bring about, without assessing whether it leads to actual or likely interference with the economic liberty of other market participants.[100]

Unlike the *per se* rule under § 1 of the Sherman Act, this presumption of illegality of monopoly power remained, however, rebuttable. *Alcoa* and subsequent cases by the US Supreme Court indeed acknowledged that a firm 'may not have achieved monopoly; monopoly may have been thrust upon it.'[101] These cases, therefore, recognised the possibility for firms to rebut this presumption of illegality by showing that their monopoly power was obtained 'merely by virtue of his superior skill, foresight and industry.'[102]. Yet, this efficiency defence was interpreted very narrowly. [103] In *Alcoa,* for example, Judge Hand reproached the defendant that it had proactively anticipated new demand and 'embrace[d] each new opportunity as it opened, and [faced] every newcomer with new capacity'.[104] In so doing, Judge Hand appeared to suggest that superior efficiency may become an offence rather than a defence under § 2 of the Sherman Act.[105]

This attempt to make the value of republican liberty operative through a situational test and a presumption of illegality against monopoly elicited strong support by certain strands in the antitrust community. The so-called 'limitist' movement, which called for a progressive use of antitrust laws as a tool for a radical re-organisation of the US economy and the elimination of monopoly power, supported such a presumption of illegality against monopoly as part of an antitrust policy that would drastically limit the size of big business and break up and dissolve

[98] E. S. Mason, *Economic Concentration and the Monopoly Problem* (Harvard University Press 1959) 361.
[99] See in this respect the apt summary of the evolution of the § 2 case law by Judge Wyzanski in *United States v. United Shoe Machinery Corp.* 110 F. Supp. 295 (D. Mass. 1953) 341; A. Director and E. H. Levi, 'Law and the Future: Trade Regulation' (1956) 51 Nw. U. L. Rev. 281 284–286.
[100] *United States v. Alcoa* 148 F.2d 416 (2d Cir. 1945) 427, 429, 432. *American Tobacco Co. v. U.S.* 328 U.S. 781 (1946). 809, 810–811. *United States v. Griffith* 334 U.S. 100 (1948) 107. *United States v. Paramount Pictures* 334 U.S. 131 (1948) 173–174; *Schine Theatres v. United States* 334 U.S. 110 (1948) 129–130.
[101] *United States v. Alcoa* (n 100) 429; *American Tobacco Co. v. U.S.* (n 100) 786, 800-804.
[102] *United States v. Alcoa* (n 100) 430. See also *United States v. United Shoe Machinery Corp.* (n 99) 341.
[103] *American Tobacco Co. v. U.S.* (n 100) 796; *United States v. Swift & Co.* 286 U.S. 106 (1932) 116.
[104] *United States v. Alcoa* (n 100) 431.
[105] ibid.

large monopolies.[106] The Harvard School, too, drew inspiration from the situational test and the presumption of illegality against monopoly coined by the *Alcoa* judgment. Kaysen and Turner put forward proposals to directly tackle the problem of excessive concentration of economic power by creating an antitrust liability on the basis of 'unreasonable market power', which we discussed in Chapter 2.[107] Under this standard, § 2 of the Sherman Act, would outright prohibit the possession of 'unreasonable market power' by an individual firm or group of firms. A presumption of illegality against firms holding 'unreasonable market power', Kaysen and Turner argued, would allow competition policy to address the problem of excessive concentration of economic power in the hand of a single company and to directly tackle oligopolistic market structures which facilitate tacit collusion and conscious parallelism.[108] In the same way as Alcoa and progeny, Kaysen and Turner, however, underscored that it must remain possible for defendants to rebut this presumption of unreasonable market power by showing that their market position is the result of superior efficiency.[109]

The second way in which US antitrust used legal presumptions to give effect to the value of liberty as non-domination when applying antitrust rules to powerful firms did not rely on a situational approach which treats the mere possession of monopoly power as *prima facie* illegal. Rather, this second form of presumption was attached to specific forms of unilateral conduct that were deemed to have an inherent tendency to foreclose competitors and entrench economic concentration in the hands of powerful firms. The creation of this type of conduct-based presumptions was the immediate result of the legislative discontent against the recognition of the rule of reason. Three years after the Court had recognised the rule of reason in *Standard Oil* and *American Tobacco*, Congress reacted by limiting or even partially reversing the scope of

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[106] F. I. Raymond, *The Limitist* (W.W. Norton & Co 1947).T. K. Quinn, *Giant Business: Threat to Democracy: The Autobiography of an Insider* (NY Exposition Press 1953). For more specialist scholarship W. Adams, 'Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust' (1951) 27(1) Indiana Law Journal 1; W. Adams, 'The Aluminium Case: Legal Victory - Economic Defeat' (1951) 41(5) The American Economic Review 915; W. Adams, 'The Rule of Reason: Workable Competition or Workable Monopoly' (1954) 63 Yale Law Journal 354; W. Adams, *The structure of American industry* (Macmillan 1971); C. D. Ewards, 'An Appraisal of the Antitrust Laws' (1946) 36(2) The American Economic Review 172; C. D. Ewards, 'Can the Antitrust Laws Preserve Competition?' (1940) 30(1) The American Economic Review 164; E. V. Rostow, 'The New Sherman Act: A Positive Instrument of Progress' (1947) 14(4) The University of Chicago Law Review 567; E. V. Rostow, 'Monopoly Under the Sherman Act: Power or Purpose' (1949) 43(6) Illinois Law Review 47. Interestingly, the ideas of the 'limitist' movement were also shared by the late Chicago economist Henry C. Simons. He advocated for instance a strict limitation of the maximum amount of property corporations could hold and the break-up of large corporations H. C. Simons, *Economic Policy for a Free Society* (Chicago University Press 1948) 17, 59. 82-83; C. Kaysen and D. F. Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) 50 fn 4.

[107] Kaysen and Turner (n 106) 44, 76. See also D. F. Turner, 'The Scope of Antitrust and Other Economic Regulatory Policies' (1969) 82(6) Harvard Law Review 1207 1213–1214.

[108] Kaysen and Turner (n 106) 76.

[109] ibid 79.

the rule of reason with the adoption of the Clayton Act in 1914.[110] Through the adoption of the Clayton Act, Congress, in fact, responded to the growing fear that that too many restraints of trade against which the Sherman Act was originally enacted would remain unchallenged under an expansive application of the relaxed rule of reason standard.[111]

Central element of this legislative response was § 3 of the Clayton Act, which established a conditional,[112] *per se*[113] prohibition for exclusive dealing, tying and discounting whose 'effect […] may be to substantially lessen competition or tend to create a monopoly'.[114] The Supreme Court subsequently interpreted the use of the formulation 'effect may be' as an indication for the Congressional intent to establish under the 'substantially lessening of competition' test of the Clayton Act a stricter standard than that governing the application of § 1 and 2 of the Sherman Act under the newly adopted rule of reason interpretation[115] and to prevent monopoly in its incipiency. [116] § 2 (a) of the Clayton Act, which was further amended by the 1936 Robinson-Patman Act, also introduced a prohibition against certain forms of geographic price discrimination to prevent large businesses from leveraging their financial strength and engage in localised price-cutting to destroy local merchants.[117]

This legislative tightening of antitrust rules against certain forms of conduct by powerful firms through the adoption of the Clayton and Robinson-Patman Act also had an important bearing on the case law of the Supreme Court. In the early days of § 3 of the Clayton Act, the Supreme Court, for instance, operationalised the republican concern about the dominating effects of exclusive dealing[118] and tying[119] agreements by prohibiting those agreements when adopted by firms with market power. The Court did not inquire, as one would expect from the vantage point of negative liberty, into whether exclusive dealing agreements or tie-ins actually

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[110] Sullivan (n 7) 432; J. M. Jacobson, 'Exclusive Dealing, Foreclosure and "Consumer Harm"' (2002) 75 Antitrust Law Journal 311 317.
[111] These concerns were further fuelled by the *Dick* case in which the Court upheld a tying agreement *Henry v. Dick Co.* 224 U.S. [1] (1911) 11–12, 51-53, 70; Stevens, W. H. S. 'The Clayton Act' (1915) 5(1) The American Economic Review 38 41.
[112] Sullivan (n 7) 432.
[113] Stevens, W. H. S. (n 93), 42.
[114] 15 U.S. Code § 14. Sale, etc. on agreement not to use goods of competitor.
[115] Stevens, W. H. S. (n 111), 43 fn.12. Sullivan (n 7) 432; Editors, 'Section 3 of the Clayton Act - "Law Unto Itself"' (22) 1954(1) University of Chicago Law Review 233 236.
[116] *Standard Fashion Company v. Magrane-Houston Company* (346 U.S. 258 (1921)) 356; Sullivan (n 7) 432.
[117] *Moore v. Mead's Fine Bread Co.* 348 U.S. 115 (1954) 119. *F. T. C. v. Anheuser-Busch, Inc.* 363 U.S. 536 (1960) 539-540, 543; Sullivan (n 7) 677. 679-684.
[118] *Standard Fashion Company v. Magrane-Houston Company* (n 116) 357. *Standard Oil Co. v. United States* 337 U.S. 293 (1949) 302–303. *United Shoe Mach. Co. v. United States* 258 U.S. 451 (1922) 457 and 458. *Tampa Electric Co. v. Nashville Coal Co.* 365 U.S. 320 (1961) 326.
[119] *Standard Fashion Company v. Magrane-Houston Company* (n 116) 357; *United Shoe Mach. Co. v. United States* (n 118) 457.

or likely adversely interfered with the choices and autonomy of competitors and consumers. Rather, in line with the republican concern about the capacity of powerful firms to exert potential domination, the Court condemned those forms of conduct on the basis of their mere tendency to restrict competition and enhance the concentration of economic power.[120] The Court thus adopted a presumption of illegality against tying and exclusive dealing agreements by dominant firms based on the assumption that they bestowed them with the 'potential power for evil over an industry'.[121]

In *International Salt*[122] and subsequent case law,[123] the Supreme Court eventually clarified that tying agreements are not only banned under § 3 Clayton Act but also constitute a *per se* violation of § 1 Sherman Act.[124] At the end of the 1950s, tying agreements were, hence, prohibited as illegal *per se*, if they covered trade in excess of a *de minimis* threshold. [125] This presumption of illegality was effective, irrespective of whether the defendant held market power over the tying product. [126] While adopting a slightly more relaxed approach towards exclusive dealing agreements, [127] the Court also created a presumption of illegality against those types of exclusive dealing agreements, which foreclosed a substantial share of the market.[128] Accordingly, exclusive dealing agreements that foreclose a substantial market share were deemed in breach of § 3 of the Clayton Act. By requiring that the exclusive dealing agreement must give rise to a substantial foreclosure rate, the Court thus created with what should become known as 'quantitative substantiality'[129] an additional, structural condition for a presumption of illegality against exclusive dealing agreements.[130] This structural condition of substantial foreclosure was, however, anything but a demanding threshold. The Court found that it was sufficient that the exclusive dealing tied about 16% of the distributors in an oligopolistic market

[120] *United Shoe Mach. Co. v. United States* (n 118) 457; *Int'l Salt Co. v. United States* (n 56) 396.
[121] *Motion Picture Co. v. Universal Film Co.* 243 U.S. 502 (1917) 519.
[122] *Int'l Salt Co. v. United States* (n 56) 396.
[123] *Motion Picture Co. v. Universal Film Co.* (n 121) 519. *United Shoe Mach. Co. v. United States* (n 118) 457. *Int'l Salt Co. v. United States* (n 56) 396. *Standard Oil Co. v. United States* (n 118) 305. *Times-Picayune Pub. Co. v. United States* 345 U.S. 594 (1953) 605; *Northern Pac. Ry. Co. v. United States* (n 58) 6.
[124] *Int'l Salt Co. v. United States* (n 56) 396.
[125] ibid.
[126] *Standard Oil Co. v. United States* (n 118) 305. *Northern Pac. Ry. Co. v. United States* (n 58) 7; *Fortner Enterprises v. U.S. Steel (Fortner I)* 394 U.S. 495 (1969) 503–504; Sullivan (n 7) 437–439.
[127] *Standard Oil Co. v. United States* (n 118) 302. *United Shoe Mach. Co. v. United States* (n 118) 457 and 458. *Tampa Electric Co. v. Nashville Coal Co.* (n 118) 326. See also the first exclusive dealing case condemning an exclusive dealing by a firm which controlled§ about 40% of the distribution market *Standard Fashion Company v. Magrane-Houston Company* (n 116) 357.
[128] *Standard Oil Co. v. United States* (n 118) 314.
[129] Jacobson (n 110), 320.
[130] *Standard Oil Co. v. United States* (n 118) 314; *Tampa Electric Co. v. Nashville Coal Co.* (n 118) 329.

(covering only 6,7% of the relevant market) for an exclusive dealing agreement to run afoul of antitrust rules.[131]

The Supreme Court also relied on legal presumptions against discriminatory forms of localized price-cutting by powerful firms. Although § 2 (a) of the Clayton Act, as amended by the Robinson Patman Act, required in addition to price discrimination the showing of competitive injury, until the late 1960s, the Court indeed seemed to infer predatory intent to exclude competitors from the discriminatory form of price-cutting.[132] This was, in particular, the case if the firms were active in different markets and charged a high price in markets where they faced no competition while setting low prices in markets where they were confronted with competition. Below-cost pricing was hence not the only way for US courts to infer anticompetitive intent and competitive injury[133] While it remained open for firms to rebut this presumption by showing that the prices charged covered their costs or could be explained by cost savings or the aim of meeting of competition,[134] the US courts thus established a relatively loose test and set the bar for aggressive pricing by powerful firms to be presumed unlawful predatory pricing quite low.[135]

At the heart of these legal presumptions against tying, certain forms of exclusive dealing agreements and non-linear pricing lay the so-called leverage theory,[136] which was supported by the leading antitrust scholars of the time. This theory encapsulated the assumption,[137] that tying and exclusive dealing agreements have a detrimental effect on the competitive market structure, as they allow dominant firms to expand or leverage their market power from markets (or portions of the market) where they did not face competition,[138] to markets where they faced competition. Along similar lines, the presumption against non-linear pricing by dominant firms

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[131] *Standard Oil Co. v. United States* (n 118) 314; *Tampa Electric Co. v. Nashville Coal Co.* (n 118) 329.
[132] J. D. Hurwitz and W. E. Kovacic, 'Judicial Analysis of Predation: The Emerging Trends' (1982) 35 Vanderbilt Law Review 63 86–92; H. C. Hansen, 'Robinson-Patman Law: A Review and Analysis' (1983) 51 Fordham Law Review 1113 1133, 1137.
[133] *Moore v. Mead's Fine Bread Co.* (n 117) 119. *F. T. C. v. Anheuser-Busch, Inc.* (n 117) 550, 552-553. *Utah Pie Co. v. Continental Baking Co.* 386 U.S. 685 (1967) 694, 696-697 fn 12. Hansen (n 132), 1137.
[134] *F. T. C. v. Anheuser-Busch, Inc.* (n 117) 541, 553.
[135] Hurwitz and Kovacic (n 132), 86–92.
[136] *Northern Pac. Ry. Co. v. United States* (n 58) 6; *United States v. Paramount Pictures* (n 100) 156; *U.S. v. Crescent Amusement Co.* 323 U.S. 173 (1944) 181–183; *United States v. Griffith* (n 100) 100, 102-109; *Schine Theatres v. United States* (n 100) 114-116, 118; *United States v. United Shoe Machinery Corp.* (n 99) 341, 345-347.
[137] Kaysen and Turner (n 106) 157. See also D. F. Turner, 'The Validity of Tying Arrangements Under the Antitrust Laws' (1958) 72 Harvard Law Review 50 60–61. See also The Attorney General's National Committee to Study the Antitrust Laws, *1955 Report* 137-140, 144-145, 149, 238.
[138] *Henry v. Dick Co.* (n 111) 51-53, 70. *Motion Picture Co. v. Universal Film Co.* (n 121) 517. *Times-Picayune Pub. Co. v. United States* (n 123) 605. *Northern Pac. Ry. Co. v. United States* (n 58) 6. *United States v. Paramount Pictures* (n 100) 156, 173. *U.S. v. Crescent Amusement Co.* (n 136) 181; *Schine Theatres v. United States* (n 100) 118.

similarly hinged upon a leverage theory[139] which assumed that powerful firms would be able to leverage their size advantage, superior financial resources, or multi-market presence to wage havoc on smaller competitors and deter entry. [140]

Presumptions of illegality, thus, played a crucial role in giving expression to the concern about republican liberty as non-domination in the application of antitrust rules to powerful firms. Republican antitrust in the US relied on two types of presumptions. On the one hand, at different points in time, the US courts relied on situational presumptions, which deemed the mere possession of monopoly power to be unlawful under § 2 of the Sherman Act. On the other hand, the US legislature and judicature devised rule-based presumptions against certain forms of conduct, such as tying, exclusive dealing and certain forms of price discrimination. Both types of presumptions had in common that they did not require the showing of any actual or likely interference. Rather, in line with the logic of republican liberty, these presumptions were informed about the potential harm and domination that certain degrees of market concentration and conduct might bring about. Instead of being informed by the likelihood of harm, these presumptions rather focused on the scale of harm that certain degrees of market concentration and conduct may generate. In a similar vein as under § 1, the adverse impact of certain situations or conduct on a decentralised market structure thus served as a proxy for the potential harm and degree of domination the situation or conduct may cause.

2.2.2 Presumptions of Illegality and Republican Liberty under Article 102 TFEU

The Court of Justice also relied to a considerable extent on presumptions of illegality to protect polycentric competition as a safeguard of the republican goal of liberty as non-domination under Art. 102 TFEU. Unlike the US courts, the Court of Justice has never relied on situational presumptions, which created a presumption of illegality against the possession of monopoly power as such. Rather, the application of Art. 102 TFEU hinged on presumptions of illegality against certain forms of dominant firm conduct.

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[139] This leverage theory was even shared by antitrust experts who were critical of the Robinson Patman Act Kaysen and Turner (n 106) 180. Kayser and Turner advocated a reform of the Robinson Patman Act which created a statutory rule prohibiting certain forms of discriminatory price cutting. ibid 184–186. This approach fundamentally differed from the Areeda-Turner test advocated less than two decades later to address predatory pricing. P. Areeda and D. F. Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88(4) Harvard Law Review 697.

[140] *Utah Pie Co. v. Continental Baking Co.* (n 133) 690, 693-694, 698, 701, 70.J. F. Brodley and G. A. Hay, 'Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards' (1980-1981) 66 Cornell Law Review 738 766.

The blueprint for this 'form-based' approach has been set out in *Hofmann-La Roche* and subsequent cases. In *Hofmann-La Roche*, the Court drew a distinction between two categories of dominant firm conduct. It juxtaposed 'normal competition' based on 'economic performance'[141] to conduct that has the 'effect of hindering'[142] competition. This dichotomy evoked the Ordoliberal distinction between 'performance-based' (*Leistungswettbewerb*) and 'hindrance' competition.[143] As we have seen in Chapter 3, the Ordoliberals subsumed under the category of performance-based competition all forms of legitimate competition that are in line with the idea of a 'parallel fight'[144] in which no player may use methods that hinder the performance of other market players in the competitive race. While dominant firms should remain free to compete based on superior economic performance, the Ordoliberals suggested that competition law should outlaw certain types of conduct that are capable of hindering competition, in particular by foreclosing competitors. This performance-based/hindrance competition divide, as well as the concept of special responsibility,[145] constituted the fundamental building blocks of the creation of legal presumptions under Art. 102 TFEU. The Court of Justice, indeed, devised several presumptions of illegality by labelling certain types of unilateral conduct by dominant firms as hindrance competition based on the assumption that they adversely affect the competitive market structure by hampering or foreclosing residual competition.

The first type of dominant firm conduct that the EU Courts and the Commission have categorically outlawed as clear forms of hindrance competition were exclusive dealing

[141] Case 322/81 *Michelin v Commission* ECLI:EU:C:1983:313 para. 70. In this sense also Case C-62/86 *AKZO v Commission* (n 509) para. 70.
[142] Case 85/76 *Hoffmann-La Roche v Commission* (n 501) para. 91; Case 322/81 *Michelin v Commission* (n 516) para. 70; Case C-95/04 P *British Airways plc v Commission of the European Communities* (n 501) para. 66.
[143] See for instance F. Böhm (ed), *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden [1933]* (Nomos 2010) 242, 275-276; W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 247; F. Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (Nomos 1980) 64. The influence of the Ordoliberal divide between performance-based and hindrance competition on the interpretation of Art. 102 TFEU has been also lucidly pointed out by J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 25(5) European Competition Law Review 263 268–272. Sher and Kallhaugher also highlight that the role of the concept of performance-based competition for the Court's understanding of 'normal competition' in *Hoffmanm-LaRoche* has been obfuscated by a translation error which referred in the English language version of the judgment merely to conduct as being at odds with ‚normal' competition. This has been subsequently corrected in *Michelin I* which referred to 'normal competition on the basis of performance'. ibid 270. For other authors suggesting that the interpretation of Art. 102 TFEU is influenced by Ordoliberalism see for instance J. S. Venit, 'Article 82: The Last Frontier - Fighting Fire with Fire' (2004) 28(4) Fordham International Law Journal 1157 1157, 1162-1166.
[144] Böhm (ed) (n 143) 209.
[145] Case 322/81 *Michelin v Commission* ECLI:EU:C:1983:313 para. 57.

agreements[146] and tying arrangements.[147] This strict approach towards exclusive dealing and tying was grounded on the assumption that they are 'incompatible with the objective of undistorted competition'[148] and amounted to a 'serious infringement'[149] of Art. 102 TFEU.[150] The presumption of illegality against tying arrangements and exclusive dealing agreements was predicated on the very same leverage theory of harm. The EU Courts held with respect to both types of conduct that

> *where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation that constitutes an abuse since it deprives the customer of the ability to choose his sources of supply and denies other producers access to the market.* [151]

The classical case law, hence, assumed that exclusive dealing and tying arrangements adopted by dominant firms pursued the primary purpose of strengthening their dominant position because they reinforce the dependence of customers on the dominant firm and thereby jeopardize the ability of independent producers to compete.[152] The Court and Commission, therefore, took the view that both types of conduct undermine the economic liberty of customers and competitors alike. By making purchasers more dependent on them, they allow dominant firms to leverage their power and foreclose competitors.[153]

Under the form-based approach, the Court of Justice also classified predatory pricing as hindrance competition. In *Akzo* and subsequent case law, the Court devised a clear presumption of illegality against pricing by a dominant firm below average variable costs (AVC), without requiring any showing of a reasonable prospect of recoupment. [154] The Court and Commission,

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[146] Case 40/73 *Suiker Unie and Others v Commission* ECLI:EU:C:1975:174 paras. 502-505; Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36 paras. 89-90.
[147] Case No IV/30.787 and 31.488 Eurofix-Bauco v. Hilti. OJ [1988] L 65/19 paras. 14-26, 66-71. Case T-30/89 *Hilti v Commission* ECLI:EU:T:1991:70 paras. 64-78, 89-94. Case No IV/31043 Tetra Pak II. OJ [1992] L 72/1 paras. 99-104.
[148] Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para. 90.
[149] Case No IV/31043 Tetra Pak II (n 147) para. 117, also 74.
[150] ibid para. 74.
[151] Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* ECLI:EU:T:1994:246 para. 137. Case 85/76 *Hoffmann-La Roche v Commission* (n 146) paras. 89.
[152] Case No IV/31043 Tetra Pak II (n 147) paras. 106,108 118, 146. Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* (n 151) paras. 135, 137 140. Case 85/76 *Hoffmann-La Roche v Commission* (n 146) paras. 89-90. Case C-62/86 *AKZO v Commission* ECLI:EU:C:1991:286 para. 149; Case T-65/89 *BPB Industries and British Gypsum v Commission* ECLI:EU:T:1993:31 para. 68.
[153] Case 40/73 *Suiker Unie and Others v Commission* (n 146) para. 503. Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para. 41. Case No IV/30.787 and 31.488 Eurofix-Bauco v. Hilti (n 147) para. 74. Case No IV/31043 Tetra Pak II (n 147) paras. 105, 117, 120, 132-133.
[154] Case C-62/86 *AKZO v Commission* (n 152) para. 71. Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-333/94 P *Tetra Pak v Commission* ECLI:EU:C:1996:256 para. 74. Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-333/94 P *Tetra Pak v Commission* (n 154) paras. 41, 44; Bailey (n 9), 368; L. V. Bruttel and J. Glöckner, 'Predatory pricing and recoupment under EC competition law -per se rules, underlying

moreover, found that under certain circumstances price cuts by dominant firms, which exceed their average variable[155] or even average total costs (ATC),[156] may amount to an abuse of dominance, in particular, if they target consumers of competing firms. The EU Courts and Commission thus seemed to assumed that discriminatory price cuts, unlike generalized price cuts, convey, at least to some extent, an exclusionary intent even if they do not fall below the dominant firm's incremental or total cost. The classical case law thus relied on the non-linear, discriminatory form of pricing by dominant firms to infer some kind of predatory intent.[157]

The classical case law on loyalty and loyalty-enhancing rebates constitute perhaps the most emblematic example for the role of legal presumptions under the form-based approach.[158] In *Suiker Unie*[159] and *Hoffmann-La Roche*[160] the Court created a clear presumption of illegality against fidelity rebates, which are conditioned on purchasers' obtaining most, or all, of their requirements from the dominant undertaking.[161] This presumption of illegality against loyalty rebates applied irrespective of whether they were adopted upon the request of customers and regardless of the size of the foreclosed market share.[162] In *Michelin I*, the Court expanded this presumption of illegality to retroactive and incremental rebates, which have a loyalty-enhancing effect, although they are not expressly conditioned upon exclusivity.[163]

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assumptions and the reality: results of an experimental study' (2010) 31(11) European Competition Law Review 423 424, 428; Ritter (n 9), 209.

[155] Case C-62/86 *AKZO v Commission* (n 418) para. 72. Case No IV/30.698 ECS/AKZO. OJ [1985] L 374/1 para. 77. See for a similar reasoning the more recent case Case No COMP/38.233 Wanadoo Interactive, paras. 280, 333-335.

[156] Case No IV/30.787 and 31.488 Eurofix-Bauco v. Hilti (n 147) para. 81; Case No IV/34.621 Irish Sugar plc. OJ [1997] L 258/1 para. 127-135; Case No IV/31.900 BPB Industries plc. OJ [1989] L 10/50 para. 129; Case T-30/89 *Hilti v Commission* (n 147) para. 100; Case T-228/97 *Irish Sugar v Commission* ECLI:EU:T:1999:246 paras. 117-124; 215-225; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:1998:518 paras. 135-137; Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:2000:132 paras. 115-119.

[157] *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 156) para. 121. See also Case C-62/86 *AKZO v Commission* (n 152) paras. 155-156.

[158] See for the argument that Ordoliberalism importantly shaped the approach of the Court of Justice towards loyalty rebates Kallaugher and Sher (n 143), 268–272. The authors also pointed out that the approach taken by the Court in Hoffmann-La Roche mirrored the legal test supported by the German Professor Peter Ulmer for abuse control in rebates cases ibid 269.

[159] Case 40/73 *Suiker Unie and Others v Commission* (n 146) 502.

[160] Case 85/76 *Hoffmann-La Roche v Commission* (n 146) paras. 89-90, 121.
L. Gyselen, 'Rebates: Competition on the Merits or Exclusionary Practice?' in C.-D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Hart 2003) 287, 289.

[161] Gyselen (n 596) 287, 289. O'Donoghue and Padilla (n 307) 351, 357, 375. ibid 92. Temple Lang and O'Donoghue (n 309), 92, 110. R. O'Donoghue and A. J. Padilla, *The law and economics of Article 82 EC* (Hart Publishing 2006) 352.

[162] Case 40/73 *Suiker Unie and Others v Commission* (n 146) paras. 502-505; Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para. 89.

[163] Case 322/81 *Michelin v Commission* (n 145) paras. 71-86; Case T-203/01 *Michelin v Commission (Michelin II)* ECLI:EU:T:2003:250 para. 59.

The Court, however, did not go as far as prohibiting all forms of rebates granted by dominant firms. Instead, the presumption of illegality against loyalty and later also loyalty-enhancing rebates as hindrance competition was accompanied by the creation of a presumption of legality for so-called quantity or volume rebates. In *Hoffmann-La Roche*, the Court of Justice clarified that quantity rebates, which are 'exclusively linked with the volume of purchases from the producer concerned'[164] do not amount to an abuse of dominance.[165] As long as they are granted 'dependent on quantities fixed objectively'[166] and 'applicable to all possible purchasers' across the board, quantity rebates are presumed to be *prima facie* lawful, [167] because they are 'based on an economic transaction which justifies this burden [for the supplier] or benefit [for the purchaser]'.[168] The EU Courts hereinafter repeatedly held that quantity rebates do not share the anticompetitive features of loyalty rebates and are usually benign. [169] As they are granted individually and only with respect to the quantities of each order placed with the dominant firm, they are unlikely to bind the customers to the dominant firm beyond the individual transaction. Quantity rebates were deemed to be a less restrictive alternative to loyalty rebates because it remains open for competitors to contest the remaining demand of the customers, which is not tied through rebates to the dominant firm. On this basis, the Court assumed that quantity rebates could be explained primarily by performance-based motivations, such as cost savings that firms gain from large orders, as they enable a supplier to pass on the benefits it draws from economies of scale to its customers and, thus, increase consumer welfare.[170] While the presumption of illegality against loyalty and loyalty-enhancing rebates relied on the premise that they constitute clear forms of hindrance competition, the safe-harbour for quantity rebates was grounded on the assumption that quantity rebates clearly fall within the scope of 'normal competition'[171] or

[164] Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para. 90.
[165] ibid.
[166] ibid para. 100.
[167] ibid.
[168] ibid para. 90.
[169] Case 322/81 *Michelin v Commission* (n 145) para. 71; Case C-163/99 *Portugal v Commission* ECLI:EU:C:2001:189 paras. 50-51.
[170] Case 322/81 *Michelin v Commission* (n 145) para.71. Case C-163/99 *Portugal v Commission* (n 169) paras. 50 - 52. Opinion of Advocate General Mischo in Case C-163/99 *Portugal v Commission* ECLI:EU:C:2000:576 para. 106. Case T-203/01 *Michelin v Commission (Michelin II)* (n 163) para. 58; Case T-57/01 *Solvay v Commission* ECLI:EU:T:2009:519 paras. 318-319, 326.
[171] Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para. 91; Case 322/81 *Michelin v Commission* (n 145) para. 70; Case T-203/01 *Michelin v Commission (Michelin II)* (n 163) paras. 98, 238.

'competition on the merits'[172] which is exclusively driven by the performance[173] of the economic operators.[174]

By contrast, the presumption of illegality against loyalty and loyalty-inducing rebates drew upon a similar theory of harm as the presumption against tying and exclusive dealing agreements. The Court repeatedly asserted that loyalty rebates undermine the economic liberty of customers and competitors alike. On the one hand, loyalty and loyalty-enhancing rebates increase the dependence of customers upon the dominant firm and thereby undermine the economic liberty of customers. At the same time, loyalty rebates also increase the switching costs of their customers and erect artificial entry barriers for competitors. They thus enable dominant firms to foreclose competitors and to frustrate their economic liberty.[175]

Hofmann-La Roche created an automatic presumption of such an illegal loyalty-inducing effect for fidelity rebates, which were expressly conditioned upon exclusivity.[176] In the case of retroactive and incremental rebates, the EU Courts and the Commission ascertained under the so-called 'all circumstances test'[177] whether their form and mode of calculation indicate a similar loyalty-enhancing nature as fidelity rebates. Once such a loyalty-enhancing effect was established, in both cases, the adverse impact on the liberty of customers, competitors and ultimately consumers were automatically inferred from the increase in the dependence of the customers on the dominant firm. The Courts, however, refrained from inquiring into whether the rebates generated a sufficiently high switching cost to actually or likely foreclose competition. Rather, the essential criterion to determine the legality of loyalty and fidelity-inducing rebates was the question as to whether the purpose of the rebate system was to tie dealers to the dominant firm and, thereby, make it more difficult for the dominant firm's competitors to enter the relevant market.[178] The form of rebates, in terms of their loyalty-enhancing nature and their potential to generate a leverage effect, was thus viewed by the EU Courts as sufficient to trigger a presumption of illegality.[179]

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[172] Case T-203/01 *Michelin v Commission (Michelin II)* (n 163) para. 97; Case T-228/97 *Irish Sugar v Commission* (n 156) para. 111.
[173] Case 322/81 *Michelin v Commission* (n 145) para. 70.
[174] The carve-out for quantity rebates does not constitute an 'efficiency defence'. Kallaugher and Sher (n 143), 270–271. P.-J. Loewenthal, 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28(4) World Competition 455 474.
[175] Gyselen (n 161) 320.
[176] Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para.89.
[177] Gyselen (n 161) 320–324.
[178] Case T-203/01 *Michelin v Commission (Michelin II)* (n 163) para. 244.
[179] ibid para. 241.

By characterising tying, exclusive dealing, below-cost predatory pricing, loyalty and loyalty-enhancing rebates as hindrance-competition, the EU Courts established, in a similar way as under Article 101 (1) TFEU, a category of unilateral dominant firm conduct which has as its 'object'[180] the restriction of competition.[181] These presumptions of illegality were not based on the assumption that anticompetitive foreclosure of competitors and consumer harm had actually occurred or were likely to result from a particular form of dominant firm conduct. In other words, these presumptions were not only directed against unilateral conduct, which, in line with the logic of negative liberty, was likely to interfere with other market participants. Rather, these presumptions of legality were grounded in fear of potential domination arising in situations where dominant players have the potential capacity to interfere with the choices of other market participants arbitrarily. The treatment of certain types of unilateral conduct as 'by-object' restriction, thus, gave effect to the value of republican liberty by outlawing conduct, which was considered to affect the polycentric market structure competition adversely and, thereby, to undermine its functioning as an institution of antipower. Certain unilateral conduct has thus been considered presumably unlawful, because of its inherent potential or tendency to undermine the ability of residual competition to constrain the dominant firm and prevent it from exerting domination.

Even though Art. 102 TFEU does not provide for a similar exemption as exists under Art. 101 (3) TFEU,[182] the legal presumptions under Art. 102 TFEU remained, however, rebuttable. The Court, indeed, consistently held that dominant firms have the possibility to rebut the presumption of illegality against *prima facie* abusive conduct by proffering an objective economic justification.[183] This objective justification was not primarily conceived as an efficiency defence whereby the dominant firm could justify its behaviour by showing that its anticompetitive effects are outweighed by its pro-competitive efficiencies.[184] Rather, the

[180] ibid.
[181] For a similar argument about the role that the object/effect divide plays under Art. 101 and 102 TFEU Colomo and Lamadrid de Pablo, A. (n 4) 346.
[182] Case 66/86 *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs* ECLI:EU:C:1989:140 para. 31; Loewenthal (n 174), 459.
[183] *Case C-40/70 Sirena v Eda* ECLI:EU:C:1971:18 paras. 16-17. Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22 paras. 158, 184, 188–191, 228. Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para. 90; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* (n 151) para. 136; Case C-333/94 P *Tetra Pak v Commission* ECLI:EU:C:1996:436 para. 37.
[184] Until the publication of the 'Commission Discussion Paper on the application of Art. 82 of the Treaty to Exclusionary Abuses' efficiency considerations played only a limited role under the objective justification. Efficiencies only appear as central elements of the objective justification in the Court of First Instance's ruling in Case T-228/97 *Irish Sugar v Commission* (n 156) para. 189. A. Llorens Albors, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' (2007) 44(6) Common Market Law Review 1727 1746; Loewenthal (n 174), 465. Instead of being grounded in Williamsonian idea of an efficiency defence, the concept

dominant firm had to show that the motivation underpinning its *prima facie* dominating conduct was not the pursuit of its idiosyncratic self-interest through arbitrary interference. The objective justification was, instead, supposed to offer the dominant firms the possibility to rebut the presumption of abuse against specific conduct by showing that it was actually motivated by other than an exclusionary purpose[185] and can be explained by legitimate commercial interests of the dominant firm[186] or other external reasons, such as product shortages.[187] In other words, the objective justification was supposed to allow firms to demonstrate that conduct, which at first sight falls within the category of hindrance competition, consists in reality of performance-based competition. The concept of objective justification was thus informed by the same dichotomy between performance-based and hindrance competition that underpinned the presumption of illegality against certain forms of unilateral conduct.

In general, the EU Courts gave the 'objective justification' a narrow interpretation and imposed a high threshold on dominant firms to rebut presumptions of illegality. The dominant firm had to demonstrate that the invoked objective justification is the genuine purpose of its conduct and does not conceal the strengthening of a dominant position as the actual motivation of the conduct.[188] The Court also consistently held that in order to be objectively justified, the conduct by the dominant firm has to be proportionate to, and, hence, the least restrictive means to achieve the legitimate objective invoked by the dominant firm.[189] Based on this demanding approach, the Commission and Court rejected in *Hilti* the defendant's argument that its tying agreements were objectively justified because they were necessary to ensure the product safety of its products. The Commission and the Court of First Instance, as a matter of principle, accepted that product safety could be invoked as an objective justification under Art. 102 TFEU. Yet, they held that Hilti should have informed public authorities if it had a genuine concern about the compliance of competitors with product safety standards instead of engaging in conduct, which led to their foreclosure. Informing the public authorities would have been the more proportionate means to address a genuine concern about public safety. The Commission and the Court also adamantly underscored that it is not the task of dominant firms to exercise

of objective justification can be traced back to the public interest justifications for Member State measures which amount to obstacles to the free movement rights under EU internal market law Llorens Albors (n 184), 1729–1735.
[185] Case C-62/86 *AKZO v Commission* (n 152) paras. 140, 146.
[186] Case 27/76 *United Brands v Commission* (n 183) paras. 189. Case 322/81 *Michelin v Commission* (n 145) para. 90.
[187] Case 77/77 *B.P. v Commission* ECLI:EU:C:1978:141 para. 33; Llorens Albors (n 184), 1793.
[188] Case T-65/89 *BPB Industries and British Gypsum v Commission* (n 152) paras. 117-118.
[189] Case 27/76 *United Brands v Commission* (n 183) paras. 158, 10ß-191.

regulatory power, which normally falls within the remit of public authorities.[190] This strict interpretation of the concept of objective justification thus aimed at limiting the possibility of dominant firms to invoke the objective justification as a cloak to exert private government and impose its arbitrary interest on other market participants to strengthen its dominant position. In a similar vein, as the interpretation and institutional design of Art. 101 (3), the interpretation of the objective justification as a channel to rebut presumptions of illegality under Art. 102 TFEU was profoundly shaped by the concern of guarding the economic liberty of market participants against arbitrary interference and domination by dominant firms.

Presumptions of illegality, hence, played a pivotal role in the operationalisation of the concept of republican liberty through the application of antitrust rules to dominant firms on both sides of the Atlantic. US antitrust law relied on two forms of presumptions towards monopoly power. In some cases, US courts considered the existence of monopoly power itself as sufficient to infer a violation of the Sherman Act. Along with these 'situational presumptions', the US courts also relied on conduct presumptions of illegality against certain types of unilateral behaviour by powerful firms. Along similar lines, the EU judicature devised presumptions of illegality against particular forms of unilateral conduct. For this presumption to be effective, no showing of actual or likely interference was necessary. Rather, the presumptions were, in line with the logic of republican liberty, grounded in the gravity of potential harm that specific forms of conduct might inflict on competitors. The US and EU Courts inferred this harm from the degree to which the conduct at issue was thought to affect the polycentric structure of markets and thus enabled the firms to exert control over the market. To further minimise instances of domination, the US and EU courts, also, set a very high bar for powerful firms to rebut those presumptions of illegality successfully.

2.3 Presumptions as Policy Instrument of a Republican Approach towards Merger Control

Merger control is the pillar of antitrust law in which the concern about republican liberty and its operationalization through the preservation of a polycentric market structure found its most immediate expression in structural presumptions of illegality. For a long time, merger policy in the US (2.3.1) and EU (2.3.2) inferred the illegality of mergers from their impact on market concentration. Merger policy on both sides of the Atlantic thus did not follow a logic of

[190] Case No IV/30.787 and 31.488 Eurofix-Bauco v. Hilti (n 147) paras. 87-95. Case T-30/89 *Hilti v Commission* (n 147) paras. 46, 109-119. Llorens Albors (n 184), 1740, 1743.

negative liberty, which would require an analysis of whether the merger leads to actual or likely interference with other market participants. Instead, in line with the republican concept of liberty as non-domination, these presumptions encoded the republican concern that mergers, which merely led to the concentration of economic power and hence to an increased capacity of firms to arbitrarily interfere with other market participants constitute a source of unfreedom. The reliance on structural presumptions of illegality thus allowed US and EU merger policy guard market participants against potential harm emanating from the concentration of economic power, without there being a clear sign of its actual or likely abuse.

2.3.1 Structural Presumptions in US Merger Control

During the Warren Court era, the US Supreme Court gave expression to the Congressional concern about the dominating effects of concentration of economic power by translating it into a structural presumption of illegality against mergers leading to an excessive increase in market concentration. In *Philadelphia National Bank*, the Court affirmed that the Congressional intent to prevent the trend towards industry concentration in its incipiency would be frustrated and legal certainty of businesses would be undermined by a legal test requiring a 'too broad economic investigation' into the economic impact of the mergers.[191] The achievement of the ultimate purpose of the Act to tackle economic concentration in its incipiency would, therefore, demand to dispense 'in certain cases, with elaborate proof of market structure, market behaviour or probable anticompetitive effects.'[192] *Philadelphia National Bank* fashioned a rebuttable structural presumption of illegality, which primarily focused on the effect of the merger on market shares and industry concentration.[193] According to this presumption,

> *a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.*[194]

[191] *United States v. Philadelphia National Bank* 374 U.S. 321 (1963) 362.
[192] *United States v. Philadelphia National Bank* (n 191) 363; *United States v. Continental Can Co.* 378 U.S. 441 (1964) 458.
[193] For further discussion S. C. Salop, 'The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach' (2015) 80(2) Antitrust Law Journal 269 269–274; H. J. Hovenkamp and C. Shapiro, 'Horizontal Mergers, Market Structure, and Burdens of Proof' (2018) 127 The Yale Law Journal 1996 2008–2009; Sullivan (n 9), 410–411.
[194] *United States v. Philadelphia National Bank* (n 191) 363.

The Court thus established a presumption of illegality against mergers whose market shares indicate their 'inherently anticompetitive tendency'. [195] It thus expressly alleviated 'the burden of proving illegality' for mergers 'whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration'.[196]

In *Philadelphia National Bank*, the Court intimated that any merger leading to a post-merger market share in excess of 20%[197] to 25%[198] or an increase in market concentration of 7 to 8%[199] could be presumed to substantially lessening competition.[200] In other cases, the Court, however, made extensive use of the incipiency doctrine to block mergers, which led to an increase in concentration that would nowadays appear insignificant and largely fell short of the threshold of 20% or 30% discussed *Philadelphia National Bank*. The Court, for example, invoked the incipiency doctrine to block mergers leading to firms with a combined market share of 7,5%,[201] 5 %[202] or even less.[203] In these cases, the Court attributed little weight to the fact that the combined firm would have continued to face a multitude of competitors.[204] It also largely dispensed with any analysis of whether the merger actually contributed to an increase in concentration.[205] Though it recognised that the actual increase in concentration brought about by some of the mergers it blocked under the *Philadelphia National Bank* presumption was very small, the Court justified their prohibition by pointing to the general trend towards concentration in the respective industries[206] and the congressional mandate to 'clamp down with vigour on mergers'.[207] The 1968 Merger Guidelines also codified this low market share threshold for the structural *Philadelphia National Bank* presumption to be come effective. The Guidelines clarified that in highly concentrated markets in which the four largest firms hold more than 75% (this corresponds roughly with an HHI in excess of 1400), the Department of Justice would block any merger combining two firms with a market share of 4% or any merger

[195] ibid 366.
[196] ibid 363.
[197] This threshold was proposed by Kaysen and Turner (n 106) 133.
[198] This threshold was proposed by G. J. Stigler, 'Mergers and Preventive Antitrust Policy: Reprinted from University of Pennsylvania Law Review, Vol. 104, No 2 (1955)' 300–303.
[199] This threshold was proposed by D. C. Bok, 'Section 7 of the Clayton Act and the Merging of Law and Economics' (1960) 74(2) Harvard Law Review 226 316.
[200] *United States v. Philadelphia National Bank* (n 191) 364 fn 41, 365.
[201] *United States v. Von's Grocery Co.* 384 U.S. 270 (1966) 272–273; Sullivan (n 7) 618–619.
[202] *Brown Shoe Co. Inc. v. United States* 370 U.S. 294 (1962) 328, 331-334, 343-344.
[203] *United States v. Pabst Brewing Co.* 384 U.S. 546 (1966) 550–552.
[204] *United States v. Von's Grocery Co.* (n 201) 272; Sullivan (n 7) 618–619.
[205] *United States v. Pabst Brewing Co.* (n 203) 552.
[206] *Brown Shoe Co. Inc. v. United States* (n 202) 328, 331-334, 343-344.
[207] *United States v. Von's Grocery Co.* (n 201) 276; *United States v. Pabst Brewing Co.* (n 203) 552.

whereby one firm with a market share of 15% or more acquires a firm with a market share of 1% or more.[208]

Even though *Philadelphia National Bank* clearly recognised the possibility for the merging parties to rebut the structural presumption, the Supreme Court interpreted potential justifications or defences very narrowly. It affirmed that Congress, by amending the Clayton Act with a view to preventing economic concentration in its incipiency, had encoded an implicit balance in the SLC test that would, in case of doubt, always tip towards the protection of a deconcentrated market structure and against growth by merger.[209] Along similar lines, the 1968 Guidelines stated that the Department of Justice will only under 'exceptional circumstances' accept efficiency defences. [210] This balance was not only informed by the socio-political considerations about the evils of concentration. It also grounded in the economic assumption that internal growth is more desirable than growth by merger. [211]

The strict approach towards efficiencies of the Warrant Court case law and the 1968 Guidelines thus left merging parties only two possibilities to rebut the structural *Philadelphia National Bank* presumption. Only mergers involving a failing firm[212] or allowing small competitors to gain the necessary efficiencies to challenge the market leaders would not raise any concern.[213] The Supreme Court and the Department of Justice in its 1968 Merger Guidelines thus implemented the republican concern about liberty as non-domination through a legal presumption, which clearly struck a balance in favour of preventing concentration and preserving a polycentric market structure to the detriment of efficiency considerations.

The structural *Philadelphia National Bank* presumption and the 1968 Merger Guidelines prominently embodied the marriage between the political, republican ideal of competition as a deconcentrated market structure and economic understanding of competition of the time.[214] The advantage of such a structural approach was not only that it was in line with the Congressional concern about excessive industry concentration, but also that it accorded with

[208] Merger Guidelines - 1968 1968 para. 5.
[209] *Brown Shoe Co. Inc. v. United States* (n 202) 344, 346.
[210] Merger Guidelines - 1968 (n 208) para. 10.
[211] *Brown Shoe Co. Inc. v. United States* (n 202) 345 fn 72. Merger Guidelines - 1968 (n 208) para. 10.
[212] ibid para. 9.
[213] ibid para. 10.
[214] Sullivan (n 9), 410; Hovenkamp and Shapiro (n 193), 2001–2002.

the economic assumption by the Harvard School that the market structure fundamentally shapes firm conduct and performance.[215]

2.3.2 Structural Presumptions in EU Merger Control

Legal presumptions were also a principal channel through which EU merger control put into effect the republican goal of preserving a polycentric market structure as a safeguard of republican liberty as non-domination. The 1989 Merger Regulation had set out a two-pronged test to determine when a merger must be considered incompatible with the internal market and, is, therefore, unlawful. Such is the case if the merger led to (i) the creation or strengthening of a dominant position and, thereby, gave rise to (ii) a significant impediment of effective competition (SIEC). In subsequent cases, the Commission and the EU Courts, however, inferred the finding of a SIEC from the fact that the merger entails the strengthening or creation of a dominant position.[216]

In other words, the EU Commission and Courts relied on a structural presumption that deduced the existence of a SIEC from the finding that the merger led to a strengthening or creation of a dominant position. Accordingly, the Court and the Commission were able to prohibit mergers for the mere reason that they fostered the concentration of market power within the hands of a single firm without there being the need to show that the merger will lead to

[215] Merger Guidelines - 1968 (n 208) para. 2. See for the role of Donald Turner, at that time Assistant Attorney General, in the drafting of the merger Guidelines D. I. Baker, 'Donald Turner's Merger Guidelines as an Antitrust Watershed' (2018) 53 Review of Industrial Organization 435 437–440. The consonance between the structural presumption and economic theory was also underscored in *Philadelphia National Bank United States v. Philadelphia National Bank* (n 191) 363, fn. 38 and 39. In support of its structural approach, the Court here referred to a considerable amount of economic literature: Comment, 'Substantially to Lessen Competition: Current Problems of Horizontal Mergers' (1959) 68(8) Yale Law Journal 1627; J. Bain, *Barriers to New Competition* (Harvard University Press 1956); F. Machlup, *The Economics of Sellers' Competition: Model Analysis of Sellers' Conduct* (The Johns Hopkins Press 1952). E. S. Mason, 'Market Power and Business Conduct: Some Comments' (1956) 46(2) The American Economic Review 471. Economic Review 471. Stigler (n 198). J. M. Markham, 'Merger Policy Under the New Section 7: A Six-Year Appraisal' (1957) 43(4) Virginia Law Review 489; Bok (n 199). The structural understanding of competition underpinning the structural presumption was also broadly in line with the thinking of other leading economists and antitrust experts on the link between market structure and workable competition, including for instance the Chicago economist George Stigler Stigler (n 198); G. J. Stigler, 'Monopoly and Oligopoly by Merger: Reprinted from Papers and Proceedings, American Economic Review, Vol. XL, No. 2. (1950)' .See also The Attorney General's National Committee to Study the Antitrust Laws (n 137) 318–321.

[216] G. Monti, *EC Competition Law* (Cambridge University Press 2007) 249–250. I. Kokkoris and H. A. Shelanski, *EU merger control: A legal and economic analysis* 26; J. Vickers, 'Merger policy in Europe: retrospect and prospect' (2004) 25(7) European Competition Law Review 455 458; A. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 128; Case T-2/93 *Air France v Commission* ECLI:EU:T:1994:55 paras. 79-80; Case T-290/94 *Kaysersberg v Commission* ECLI:EU:T:1997:186 paras. 179, 185. For a different view see L.-H. Röller and De la Mano, Miguel, 'The Impact of the New Substantive Test in European Merger Control' (2006) 2(1) European Competition Journal 9 10–13.

likely interference with other market participants and entail adverse welfare effects.[217] While the 1989 Merger Regulation did not set out any threshold for a structural presumption of illegality, the EU Commission and the Court of First Instance transposed the so-called '*Akzo* presumption of dominance', pursuant to which a market share of 50% or more is in itself considered evidence for the existence of a dominant position, from Art. 102 TFEU to EU merger policy.[218] In some cases, the Commission even found that mergers leading to a combined market share between 40%-50%[219] or even below 40%[220] may entail the creation or strengthening of a dominant position.

Not only did the Commission and EU Courts introduce a structural presumption of illegality, but they also importantly limited the presumption of legality of mergers under the Merger Regulation. In expanding the concept of dominance under the Merger Regulation from single-firm to collective dominance, the Commission and EU Courts partially overruled the presumption of legality contained in recital 15 of the Merger Regulation, which suggested that a merger leading to a combined market share of less than 25% does not give rise to a dominant position and would, therefore, be presumed compatible with the internal market.[221] The EU Courts, thus, clarified that mergers giving rise to a collective dominance in oligopolistic markets might trigger the presumption of illegality attached to the finding of dominance even if they do not lead to a combined market share in excess of 25%.[222] While in collective dominance cases, high market shares do not give rise to a conclusive presumption of a collective dominant position,[223] high market shares and levels of concentration may be considered as strong, albeit rebuttable, indication for collective dominance.[224]

In a similar vein as the Warren Court case law and the 1968 Guidelines, the EU merger policy under the 1989 Merger Regulation also provided for only very limited possibilities to

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[217] A. C. Witt, 'From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really About More Economics?' (49) 2012(1) Common Market Law Review 217 225.
[218] Case C-62/86 *AKZO v Commission* (n 152) para. 60; Case No IV/M.784 Kesko/Tuko. OJ [1997] L 110/53 para. 106; Case T-221/95 *Endemol v Commission* ECLI:EU:T:1999:85 para. 134; Case T-102/96 *Gencor v Commission* ECLI:EU:T:1999:65 para. 205; Monti (n 216) 251.
[219] Case No COMP/M.2337 Nestlé/ Ralston Purina. Document No 301M2337 paras. 48-50.
[220] Case No IV/M.1221 Rewe/Meinl. OJ [1999] L 274/1 paras. 98-114; Case No COMP/M.2337 Nestlé/ Ralston Purina (n 219) paras. 44-47; Commission Guidelines on the assessment of horizontal mergers. O.J [2004] C 31/5 para. 17.
[221] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ [1989] L 395 rec. 15.
[222] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* ECLI:EU:C:1998:148 para. 176-177. Case T-102/96 *Gencor v Commission* (n 218) paras. 134-136.
[223] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 222) para. 226.
[224] Case T-102/96 *Gencor v Commission* (n 218) para. 206.

rebut the structural presumption under the dominance test. The 1989 Merger Regulation did not provide for an explicit efficiency or failing firm defence. [225] Instead, Article 2 (1) (b) suggested that the European Commission would have to assess efficiencies as part of its assessment of whether the merger gives rise to a SIEC.[226] Decisions, such as the *Aerospatial-Alenia/deHavilland* merger, however, show that the Commission gave little weight to efficiency considerations and thus construed the possibility of parties to rebut the structural presumption very narrowly. The Commission even appeared to perceive efficiency as a potential offence, as it raised the concern that the merger-generated efficiencies might have a detrimental impact on competitors.[227]

Due to this prominent role of the structural presumptions, US and EU merger policy clearly differed from an approach grounded in a negative understanding of liberty as non-interference. An approach based on negative liberty would presuppose that the competition authority or court inquire into whether the merged entity would actually or likely abuse its power as a precondition of prohibiting the merger from going forward. Instead, the structural presumption devised under US and EU merger policy followed the republican concept of liberty, which already perceives the mere existence of instances of power and the ability of agents to arbitrarily interfere with the choices and actions of others as a source of domination and unfreedom. The structural presumption in merger policy thus is the most immediate translation of the republican assumption that industry concentration generates domination into competition rules. Like the presumptions under the other two pillars of antitrust law, this presumption was informed by a concern about the magnitude of potential harm, rather than its likelihood, that excessive concentration might generate. In other words, this structural presumption used the increase in concentration and the concomitant decrease in the capacity of residual competition to impose checks on economic power as a proxy for the potential domination a merger may bring about. The limited possibilities under US and EU merger policy to rebut this presumption on the basis of efficiency considerations also showed that the structural presumption encoded the implicit assumption that the harm brought about by an increase in concentration can be in most cases expected to outweigh potential benefits deriving from integration by merger.

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[225] Case No IV/M.308 Kali- Salz/MdK/Treuhand. OJ [1994] L 186/38 paras. 70-90; Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 222) paras. 112-116.

[226] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (n 221) Art. 2 (1) (b).

[227] Case No IV/M.053 Aerospatiale-Alenia/de Havilland. OJ [1991] L 334/42 paras. 30, 69.

2.4 Presumptions and the Resilience of Republican Liberty

All three pillars of EU and US competition law for quite some time relied heavily on an extensive use of presumptions of illegality. Conventional antitrust scholarship explains the use of presumptions by their role in securing procedural economy, administrability and legal certainty in competition law enforcement.[228] Legal presumptions, indeed, allow competition authorities and courts to condemn particular forms of firm conduct while dispensing with the resource-intensive, time-consuming and costly inquiry into fact-specific evidence to determine their actual or likely economic consequences. At the same time, they enhance legal certainty for businesses that receive clear guidance as to which conduct is incompatible with antitrust rules.[229] Antitrust scholars, including those who express misgivings about the domination resulting from instances of concentrated economic power,[230] ignore that legal presumptions, along with reducing the costs of antitrust enforcement, were a primary channel through which US antitrust until the 1960s and EU competition law until the 2000s operationalised the value of republican liberty.[231]

The foregoing discussion shows that legal presumptions give effect to the concept of republican liberty by outlawing conduct on the basis of its mere potential or capacity to harm competitors and consumers. This use of presumptions indeed differs from an approach, which in line with the probabilistic logic of negative liberty would only countenance antitrust intervention if the anticompetitive agreement, monopolistic conduct or merger at issue gives rise to actual or likely interference with the economic liberty of competitors and consumers.

Legal presumptions also play a crucial role in giving shape to the structuralist policy objective of preserving polycentric markets as a safeguard of republican liberty and as an institution of antipower. Republican antitrust indeed used legal presumptions as predilect instruments to translate the concern about market structure into legal rules. Indeed, legal presumptions offered republican antitrust an effective instrument to regulate the level of concentration of economic power. On the one hand, legal presumptions tackle market

[228] C. F. Beckner, III and S. C. Salop, 'Decision Theory and Antitrust Rules' (1999) 67 Antitrust L.J. 41 43–61; Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 9) 8; Bailey (n 9), 368; Ritter (n 9), 211; Salop (n 193), 280–283.
[229] *United States v. Trenton Potteries Co.* (n 46) 397. *Northern Pac. Ry. Co. v. United States* (n 58) 5. *United States v. Topco Assocs. Inc.* (n 52) 607. ibid. Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 73) paras. 42-43. Opinion of Advocate General Wathlet in Case C-170/13 *Huawei Technologies* ECLI:EU:C:2014:2391 para. 58.
[230] Khan and Vaheesan (n 7), 279–280.
[231] The role of presumptions in operationalsing overarching policy goals has, however, been recently recognised by Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 9) 13, 23-24,30. Baker (n 9) 77.

concentration indirectly by attaching a *prima facie* or *per se* illegality to those types of coordinated or unilateral conduct, which experience shows have the most detrimental impact on the polycentric structure and functioning of competition. On the other hand, legal presumptions allow competition policy also to regulate the level of concentration directly by establishing structural thresholds above which industry concentration through monopoly or merger is deemed excessive. As the ability of firms to exert domination is, from a republican vantage point, reversely correlated to the degree to which they are constrained by polycentric competition, legal presumptions in capping the level of market concentration also immediately tackle the level of domination prevailing in the market.

There is a third way in which legal presumptions enhance republican liberty. Rebuttable and irrebuttable presumptions of illegality, by creating either a conditional or unconditional (*per se*) rule against certain forms of anticompetitive agreements, unilateral conduct and mergers reduce the ability of private actors to impose their interests upon other market participants and engage in private government. In the US until the late 1960s and in the EU until very recently, courts have adopted a broad interpretation of presumptions of illegality, while displaying considerable reluctance to engage in a sweeping, unstructured rule of reason analysis, which presupposes a detailed economic analysis and balancing of anticompetitive effects and pro-competitive virtues of business conduct.[232] In support of this broad application of presumptions under the *per se* rule, the Supreme Court repeatedly highlighted that legal presumptions, due to their rule-like character, considerably limit the discretion of private parties to decide when the procompetitive virtues of a particular conduct are sufficiently important to justify a restriction of competition. The Court warned that too broad an application of a rule of reason analysis might lead to situations of arbitrary domination as '[p]rivate forces are too keenly aware of their own interests in making such decisions.'[233] The Court, therefore, repeatedly rejected to weigh anticompetitive and pro-competitive effects of *per se* offences. It instead insisted that 'a decision [...] to sacrifice competition in one portion of the economy for greater competition in another portion [...] must be made by Congress and not by private forces or by courts.'[234] The extensive use of legal presumptions until the 1970s was thus driven by the concern that the rule of reason standard gives private firms more possibilities to impose their

[232] *United States v. Trenton Potteries Co.* (n 46) 397. *United States v. Socony-Vacuum Oil Co.* (n 51) 221. *Northern Securities Co. v. United States* (n 13) 5. *United States v. Topco Assocs. Inc.* (n 52) 609.
[233] ibid 611.
[234] *United States v. Topco Assocs. Inc.* (n 52) 611, also 610-12; *Timken Roller Bearing Co. v. United States* 341 U.S. 593 (1951) 597; *United States v. Sealy, Inc.* (n 52) 357; *United States v. Philadelphia National Bank* (n 191) 370.

interests and value judgments upon other market participants and, hence, to exercise private government.[235]

Similar concerns about private government and domination also prompted the EU Courts and the Commission to rely on a broad interpretation of presumptions, even against conduct, which did not only pursue the goal of restricting competition. For example, the Courts and the Commission encountered claims that certain anticompetitive agreements were necessary to address market failures or to ensure compliance with existing regulations with scepticism. They held that any redeeming virtues of these agreements could only be taken into account under Article 101 (3) TFEU.[236] The EU Courts and the Commission also made clear that private parties cannot rely on the need to ensure compliance of other market participants with existing regulations to justify their anticompetitive agreements or exclusionary conduct. They, instead, underlined that it is not the role of private, self-interested players, but the exclusive competence of public authorities to ensure the compliance of market participants with the law.[237] This strict approach sought to prevent private actors from imposing their idiosyncratic views on other market participants and to minimise the ability of private actors to subject other economic operators to their private rule-making and government.

This third way in which legal presumptions make the value of republican liberty operative hints to yet another dimension through which legal presumptions are related to republican liberty. Not only do legal presumptions provide for a broader protective scope of economic liberty, because they guard economic players against domination rather than merely actual or likely interference. But legal presumptions also ensure a greater intensity or level of protection than a rule of reason-based approach grounded in negative liberty as non-interference. Republican antitrust in the US and in Europe, indeed, turned on the assumption that legal presumptions are more effective than standards in protecting market participants

[235] *United States v. Socony-Vacuum Oil Co.* (n 51) 212, 221-222, 225; *United States v. Topco Assocs. Inc.* (n 52) 611. See for instance also with regard to attempt of firms to justify collective boycotts by alleging unfair competition *Eastern States Lumber Ass'n v. United States* (n 53) 609; *Fashion Originators' Guild, Inc. v. FTC* (n 53) 461, 468.

[236] Case 136/86 *BNIC v Aubert* para. 22; Opinion of Advocate General Slynn in Case 136/86 *BNIC v Aubert* p. 4803; Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* (n 64) para. 21. See for a similar reasoning in *Limburgse* where the Court held that the context of economic crisis can only be taken into account under Article 101 (3) TFEU Case C-238/99 P *Limburgse Vinyl Maatschappij and Others v Commission* (n 77) paras. 486-487.

[237] Case C-68/12 *Slovenská sporiteľňa* (n 84) para. 20. Case T-30/89 *Hilti v Commission* (n 147) paras. 68, 82-83, 115-119, 139-140. Case C-53/92 P *Hilti v Commission* ECLI:EU:C:1994:77 paras. 11-16. Case No IV/31043 Tetra Pak II (n 147) para. 118-119; Case No IV/30.787 and 31.488 Eurofix-Bauco v. Hilti (n 147) para. 87-96; Case No IV/30.787 and 31.488 Eurofix-Bauco v. Hilti (n 147); Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* (n 151) paras. 82-83.

against the arbitrary exercise of power and private government by other firms.[238] Due to their rule-like character, presumptions enhance the resilience of the protection of market participants against certain forms of domination. Unlike legal standards, rule-like legal presumptions make the protection of the economic liberty of other market participants less contingent upon how the parties to an agreement, the dominant firm or the merging parties actually exercise their power in a specific case. Rather, they establish clear bright-line rules against certain forms of coordinated and unilateral conduct, as well as mergers on the basis of their tendency or potential to give rise to harm and domination. These rule-like, *prima facie* presumptions make thus make certain forms of conduct unavailable or at least more costly. Legal presumptions thus enhance legal certainty for market operators, because they not only protect them against actual or likely interference but also limit firms' overall capacity to interfere in an arbitrary way with other market participants by having recourse to certain forms of conduct.[239]

The form-based or rule-like character of legal presumptions, thus, strengthens the resilience and security of the liberty market participants enjoy, as they prevent certain forms of interference not just in the actual case, but in a range of possible cases where contingencies are different.[240] Unlike the rule-of-reason standard, rule-like presumptions not only address and prevent a specific incidence of arbitrary interference, but make access to such interference unavailable or, at least, very costly.[241] Put simply, the protection of market participants against the potential harm of certain agreements, monopolistic conduct or mergers is not contingent upon whether the fact-finder establishes in the concrete case that it unduly interferes with their choices or forecloses competitors. Rather, by categorically preventing firms from engaging in certain conduct that is tainted by a tendency to entail arbitrary interference, rule-like presumptions reduce firms' access to what one could consider as 'resources for domination'.[242]

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[238] This aspect is often ignored by the discussion of the respective virtue of rules and standards L. Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 Duke Law Journal 557. Moreover, Crane and Christiansen/Kerber put forward conflicting views about the propensity of rules and standards to reduce rent-seeking and interest capture. Crane posits that standards are more likely to reduce legislative and judicial interest capture than rules. By contrast, Christiansen/Kerber, drawing upon the Ordoliberal tradition and Hayek, suggest that rules are less prone to interest capture and rent-seeking than standards. D. A. Crane, 'Rules versus Standards in Antitrust Adjudication' (2007) 64 Wash. & Lee L. Rev. 49 97–98; A. Christiansen and W. Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of per se Rules vs. Rule of Reason' (2006) 2(2) Journal of Competition Law and Economics 215 219–220. Baker has recently made similar argument, pointing out that rules and trunctated approaches limit judicial discretion and, therefore, reduce the risk of interest capture of antitrust judges Baker (n 9) 66–69..

[239] Pettit (n 1) 26.

[240] See for this characteristic of robustness of republican liberty as non-domination Pettit (n 88), 589. Pettit (n 1) 25–26; P. Pettit, *On The People's Terms : A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 67.

[241] Pettit (n 5), 145–146.

[242] Pettit (n 88), 590.

Rule-like presumptions thereby also make liberty as non-domination less contingent upon the goodwill of the parties to an agreement, a dominant firm or the merging parties to withstand the temptation of exercising their power in an arbitrary way.

For republican antitrust on both sides of the Atlantic, legal presumptions played a fundamental role in preserving republican liberty as a thick form of economic liberty of market participants, which is more resilient and hence less contingent than negative liberty. For they empowered competitors and consumers much more effectively against arbitrary interference by other firms than the rule of reason standard. By diminishing the 'precarious contingency' of arbitrary interference,[243] the extensive use of legal presumptions ensured a more 'resilient absence of interference'[244] than would have been possible under a broadly construed rule of reason standard.

3 The Standard of Proof

A second policy instrument or parameter through which US and EU competition law implemented the goal of republican liberty as non-domination was the substantive standard of proof. The concept of standard of proof determines the requisite threshold or weight of proof, in terms of quality and quantity of evidence of anticompetitive effects, that must be met in order for a competition authority or court to be able to conclude that a certain conduct violates antitrust law and warrants state intervention. [245] Republican antitrust law on both sides of the Atlantic relied on a standard of proof, which was closely aligned with the republican concern about domination. This standard of proof accounted for the fact that republican liberty, unlike

[243] Pettit (n 1) 24.
[244] ibid 26.
[245]For a discussion of the standard of proof in EU Competition Law: D. Bailey, 'Standard of proof in EC merger proceedings: A common law perspective' (2003) 40(4) Common Market Law Review 845 848. For a critical assessment of this concept in the context of EU competition law E. Gippini-Fournier, 'The Elusive Standard of Proof in EU Competition Cases' (2010) 33(2) World Competition 187; Heinemann (n 9) 167–168; H. Schweitzer, 'Judicial Review in EU Competition Law: Chapter in Damien Geradin & Ioannis Lianos (eds.), Research Handbook on EU Antitrust Law, Edward Elgar Publishing, Forthcoming' 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129147> accessed 18 April 2019. Some authors have suggested a sharp distinction between the substantive definition of the scope of prohibition of anticompetitive conduct (i.e. the conduct which is prohibited under EU competition law) and the standard of proof under EU competition law. In their view, the question of the extent to which the showing of anticompetitive harm or effects is required is a question of the substantive legal test rather than the procedural question of the standard of proof. La Castillo de Torre and Gippini Fournier (n 9) 4, 7-10; Kalintiri (n 9) 78–80. The way how I use the concept of 'standard of proof' in the following does not follow this suggestion because, as the authors themselves acknowledge, this line between substantive and procedural questions is blurred or ambivalent La Castillo de Torre and Gippini Fournier (n 9) 9; Kalintiri (n 9) 74. I, instead, rely on an economic reading proposed by Beckner and Salop that focuses on the extent to which a plaintiff has to proof the plausibility or probability of anticompetitive harm or effects has to be proven to discharge his/her burden of proof. Beckner, III and Salop (n 228), 61–62.

negative liberty, does not rely on a probabilistic logic that is merely concerned about actual or the threat of likely interference. Rather, republican liberty perceives the mere capacity of other individuals to engage in arbitrary interference and, hence, the mere potential of harm emanating from the existence of instances of concentrated economic power as a source of unfreedom. Instead of adopting a probabilistic standard of proof in line with negative liberty, the US Supreme Court until the 1970s and the EU judicature until most recently translated this republican concern about domination in a standard of proof which requires the showing of potential, rather than actual or likely harm for antitrust intervention to be warranted. This standard of proof of potential anticompetitive effects governed the interpretation of all three substantive pillars of competition law: the prohibition of anticompetitive coordination (3.1), the regulation of monopoly power (3.2) and merger policy (3.3).

3.1 The Republican Standard of Proof and the Prohibition of Anticompetitive Coordination

A key feature of the republican approach towards § 1 of the Sherman Act and Art. 101 TFEU was the reliance of the US and EU courts and authorities on a broad interpretation of presumptions of illegality. As a consequence, the Supreme Court and the EU judicature contented themselves in most cases with the showing that coordinated conduct had the potential to undermine competition and harm competitors and consumers.

The US Supreme Court, for instance, repeatedly held that for an agreement to be prohibited by the *per se* rule, it does not have to entail any actual or likely interference. Instead, the *per se* rule was directed against agreements that 'create […] potential power'[246] to adversely affect competition without there being the need to show that it has been exercised in an unreasonable manner.[247] The *per se* rule was hence grounded upon a prophylactic approach that prohibits certain agreements irrespective of the likelihood of anticompetitive effects. Indeed, it was sufficient that agreements have a 'tendency'[248] to foreclose competitors, restrict competition and enhance the parties' control over the market in order for them to be caught by the prohibition of § 1 of the Sherman Act.

The EU Courts' relied on a similar standard of proof of potential harm as the requisite threshold for finding that an agreement has as its object the restriction of competition in breach

[246] *United States v. Socony-Vacuum Oil Co.* (n 51) 218; *Fashion Originators' Guild, Inc. v. FTC* (n 53) 468.
[247] *United States v. Trenton Potteries Co.* (n 46) 397.
[248] *Fashion Originators' Guild, Inc. v. FTC* (n 53) 468; *Int'l Salt Co. v. United States* (n 56) 396; *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (n 53) 211.

of Article 101 (1) TFEU. The Court of Justice repeatedly held that for an agreement to qualify as a by object restriction, it is sufficient that it 'has the potential to have a negative impact on competition' or 'in other words [is] capable in an individual case […] of resulting' in a restriction of competition.[249] This 'capability standard'[250] of proof establishes a relatively low threshold for an agreement to be caught as a by object restriction. Accordingly, no analysis of the likely effects of the agreement, for instance, on consumer welfare, [251] is necessary. Likewise, the market power of the parties[252] or the number of persons affected by the agreement[253] are irrelevant for the finding of an anticompetitive object.

3.2 The Republican Standard of Proof and the Regulation of Monopoly Power

The republican approach of US and EU courts towards monopoly power was also guided by a standard of proof, which required merely the showing of potential, rather than actual or likely harm, to sustain a finding of a restriction of competition and violation of competition law.

The US courts relied on a standard of proof, which went beyond the probabilistic logic underpinning negative liberty, with respect to the situational and conduct-based presumptions of illegality alike. The situational presumption, according to which the sole possession of monopoly power was considered in breach of § 2 of the Sherman Act, clearly was not only concerned about the unfreedom of market participants flowing from actual or likely interference by a monopolistic firm. It also tried to account for the potential domination resulting from the mere existence of monopoly power. The Supreme Court held, for instance, in *American Tobacco* that no 'proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors' was necessary to sustain a finding of unlawful monopolization.[254] The Court, instead, relied on a standard of proof, which merely required the

[249] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 64) para. 31; *Opinion of Advocate General Kokott Case C-293/13 P Fresh Del Monte Produce* ECLI:EU:C:2014:2439 para. 210; Opinion of Advocate General Kokott in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2014:2437 para. 109; Case T-587/08 *Fresh Del Monte Produce v Commission* ECLI:EU:T:2013:129 para. 306; *Opinion of Advocate General Kokott in* Case C-226/11 *Expedia* (n 72) para. 49; Case C-32/11 *Allianz Hungária Biztosító and Others* (n 64) para. 38.
[250] Colomo and Lamadrid de Pablo, A. (n 4) 361–363.
[251] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 64) para. 29-30, 38. Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2015:184 para. 125. Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 73) paras. 58, 60. Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* (n 83) para. 63. See more recently Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* (n 251) para. 125.
[252] Case C-226/11 *Expedia* (n 72) para. 37.
[253] Case C-172/14 *ING Pensii* ECLI:EU:C:2015:484 para. 53-56.
[254] *American Tobacco Co. v. U.S.* (n 100) 810; see also 809.

showing of potential harm to protect competitors and consumers against the potential abuses of monopoly power.[255]

This standard of proof of potential harm shaped not only the Supreme Court's use of situational presumptions but also guided the application of conduct-based presumptions of illegality to certain forms of unilateral conduct. Based on the incipiency doctrine, [256] the Supreme Court, for instance, interpreted the prohibition of exclusive dealing and tying under § 3 of the Sherman Act in line with a standard of proof requiring potential, rather than actual or likely harm. The incipiency doctrine thus clearly reflected a prophylactic approach in keeping with the republican concern about potential, rather than actual or likely interference. The Court, in fact, condemned tying and exclusive dealing agreements by dominant firms because they bestowed them with the 'potential power for evil over an industry'.[257] The incipiency doctrine also prompted the Court to apply a similarly unexacting standard to predatory pricing cases. Instead of requiring the showing of likely or actual harm to competitors or consumers, the Supreme Court deemed it sufficient for the price cuts to carry a 'reasonable possibility' to harm competition to run afoul of antitrust rules.[258]

Along similar lines, the classical form-based interpretation of Art. 102 TFEU by the EU judicature and Commission revolved around a standard of proof that was closely aligned with the republican understanding of liberty as non-domination. The Court consistently declined to adopt a standard of proof, which would follow the probabilistic logic of negative liberty by requiring actual or likely anticompetitive effects. Instead, based on form-based presumptions, the Court condemned certain forms of dominant firm conduct because of their mere capacity to bring about domination and before they reached the stage where they constituted an actual or a concrete threat of likely interference with the actions and choices of competitors and consumers.[259]

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[255] *United States v. Columbia Steel Co.* 334 U.S. 495 (1948) Justice Douglas, Black, Murphy, Rutledge dissenting, 535-536.
[256] *Standard Fashion Company v. Magrane-Houston Company* (n 116) 356; Sullivan (n 7) 432.
[257] *Motion Picture Co. v. Universal Film Co.* (n 121) 519.
[258] *Utah Pie Co. v. Continental Baking Co.* (n 133) 696 fn 12, 698, 699, 700, 701, 702.
[259] See for this standard of proof requiring potential harm in tying cases Case No IV/31043 Tetra Pak II (n 147) para. 105, 117, 120. For the proposition that the classical case law considers tying by a dominant firm 'by its very nature liable to foreclose competition.' Case No COMP/37.792 Microsoft. C (2004)900 final para. 841; Case T-201/04 *Microsoft Corp v Commission* ECLI:EU:T:2007:289 paras. 857, 868. For a similar standard of proof in exclusive dealing cases Case 85/76 *Hoffmann-La Roche v Commission* (n 146) paras. 90, 127; P. Lugard, 'Eternal Sunshine on a Spotless Policy? Exclusive Dealing Under Article 82 EC' (2006) 2(sup 1) European Competition Journal 163 178. For a similar standard of proof in predatory pricing cases see Case C-62/86 *AKZO v Commission* (n 152) para. 72; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 156) para. 134.

This 'minimalist'[260] standard of proof of potential harm under Art. 102 TFEU surfaced most prominently in cases involving rebates. The EU Courts consistently held that for loyalty or loyalty-enhancing rebate schemes to violate Art. 102 TFEU, it is sufficient that they have the tendency ('tends to')[261] or capacity ('is capable of')[262] to foreclose competitors. Based on this standard of proof, which focuses on the potential,[263] rather than actual or likely effects of rebates, the Commission and the EU Courts found loyalty-enhancing rebates by dominant firms to be in breach of Art. 102 TFEU even when they covered only very small quantities.[264] On several occasions, the EU Courts also held that a firm had abused its dominant position in the absence of any proof of consumer harm, for instance, in terms of price increases.[265] In *Michelin II*, evidence that prices and the market share of the dominant firm fell during the alleged period of abuse did not prevent the Commission and the Court of First Instance from concluding that the loyalty-enhancing rebates amounted to an abuse of a dominant position. On the contrary, they affirmed that the fact the result sought by the rebate scheme had not been achieved is irrelevant for their assessment under Art. 102 TFEU.[266]

3.3 The Republican Standard of Proof in Merger Control

Merger policy on both sides of the Atlantic also implemented the goal of liberty as non-domination through a standard of proof which required the showing of potential, rather than actual or likely harm. Even though US and EU merger policy occasionally referred to the showing of a 'reasonable probability' of anticompetitive effects, their extensive use of

[260] Kallaugher and Sher (n 143), 263. Referring to an ‚exteremly low standard' J. Temple Lang and R. O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82' (2002) 26 Fordham Int'l L.J. 83 110.

[261] Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para. 90. Case 322/81 *Michelin v Commission* (n 145) paras. 73, 81. Case C-95/04 P *British Airways plc v Commission of the European Communities* ECLI:EU:C:2007:166 para. 67. Opinion of Advocate General Kokott in Case C-95/04 P *British Airways* ECLI:EU:C:2006:133 76 fn. 81; Case T-203/01 *Michelin v Commission (Michelin II)* (n 163) paras. 239-240. Case T-57/01 *Solvay v Commission* (n 170) para. 334.

[262] Case 85/76 *Hoffmann-La Roche v Commission* (n 146) para. 127. Case C-62/86 *AKZO v Commission* (n 152) para. 72; Opinion of Advocate General Kokott in Case C-95/04 P *British Airways* (n 261) paras. 41 and 46. Case C-95/04 P *British Airways plc v Commission of the European Communities* (n 261) paras. 68, 77. Note that unlike the General Court and the Advocate General, the Court of Justice avoided any reference to the ‚likelihood' of anticompetitive effects. Both the General Court and the Advocate General seemed to use ‚capable' and ‚likely' as synonyms. Case T-219/99 *British Airways plc v Commission* ECLI:EU:T:2003:343 para. 293. Opinion of Advocate General Kokott in Case C-95/04 P *British Airways* (n 261) para. 71.

[263] Gyselen (n 161) 293–294; Kallaugher and Sher (n 143), 264.

[264] Case T-57/01 *Solvay v Commission* (n 170) para. 338.

[265] Case 85/76 *Hoffmann-La Roche v Commission* (n 146) p. 488. For a clear rejection of the requirement to show consumer harm Case C-95/04 P *British Airways plc v Commission of the European Communities* (n 261) para. 106.

[266] Case T-203/01 *Michelin v Commission (Michelin II)* (n 600) para. 245. See also Case T-219/99 *British Airways plc v Commission* (n 262) para. 298.Case C-95/04 P *British Airways plc v Commission of the European Communities* (n 261) para. paras. 98-102.

presumptions suggests that they, in effect, contented themselves with the showing of potential effects to block a merger.

Until the late 1960s, US Merger Policy was shaped by a standard of proof, which was profoundly imbued by the republican concern about the potential dominating effects of concentrated economic power. The Supreme Court consistently held that the Congressional intent and the incipiency doctrine would preclude §7 of the Clayton Act from being applied based on the same legal standards as used under the Sherman Act. The legislative history of §7 of the Clayton Act, thus, rule out a standard of proof, which required the showing of actual or likely anticompetitive effects.[267] The Court instead underscored that the use of the words ‚*may be* to substantially lessen competition' suggests that the requisite standard of proof, while not being merely concerned about ‚ephemeral possibilities' rests upon reasonable ‚probabilities, not certainties.'[268]

The line drawn by the Court between reasonable probabilities and mere possibilities, assumptions or conjecture was, however, a blurry one.[269] Though the Court phrased the requisite standard of proof in probabilistic terms as requiring ‚probable' anticompetitive effects,[270] it rejected the probabilistic logic of negative liberty that would have required the showing of actual or likely anticompetitive effects. The Court, instead, emphasised the need to inhibit excessive economic power in its incipiency. On this basis, it noted that § 7 of the Clayton Act was directed against mergers ‚that may tend to lessen competition'[271] or create a ‚*tendency* towards monopoly'.[272] The Court thus fashioned a standard that required the showing of potential rather than actual or likely anticompetitive effects for there to be a violation of §7 of the Clayton Act.

This argument is also supported by the fact that the Court ascertained what it referred to as 'probability' of anticompetitive effects not only with respect to the 'probable effects of the merger on the economics of the particular markets affected but also […] its probable effects

[267] *Brown Shoe Co. Inc. v. United States* (n 202) 518, 329. This interpretation was clearly supported by Kaysen and Turner (n 106) 129–130; R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 206; Bok (n 199), 252,255-256.
[268] *Brown Shoe Co. Inc. v. United States* (n 202) 323 and fn 39; Kaysen and Turner (n 106) see also 130.
[269] *FTC v. Procter & Gamble* 386 U.S. 568 (1967) Justice Harlan dissenting, 584. See also for the difficulties to reconcile the incipiency doctrine with a standard of proof requiring probabilities, rather than mere possibilities Kaysen and Turner (n 106) 129–130. This reading is also supported by Bok, who suggests that ‚reasonable probability' cannot be understood in a statistical sense as requiring the showing that the merger on a balance of probabilities is more likely than not to lead to anticompetitive effects Bok (n 199), 255–256.
[270] *Brown Shoe Co. Inc. v. United States* (n 202) 323, 325.
[271] ibid 317, 320, 335, 346, fn 69. See also *United States v. Philadelphia National Bank* (n 191) 367.
[272] ibid.

upon the economic way of life sought to be preserved by Congress.'[273] Under this standard, § 7 of the Clayton Act would also apply to mergers that would frustrate the Congressional intent of preserving a polycentric industry structure and society 'composed of many independent units'[274] irrespective of its actual or likely effects on prices or output. Adopting a very broad interpretation of the incipiency doctrine, the Court, in effect, extrapolated an overall trend towards concentration even in mergers that brought about a marginal increase in concentration.

This broad interpretation of the incipiency doctrine was grounded in a bold counterfactual. The Court, indeed, assumed that the clearance of a small merger could trigger a cumulative series of similar small acquisitions. Under a consistent merger policy, these mergers of similar small size would have to be equally approved. Eventually, the cumulative effects of such a wave of multiple small acquisitions would increase industry concentration and would frustrate the Congressional intent to inhibit economic concentration in its incipiency.[275] Based on this broad reading of an incipiency doctrine, the Supreme Court inferred potential harm to competition and domination even in mergers leading to merged entities with tiny market shares of about 5%.[276] Given this undemanding standard of proof, the Court thus blocked mergers based on the possibility, rather than probability, that a particular market may 'slowly but inevitably gravitate from a market of small competitors to one dominated by one or a few giants, and competition would thereby destroyed.'[277]

Unlike in the US, neither the case law nor the Merger Regulation provided for the basis of any form of incipiency theory under EU Merger Control. Nonetheless, the form-based presumption informing the dominance test was equally anchored in a standard of proof which required the showing of potential, rather than actual or likely effects on competition. The early case law by the EU Courts on the application of the Merger Regulation identified the finding of dominance as the essential legal benchmark to determine the legality of a merger. Once the definition of the relevant market and the analysis of the market shares indicated the creation of absence of dominance, the Commission was under the obligation to prohibit or clear the merger without any further inquiry into its actual effects on competition.[278] The standard of proof adopted by the EU Courts and the Commission thus clearly fell short of requiring the showing,

[273] *Brown Shoe Co. Inc. v. United States* (n 202) 333.
[274] *Brown Shoe Co. Inc. v. United States* (n 202) 333; *United States v. Pabst Brewing Co.* (n 203).
[275] *Brown Shoe Co. Inc. v. United States* (n 202) 334,345-346.
[276] ibid.
[277] *United States v. Von's Grocery Co.* (n 201) 278.
[278] Case T-2/93 *Air France v Commission* (n 216) paras. 79-80; Case T-290/94 *Kaysersberg v Commission* (n 216) paras. 170-184.

in line with the probabilistic logic underpinning negative liberty, that the merger was likely to lead to anticompetitive effects, for instance in the form of higher prices or lower output. The prohibition of a merger could, instead, be sustained by the finding of potential harm that might ensue from the creation of a dominant position.

With the recognition of the possibility of blocking a merger under the Merger Regulation on the basis of the finding of collective dominance, the EU judicature, however, slightly tightened the standard of proof. The Court held in *Kali und Salz*, that the Commission has to support the finding of collective dominance by 'a sufficiently cogent and consistent body of evidence'[279] which demonstrates 'to a sufficient degree of probability'[280] that the merger will lead to anticompetitive effects. It went even a step further, referring to the likelihood of anticompetitive effects.[281] By adopting a more demanding standard for the finding of collective dominance, the Court clarified that a finding of collective dominance could not be based on the analysis of market shares alone.[282] Despite this apparent tightening of the standard of proof in collective dominance cases, the analysis of collective dominance in the early case law remained largely confined to an assessment of structural market characteristics to determine the extent to which the merger will lead to an oligopolistic market structure conducive to tacit collusion or conscious parallelism.[283] By contrast, the Commission and Courts attributed little weight to the assessment of behavioural factors and incentives, which would suggest that the collectively dominant firms were likely to abuse their collective market power and tacitly collude post-merger.[284] Accordingly, although the Courts referred to the likelihood of anticompetitive effects as precondition for the finding of collective dominance, in effect, mergers could be blocked on the basis of the potential harm ensuing from the creation of a collective dominant position, without any further analysis of whether the merging and non-merging parties were likely to exert their collective market power by raising prices or decreasing output in parallel.

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[279] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 222) para. 228.
[280] ibid para. 246.
[281] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 222) paras. 170, 219; Case T-102/96 *Gencor v Commission* (n 218) para. 222.
[282] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 222) para. 226. The Court of First Instance, while recognising that market shares may play a less important role in the assessment of collective, as compared to single-firm dominance, nonetheless offers a strong, but rebuttable, indication for the existence of collective dominance. Case T-102/96 *Gencor v Commission* (n 218) para. 206.
[283] ibid para. 276. See also G. Monti, 'The Scope of Collective Dominance under Articles 82 EC' (2001) 38(1) Common Market Law Review 131 134–135.
[284] For the relevant factors see Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 222) paras. 221-250; Case T-102/96 *Gencor v Commission* (n 218) paras. 206-296.

Republican antitrust in the US and in EU was hence put into practice through a specific standard of proof. Unlike an approach grounded in negative liberty, the republican interpretation of the standard of proof did not require the showing that the anticompetitive agreement at issue is on a balance of probabilities more likely to give rise to anticompetitive agreements than not. Rather, the republican approach took into account the magnitude of potential harm that certain forms of agreements, unilateral conduct and mergers may entail. This republican balance-of-harm approach justified the prohibition of certain types of agreements on the basis of their potentially substantial harm to competition, without there being the need to inquire into the likelihood of this harm to materialise. The republican approach thus attributed more weight to the magnitude of potential harm than to its probability. It thus also enabled the application of competition law in cases where anticompetitive harm is considered a low-probability, but high-impact event. This standard of proof was essential for republican antitrust to ensure a 'probabilistically unweighted form of protection' of market participants against arbitrary interference, in keeping with the thick, resilient understanding of republican liberty.[285] The reference of the EU Courts in *Kali und Salz* and *Gencor* to the need of showing the likelihood of anticompetitive effects in collective dominance cases, however, already foreshadowed a more generalised shift of EU merger control towards a more probabilistic standard of proof that was soon to come.

4 The Republican Understanding of the Costs and Benefits of Antitrust Intervention

The third policy instrument or channel through which US and EU antitrust law implemented the ideal of republican liberty was a specific understanding of the costs and benefits of antitrust intervention. This error-cost framework expressed a clear preference for false positives (type I errors). It, hence, erred in the case of doubt on the side of over-enforcement (4.1). This skewed error-cost framework and favourable attitude towards state intervention were informed by economic considerations (4.2) and a balance of rights firmly in line with the logic of republican liberty (4.3).

[285] Pettit (n 5), 137.

4.1 A Preference for False Positives

The reliance of republican antitrust on both sides of the Atlantic on broadly construed legal presumptions and a relatively unexacting standard of proof of potential harm operated on the basis of an error-cost framework which encoded a welcoming attitude towards antitrust intervention. This error-cost framework can be considered as the 'source-code' of republican antitrust because it demarcates the legitimate scope of state and antitrust intervention. It was grounded in the assumption that the benefits of broadly prohibiting certain forms of agreements, unilateral conduct, or mergers exceed the costs caused by the application of inherently over-inclusive legal presumptions that might give rise to false positives by catching innocuous conduct.[286] In other words, the paramount importance of legal presumptions for the republican approach reflects the implicit value judgment that the benefits of categorically outlawing certain forms of conduct exceed the costs of potential over-enforcement (type I errors). This also implies that the benefits of broadly construed presumptions are superior to the benefits of a rule of reason analysis, which would reduce those type I errors by screening out and insulating pro-competitive conduct from antitrust liability based on a case-by-case analysis. Lastly, the combined application of broadly construed legal presumptions and a low standard of proof also gave expression to the assumption that the costs of under-enforcement of competition law under a rule of reason approach exceeded the benefits of filtering out pro-competitive conduct and shielding them from the application of competition rules.

Overall, the way in which the republican approach conceived legal presumptions and designed the requisite standard of proof thus reflected an implied a preference for over-enforcement (type I errors) over under-enforcement (type II errors). The republican approach stood for the proposition that under-deterrence of antitrust laws creates considerably more harm and costs than over-deterrence. It therefore clearly preferred type I errors, assuming that '[i]t would be more in keeping with the spirit of the Sherman Act to give the benefits of any doubts to the struggling competitors.'[287]

[286] *Northern Pac. Ry. Co. v. United States* (n 58) 5; *United States v. Topco Assocs. Inc.* (n 52) 607; *United States v. Topco Assocs. Inc.* (n 52) 607. *Ariz. v. Maricopa County Medical Soc.* (n 61) 343.
[287] *United States v. Columbia Steel Co*. (n 255) 539.

4.2 The Economic Assumptions underpinning the Republican Error-Cost Framework

Republican antitrust thus relied on an error-cost framework that, in the case of doubt, tipped the balance of rights towards state interference. This skewed error-cost framework was grounded in a number of economic assumptions about the robustness and auto-corrective forces of markets. It turned on the belief that for a broadly construed category of anticompetitive conduct, state interference is more beneficial than leaving the remediation of (undetected) anticompetitive effects to self-correcting market forces. Republican antitrust thus clearly accounted for the fragility of markets and harboured doubts about their capacity to remedy anticompetitive behaviour that has gone undetected by antitrust enforcement (under the rule of reason analysis).[288]

This preference for broadly construed presumptions of illegality and type I errors tallied nicely with the understanding of the costs and benefits of antitrust intervention of the Ordoliberal and Harvard School. Both schools of thought suggested that the benefits of robust antitrust intervention exceeded its costs, as it normally does not chill efficient business conduct.[289] Conversely, the preference for type I errors also hinged on the economic belief that economic concentration and monopoly are a source of economic inefficiencies rather than of performance, progress and innovation.[290] This assumption, in turn, found support in the socio-economic belief in the virtue and superior economic performance of small and inventive businessmen. [291]

One example of the role of economic assumptions in tilting the republican error-cost framework in favour of state intervention was the sceptical stance of the Warren Court and the 1968 Merger Guidelines towards merger-driven efficiencies and their clear preference for internal growth, as opposed to growth by integration. This preference for internal growth dovetailed with the prevailing economic view of the Harvard School. Proponents of the S-C-P paradigm assumed that firm size was not necessarily associated with efficiencies and that small

[288] P. Larouche and M. P. Schinkel, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act' (TILEC Discussion Paper No. 2013-02, Tilburg 2013)) 11.
[289] Kaysen and Turner (n 106) 6, 10-11. See for a discussion of the Ordoliberal error-cost framework Larouche and Schinkel (n 288) 11.
[290] *United States v. Columbia Steel Co.* (n 255) Justice Douglas, Black, Murphy, Rutledge dissenting, 534-535 fn 1.
[291] See for instance *United States v. Columbia Steel Co.* (n 255) Justice Douglas, Black, Murphy and Rutledge dissenting, 534 fn.1; *United States v. Columbia Steel Co.* (n 255) ibid Justice Douglas, Black, Murphy and Rutledge dissenting, 534. Temporary National Economic Committee, 'Relative Efficiency of Large, Medium-sized, and Small Business' (1941). TNEC Monograph 13.ibid.

firms are often equally efficient and innovative as large firms.[292] This view, on the one hand, explains why the Court was more willing to accept efficiencies defences in mergers that would ensure the survival of or strengthen small firms relative to efficiency defences in mergers involving large firms. On the other hand, the assumption that the alleged efficiencies of mergers could also be easily achieved through internal growth explains why the Court was less reluctant to prohibit mergers. The blocking of mergers was assumed to be unlikely to harm welfare, as firms could achieve the same efficiencies through internal growth.[293] This limited weight of integration-driven efficiency, thus, suggests that the republican approach assumed the economic costs of type I errors to be low. [294]

4.3 The Republican Balancing of Rights underpinning the Republican Error-Cost Framework

Apart from economic considerations, the republican error-cost framework was also clearly animated by the republican attitude towards state interference and the underlying calculus of the balancing of rights.

The value of republican liberty shaped this error-cost framework in a number of ways. First, the republican error cost framework encoded the assumption that the costs in terms of losses in liberty (understood as non-domination) due to erroneous non-intervention of antitrust law are high. This assumption was the immediate consequence of the thick understanding of republican liberty. What distinguishes republican liberty from negative liberty is the belief that liberty is not only jeopardised if an anticompetitive agreement, unilateral conduct or merger brings about an actual or likely interference with the economic choices and actions of other market participants. Rather, from the perspective of republican liberty, the potential domination resulting from the mere existence of individual or collective monopoly power is sufficient to undermine the liberty of all market participants. To proponents of republican liberty, the evil of domination is much bigger than the evil of interference because it is not confined to an isolated incidence of interference but continues to undermine liberty as long as it remains available for powerful firms.[295] As a consequence, the magnitude of the potential harm of a particular business conduct tampering with a polycentric market structure and increasing economic

[292] Kaysen and Turner (n 106) 82–85.See for instance See also for a more recent critical analysis of the claim that mergers enhance efficiencies. F. M. Scherer and D. Ross, *Industrial market structure and economic performance* (Houghton Mifflin 1990) 159–174.
[293] *Brown Shoe Co. Inc. v. United States* (n 202) 345 fn 72.
[294] ibid.
[295] See in this respect Pettit (n 5), 145.

concentration is far greater from a republican vantage point, than it is from the perspective of the thin, negative liberty which only perceives conduct that leads to actual or likely interference as obstruction of liberty. It follows that for proponents of republican liberty as non-domination the costs of type II errors are high much higher than for proponents of a negative concept of liberty.

The costs of type II errors, from the vantage point of republican liberty, are further amplified by the fact that the multifaceted harm flowing from domination caused by an increased concentration of economic power is not strictly confined to the realm of the market or limited to welfare losses. Rather, increased concentration of economic power raises the spectre of a decrease in the ability of polycentric competition to impose constraints on the ability of powerful firms to exert domination. A higher level of industry concentration may also lead to a reduction in consumer choice[296] and the elimination of small competitors as pillars of a republican society. Most importantly, given the close link between economic liberty as non-domination and a republican society and polity, the harm of erroneous non-intervention may eventually even undermine democracy. The republican error-cost framework thus gives considerable weight to type II errors. This also explains the limited role of efficiency considerations for republican antitrust. As the potential harm of type II errors goes beyond welfare losses, it is rather unlikely to be outweighed by efficiency gains achieved through the reduction of over-enforcement (type I errors), for instance, through a rule of reason analysis or a relatively low threshold for rebutting a presumption of illegality. Under the republican approach, the expected magnitude of harm and potential costs of erroneous non-intervention hence tipped the scale clearly in favour of illegality of certain forms of agreements, unilateral conduct or forms of economic concentration.[297]

From the perspective of republican liberty not only the losses of non-intervention but also the gains of state intervention are considerably higher than from the perspective of a thin, negative understanding of liberty as non-interference.[298] From the republican vantage point, state intervention does not only advance liberty by preventing or remedying the punctual incidence of interference, say by cartelists or a monopolist, with the negative liberty of other market participants. Rather, state intervention also advances liberty in reducing the overall level of domination prevailing in the market. Republican antitrust, on the one hand, makes firms'

[296] *United States v. Philadelphia National Bank* (n 191) 367.
[297] Bork (n 267) 210.
[298] This argument draws on Pettit (n 5), 145–146.

access to certain forms of conduct unavailable or very costly. On the other hand, it also diminishes the concentration of economic power, for instance, by ensuring that residual competition in the middle- to long-run erodes the economic power of the dominant firm. Through both channels, republican antitrust thus reduces the access of powerful firms to resources of domination and enhances the protective function of polycentric competition as an institution of antipower that shields market participants also against future domination. State intervention thus averts harm of much higher magnitude than from the perspective of negative liberty. [299] These benefits of state or antitrust intervention are further amplified because the positive effects of guarding economic liberty against domination are not limited to the economic sphere. Given the importance of republican liberty for a republican and democratic society and polity, antitrust intervention generates positive externalities for the broader society and polity. By contrast, from the perspective of negative liberty, the gains of state intervention are limited to the prevention of a (isolated instance of) loss of liberty otherwise caused by actual or expected interference. As a consequence, from the perspective of republican liberty, the gains of state or antitrust intervention clearly exceed the benefits proponents of negative liberty associate with state interference.

While from the perspective of republican liberty the costs of non-intervention and the benefits from state intervention are higher than from the perspective of negative liberty, the costs of state intervention are much lower.[300] Unlike proponents of negative liberty, [301] the republican tradition did not automatically consider laws and state interference as an invasion of liberty. Instead, the republican tradition assumes that 'non-arbitrary' state interference, unlike private interference,[302] does not necessarily undermine liberty, even if it restricts individuals' economic autonomy.[303] Proponents of republican liberty indeed underline that republican laws adopted in line with democratic and constitutional processes and in compliance with the rule of law allow for non-arbitrary interference which does not diminish liberty, even if it restricts individuals' unrestricted freedom of action or choice. This explains why the republican approach conceived antitrust intervention not as an antonym, but rather as a safeguard of liberty as non-domination, although it interferes with the contractual freedom and right to property of businesses.[304] In reducing or even defining away losses of liberty resulting from state

[299] Pettit (n 5), 146; *United States v. Joint Traffic Ass'n* (n 13) 572.
[300] Pettit (n 1) 35–41.
[301] ibid 37–39.
[302] Pettit (n 5), 146.
[303] Pettit (n 88), 586, 597; Pettit (n 5), 135. E. Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination?' (2017) 9(2) European Journal of Legal Studies 103 105–109.
[304] *Northern Securities Co. v. United States* (n 13) 331.

intervention, this understanding of non-arbitrary state interference further pulls the scales of the republican error-cost framework towards type I errors. From a republican perspective, the benefits of state interference are not only much higher than from the perspective of negative liberty. But the losses of liberty due to a broad application of competition law and state interference are also much lower than from the perspective of negative liberty. [305]

This republican balance of rights approach thus clearly differed from the balancing of rights cultivated by proponents of negative liberty. For proponents of negative liberty, any kind of state intervention leads to a reduction of the economic liberty of members of a cartel, a dominant firm or merging parties. State intervention is, therefore, only permissible if this reduction of liberty is outweighed by the gains of liberty of other market players resulting from the prevention of interference through state intervention.[306] State intervention thus requires a balancing of rights which shows that the anticompetitive conduct interferes with the liberty of other market participants in a way which exceeds a certain proportionality threshold for the limitation of the reduction of liberty on the part of parties of an agreement, a dominant firm or merging parties by means of antitrust intervention to be justified. Under this balancing of rights calculus, state intervention is only permissible if the harm ensuing from the reduction of liberty of other market participants as a consequence of the restraint of competition at issue, outweighs the reduction of liberty caused by the state interference with the defendants' economic liberty. It thus requires some form of utilitarian cost-benefit balancing of the costs and benefits of government and private interference. Only when the costs of private interference are unreasonably high, because they harm social welfare, antitrust intervention is justified.

The ideal of republican liberty as non-domination of republican antitrust on both sides of the Atlantic shaped an error-cost framework and balancing of rights, which expressed a clear preference in favour of state intervention. This balancing of rights was, on the one hand, informed by the economic assumption that competitive markets are not always self-correcting and that industry concentration and firm size are often a source of slacking economic performance rather than of efficiencies. On the other hand, this bias in the error-cost framework is the immediate outcome of the thick concept of republican liberty as non-domination. Because from the republican perspective, non-arbitrary state interference does not automatically lead to a reduction of liberty, the costs of state intervention are relatively low. By contrast, since the adverse effect of domination resulting from concentrated economic power go beyond economic

[305] Pettit (n 5), 146.
[306] ibid 145.

welfare losses, but may even entail adverse impact on a republican or democratic polity, the costs of non-intervention are much higher than potential efficiency savings. This explains why the republican approach likened potential losses of productive and dynamic (innovation) efficiency caused by robust antitrust intervention and the de-concentration of economic power to the inefficiencies and 'wastes' of democracy whose benefits nonetheless outweigh the efficiencies of absolutism.[307]

5 Conclusion

This chapter further describes how the ideal of republican liberty has been operationalised through concrete competition policy. Analysing the application of US and EU competition law rules to coordinated conduct, monopoly power and mergers this chapter identifies the three principal policy instruments or channels through which republican antitrust on both sides of the Atlantic gave shape to the value of republican liberty and its operationalisation through the protection a polycentric market structure, discussed in the previous chapter.

The first policy instrument through which republican antitrust operationalised the goal of republican liberty was through the broad construction of structural presumptions of illegality. Republican antitrust attached these presumptions to specific forms of agreements, unilateral conduct, and mergers that were assumed to have an adverse effect on the polycentric functioning of markets. These structuralist presumptions of illegality were in three different ways linked with the ideal of republican liberty. First, structural presumptions of illegality constitute the most immediate and handy tool to tackle the link between economic concentration and domination. As soon as a particular form of conduct or level of market concentration are known to affect the polycentric market structure adversely, they can be presumed to give rise to domination and, hence, to unfreedom. Second, this reliance on structural presumptions also accounts for the fact that liberty as non-domination, unlike negative liberty, does not only perceive actual or likely interference but even the mere capacity of a powerful individual to arbitrarily interfere with the choices and actions of others as a source of unfreedom. As the structural presumptions allow antitrust enforces to dispense with the showing of actual or likely harm, they enable competition law also to tackle instances of domination, which occur in the

[307] *United States v. Columbia Steel Co.* (n 255) Justice Douglas, Black, Murphy, Rutledge dissenting, 534-535 fn 1.

presence of instances of individual or combined concentrated economic power, although they have not yet exerted their ability to interfere. Third, due to their rule-like character, legal presumptions of illegality reduce the level of domination by making the enjoyment of economic liberty less contingent than it would be the case under legal standards. Presumptions of illegality make the recourse to certain forms of conduct, which are known to have a high potential of generating domination, unavailable or, at least, very costly for firms. As a consequence, legal presumptions enhance the resilience of economic liberty guaranteed by competition law, because they ensure that market participants are not only shielded from domination resulting from a particular conduct in a specific case but across a range of different possible situations. In so doing, legal presumptions limit the resources and leeway of firms to exert arbitrary domination.

The standard of proof was a second policy instrument through which republican antitrust on both sides of the Atlantic implemented the ideal of republican liberty and the policy objective of protecting a polycentric market structure. Instead of adopting a standard of proof, which, in line with the probabilistic logic of negative liberty, requires the showing of actual or likely anticompetitive harm, US and EU courts endorsed a standard of proof which merely required the showing that certain agreements, monopoly conduct or mergers give rise to potential harm. This standard of proof accounts for the fact that republican tradition does not only consider actual or likely interference as an abrogation of liberty, but also views the mere presence of an actor with the capability to arbitrarily interfere with other market participants as a source of unfreedom. This standard of proof thus did not rely on a balance of probabilities, but rather on a balance of harm. This balance of harm standard enabled a prophylactic or precautionary antitrust intervention, which seeks to prevent harm and domination even if it is a low-likelihood but high impact event. It thus enabled republican liberty to ensure a 'probabilistically unweighted' protection of economic liberty.

Republican antitrust relied on a specific error-cost framework as a third policy instrument to give effect to the value of republican liberty and the policy objective of preserving a polycentric market structure. On the one hand, this error-cost framework was shaped by economic considerations about the capacity of markets to auto-correct undetected anticompetitive conduct. On the other hand, the error-cost framework encoded a balancing of rights in keeping with the thick concept of republican liberty. Unlike proponents of negative liberty, this republican error-cost framework did not perceive any form of state interference as obstruction of liberty. At the same time, the republican error-cost framework put more emphasis

on the gains of state intervention than do proponents of negative liberty. This error-cost framework became a source code of an antitrust policy for which the benefits of antitrust intervention easily outweighed the costs. As a consequence, republican antitrust consistently erred in case of doubt on the side of preventing or reducing economic concentration, even though this involved welfare costs.

Chapters I to III have shed light on the theoretical relationship between competition, competition and democracy and have identified the concept of republican liberty as the missing link of the competition-democracy nexus. This and the previous chapter, in turn, give a clear answer to the question: How did and can competition law in the concrete contribute to and enhance democracy? Both chapters show that this link operated not through the application of competition rules to lobbying or interest capture with a view to directly regulating the transmission belt between economic power and political influence. Rather, competition law enhanced republican liberty by reducing domination in the economic sphere and thus preserving republican liberty as a basis of a republican society and polity of free and equals. Both chapters identify four elements that played an important role in implementing the value of republican liberty through what one can call 'republican antitrust'. Chapter IV shows that the value of liberty as non-domination has been translated into the structural policy objective of preserving a polycentric market structure. Through this structuralist policy objective, republican antitrust tackled the concentration of economic power as a source of domination, while, at the same time promoting, the egalitarian and emancipatory ideal of republican society of independent, free and equal businessmen. This Chapter has shown how this structural policy objective has been further implemented through three specific policy instruments. First, structural presumptions contributed to a reduction in the contingency of republican liberty by making certain forms of conduct unavailable to firms and thus ensuring 'resilient enjoyment' of liberty as non-domination.[308] The standard of proof requiring potential rather than actual or likely harm allowed antitrust to tackle and avert instances of concentrated economic power and domination even in the absence of actual or likely abuses of power, thus guaranteeing a 'probabilistically unweighted' form of protection against domination.[309] The republican error-cost framework, in turn, ensured that competition law in the case of doubt tended to err in favour of reducing instances of economic concentration and, eventually, to protect democracy, even if this involved efficiency costs and state interference with the negative entrepreneurial liberty.

[308] Pettit (n 88), 589.
[309] Pettit (n 5), 137.

These four parameters – the structural approach, the reliance on legal presumptions, a standard of proof of potential harm and a specific error-cost framework – built the foundations of the tight cage that republican antitrust built around Behemoths to preserve republican liberty against domination and private government. By shackling Behemoth, republican antitrust sought to uphold the promise encoded in Mandeville's imaginary of the Grumbling Beehive and Smith's invisible hand that the interaction between self-interested individuals will contribute to a stable society and a moderate, republican form of government. From the 1970s onwards, the foundations of this cage started to crumble. With the ascent of the Chicago School, the industrial Behemoths were unleashed from what was increasingly perceived as a 'straightjacket' of competition law under the banner of welfare, growth and entrepreneurial liberty.

CHAPTER VI – THE RISE OF NEGATIVE LIBERTY AND LAISSEZ-FAIRE ANTITRUST

> *There is ample historical precedent for identifying a perfect market with a competitive market […]. I personally oppose the identification, on the ground that the essence of a market is the exchange of titles, whereas the essence of competition is the diffusion of economic power. No market can be perfectly competitive, it is quite true, if the traders are very ignorant of offers and bids because many cases of bilateral monopoly or oligopoly may survive. But a market may be remarkably efficient as a place in which to make transactions, even though one party is a monopoly.*[1]

1 Introduction

Nowadays, the value of republican liberty and the idea of a link between competition and democracy have almost entirely disappeared from the normative landscape of modern antitrust law. Antitrust textbooks barely refer to the role of economic liberty and democracy for competition law and policy. If they do so, they portray both ideals as dusty relics of long-gone times. Mainstream antitrust scholarship suggests not only that considerations about liberty and democracy have lost their relevance for modern antitrust, but also cautions against any attempt to reinvigorate their role for the interpretation of competition law.

This chapter explains why and how the edifice of republican antitrust has collapsed. It seeks to answer a simple question: How is it possible that the values of republican liberty and the idea of a competition-democracy nexus, which had played for more than half a century such a central role for antitrust movements and the interpretation of competition law in the United States ('US') and in Europe suddenly disappeared? The answer to this question lies primarily in what is often referred to as the Chicago School antitrust 'revolution'.[2] From the late 1950s onwards, a group of legal scholars led by Aaron Director, Robert Bork and Richard Posner and

[1] G. J. Stigler, 'Imperfections in the Capital Market: Reprinted from Journal of Political Economy, Vol. LXXV, No. 3, June 1967' in G. J. Stigler (ed), *The Organization of Industry* (1968) 117.
[2] H. Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84(2) Michigan Law Review 213 217.

inspired by emblematic Chicago economists, such as George Stigler, Milton Friedman, Harold Demsetz, Lester Telser and Ronald Coase succeeded in fundamentally reshaping how we think about competition and competition law. The Chicago School swept away more than seventy years of republican antitrust tradition, which rooted in the idea that it is the role of competition law to promote, alongside economic welfare and efficiency, the non-economic values of liberty, equality and democracy through the preservation of a deconcentrated market structure. The Chicago School instead entrenched the nowadays hegemonic view that competition law should as its exclusive goal promote consumer welfare and efficiency.[3] From the late 1990s onwards, this single-edged focus on consumer welfare and the economic effects of business conduct on prices and output has also been increasingly emulated by the More Economic Approach in Europe.

Conventional antitrust literature explains the rise of the Chicagoan More Economic Approach and the displacement of socio-economic and political goals of competition law primarily by the successful attempt of Chicago Scholars to bring antitrust in line with neo-classical price theory and welfare considerations. The eradication of the idea of a competition-democracy nexus from antitrust textbooks is most often portrayed as the ultimate outcome of the triumph of economics over politics.[4] This chapter puts forward a different account. It argues that the Chicago School toppled republican antitrust through two lines of attack. The first line of attack was economics. The Chicago School, indeed, dealt the ideal of republican liberty and its operationalisation through a structuralist interpretation of antitrust laws an important blow by revealing the methodological flaws of the Harvard S-C-P paradigm and laying bare the economic welfare costs of republican antitrust. The Chicago School thus stripped republican antitrust of its economic foundation. The second line of attack, which is rarely discussed in antitrust literature, was politics and ideology. This chapter shows that the Chicago School

[3] For a recent account of the impact of the Chicago School on antitrust law and the concern about bigness and industry concentration T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018) 83-92,102-110.

[4] R. A. Posner, 'The Chicago School of Antitrust Analysis' (1979) 127(4) University of Pennsylvania Law Review 925 933–934; R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051 1051; Hovenkamp (n 2), 226–233; E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140 1140, 1145, 1155; E. M. Fox and L. A. Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming from-Where Are We Going' (1987) 62 N.Y.U. L. Rev. 936 956, 956-960; E. M. Fox, 'The Battle for the Soul of Antitrust' (1987) 75(3) California Law Review 917 918; J. J. Flynn, 'The Misuse of Economic Analysis in Antitrust Litigation' (1980) 12 Sw. U. L. Rev. 335 338–339; L. M. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harv. L. & Pol 235 269–277; L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710 718–722; L. M. Khan, 'The Ideological Roots of America's Market Power Problem' [2018] Yale Law Journal Forum 960, 972; T. Wu, 'After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice' 2018 Competition Policy International 3; Wu (n 3) 83–92.

provided with the consumer welfare standard a powerful and versatile framework to ground antitrust law on a narrow concept of negative liberty as non-interference.[5] It is thanks to this ability to put forth an alternative notion of liberty and a workable framework to implement it through antitrust policy that the Chicago School succeeded in coining a *laissez-faire* approach that superseded the republican understanding of antitrust and the concept of a competition-democracy nexus. This *laissez-faire* approach shaped by the Chicago School became predominant on both sides of the Atlantic, as it has been endorsed by post-Chicago scholars in the US and by proponents of the More Economic Approach in Europe alike.

This chapter traces this shift from republican antitrust to the *laissez-faire* antitrust by focusing on the readjustment of all three pillars of competition law with the logic of negative liberty. The argument of this chapter unfolds in four steps. The chapter first provides a brief account of the rise of the Chicago School analysis and its basic tenets (Section 2). The chapter then discusses the economic line of attack through which the Chicago School shook up the economic foundations of the structuralist approach of republican antitrust (Section 3). The central claim of this chapter is, however, that the consumer welfare standard did not only serve as economic ammunition against republican antitrust law. Rather, it also provided the Chicago School with a framework to substitute the thick concept of republican liberty as non-domination by a thinned out version of negative economic liberty as non-interference as the overarching ideological value of modern competition law (Section 4). The last section traces how the ascent of the Chicagoan consumer welfare standard has moved the interpretation of the prohibition of anticompetitive agreements, the regulation of monopoly power, and merger policy under US and EU antitrust law away from the goal of preserving competition as deconcentrated market structure, which prevents domination by dispersing power amongst a multitude of players. With the rise of the Chicago School and the More Economic Approach, this structural understanding of the goal of antitrust law has increasingly given way to the goal of consumer welfare (Section 5).

This does not only mean that the focus of antitrust law has been narrowed down to the sole concern about how business conduct affects output and prices. The consumer welfare standard has, indeed, become the predilect framework within which competition authorities and courts solve conflicting claims about how agreements, unilateral firm conduct and mergers

[5] This argument is only made in rudimentary form by E. M. Fox, 'Consumer Beware Chicago' (1986) 84(8) Michigan Law Review 1714 1715; E. M. Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window' (1986) 61 N.Y.U. L. Rev. 554 558 fn. 14, 588.

affect negative economic liberty. In essence, the adoption of the consumer welfare approach in the US and Europe has led to an interpretation of antitrust law, which shields the exercise of negative entrepreneurial liberty to the largest extent possible from state intervention. It is exactly this displacement of the republican ideal of liberty as non-domination by the thinner concept of negative liberty encapsulated in consumer welfare approach, which eventually severed the link between the anti-cartel, anti-monopoly and anti-merger pillars of competition law and democracy.

2 The Basic Precepts of the Chicago Revolution

The year of 1956 was an eventful, if not a dramatic year, in the history of the 20th century, marked by the Suez Crisis, and the violent suppression of anti-Soviet protests in Poland and Hungary. The year of 1956 was also an epochal year for antitrust law. In 1956, Aaron Director and Edward H. Levi published a short article cryptically entitled 'Law and the Future: Trade Regulation'.[6] This article should become one of the most consequential papers in the history of antitrust. The major claim of this paper was that the way how US courts applied antitrust law was fundamentally at odds with the basic insights of economic price theory. The paper also set out a clear vision of how antitrust law might evolve in the near future: Either antitrust sticks to its multi-value approach pursuing amongst other things political goals, such as republican liberty. In this case, competition law would be anything but economic law. Or antitrust law would undergo a radical reform and align itself with the basic tenets of economic price theory.[7]

The year of 1956 thus marked the birth of modern antitrust. The Director/Levi paper lay the intellectual foundations of our contemporary understanding of competition law and triggered what should become known as the most profound transformation of antitrust law: the Chicago antitrust revolution. In their paper, Director and Levi set out a clear research and policy agenda, which was henceforth ardently pursued by economists and lawyers associated with the Chicago School. The starting point of the Chicago School analysis was the diagnosis that the source of the 'crisis of antitrust'[8] lay in the fact that republican antitrust also recognised, alongside the economic goal of consumer welfare, non-economic goals, such as the preservation of republican freedom through the limitation of concentration and abuses of economic power

[6] A. Director and E. H. Levi, 'Law and the Future: Trade Regulation' (1956) 51 Nw. U. L. Rev. 281.
[7] ibid 282, 296.
[8] R. H. Bork and Bowman, Ward S. Jr. 'The Crisis of Antitrust' (1965) 65(3) Columbia Law Journal 363.

or the protection of small and local businesses.[9] This attempt to pursue and reconcile a 'randomized mix'[10] of often conflicting economic and non-economic goals produced in the eyes of the Chicago Scholars 'bad policy and bad law', which ignored the genuine interests of consumers and undermined legal certainty for businesses. [11]

On the basis of this diagnosis, the Chicago School developed the blueprint for a reform of antitrust policy. This reform should soon revolutionise antitrust analysis and set the foundations of what should become, under the banner of the so-called 'More Economic Approach', the predominant competition law paradigm on both sides of the Atlantic. The Chicago School in fact succeeded in rewriting the history and change the face of US antitrust law by putting forward a parsimonious and coherent framework for antitrust policy

The starting point of the Chicago School attempt to reform antitrust law was the observation that a coherent antitrust policy is only possible once we settle the question of its policy-goals for good.[12] Chicago Scholars, therefore, advocated that antitrust law should be grounded in the sole goal of consumer welfare. [13] Some Chicagoans, such as Bork, went even a step further. He argued that the goal of consumer welfare was firmly anchored in the legislative history of the Sherman Act. Based on a selective reading of the legislative debates of the Sherman Act and the formative case law, Bork claimed that welfare considerations constituted the major, if not only concern underpinning the enactment of US antitrust statutes by Congress and their subsequent interpretation by the Supreme Court. [14]

Apart from this attempt to rewrite the history of US antitrust, the Chicago School also put forth forceful methodological claims about why welfare maximisation or efficiency should constitute the unique legitimate goal of competition law. In the eyes of many Chicagoans, the perceived 'crisis of antitrust'[15] was primarily the result of the profound confusion over a

[9] R. A. Posner, *Antitrust Law* (University of Chicago Press 2001) 24–28.
[10] T. E. Kauper, 'The Influence of Conservative Economic Analysis on the Development of the Law of Antitrust' in R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008) 43.
[11] R. H. Bork, 'The Goals of Antitrust Policy' (1967) 57(2) The American Economic Review 242 242.
[12] Director and Levi (n 6), 296. Bork (n 11), 243–244; Bork and Bowman, Ward S. Jr. (n 8), 376. R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 5, 7.
[13] R. H. Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1966) 75(3) The Yale Law Journal 775 830, 832. See for Bork's argument that ‚consumer welfare' should constitute the exclusive goal of antitrust Bork (n 12) 80–89. For the economic assumptions underpinning the Chicagoan consumer/total welfare model Bork (n 12) 90–115; Posner (n 9) 2, 21-27; Posner (n 9) 2, 21-29; F. H. Easterbrook, 'The limits of Antitrust' (1984) 63(1) Tex. L. Rev. 1 13.
[14] R. H. Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9(1) Journal of Law&Economics 7. Bork (n 12) Chapters I to III, and in particular 15–71. Bork (n 11), 244–246. Bork (n 13).
[15] Bork and Bowman, Ward S. Jr. (n 8).

hodgepodge of various social, economic and political goals promoted by the Harvard School and other antitrust movements of the time. Only the radical solution of purging antitrust policy from these various, often contradictory objectives and their substitution with a clear, precise and unique goal could restore the coherence of antitrust enforcement and jurisprudence.[16] To Chicagoans, consumer welfare was the only reasonable and legitimate policy goal, which would ensure this consistency, while respecting the philosophy of the Sherman Act.[17] Directly derived from what Chicago Scholars portrayed as the scientific truth of economic neoclassical price theory, the goal of consumer welfare harboured the promise of providing a reliable normative focal point for a workable and sound antitrust policy.[18] Adopting consumer welfare as a policy goal thus had the appeal of firmly grounding competition policy in the discipline of modern economic theory, as the 'theory of antitrust'.[19]

In elevating consumer welfare to the sole legitimate aim of antitrust, the Chicago School discarded any policy goal other than welfare maximisation, such as the protection of economic freedom or the competitive process.[20] Competition law, it was argued, should not be concerned about the protection of competition as process or rivalry, because it would automatically transform antitrust law into a 'protectionist'[21] tool to protect competitors rather than competition. What matters is not the effect of certain business behaviour on the competitive process or market structure, but rather its implication for efficiency and welfare. The Chicago School thus posited that competition should merely be considered as an outcome in terms of efficiency or consumer welfare rather than as a process of rivalrous interaction or a polycentric market structure. Economic outcomes in terms of efficiency or welfare, it was argued, constituted the only reliable benchmark for the effectiveness of competition. Antitrust policy should, therefore, only focus on the 'effects of business behaviour on consumers.'[22]

The Chicago School thus championed a radical break with republican antitrust, which prohibited agreements, unilateral conduct by dominant firms and mergers based on their adverse impact on market structure and the mere fact that they bestowed some market participants with the possibility to control the market and exert domination.[23] Conceptualizing

[16] Bork (n 11), 244–246; Bork (n 12) 90–129.
[17] R. Schmalensee, 'Thoughts on the Chicago Legacy in U.S. Antitrust' in R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008) 13.
[18] Bork (n 12) 8, 91.
[19] ibid 5, 116-129.
[20] On the "impossibility" of the goal of protecting the "competitive process" Bork (n 11), 252–253.
[21] Bork and Bowman, Ward S. Jr. (n 8), 364.
[22] Bork (n 12) 90.
[23] Bork (n 13), 834.

competition as welfare maximisation exercise rather than a process or market structure, the Chicago School pointed out that neoclassical price theory recognises only three potential effects of business conduct on consumer welfare. Either business conduct is beneficial, for instance, because it generates efficiencies; or it is welfare neutral because it neither harms nor benefits consumers; or it is detrimental to consumer welfare because it restricts output below or increases prices above the competitive level. Price theory and consumer welfare as the goal of antitrust policy, hence, provide clear guidance for antitrust policy, as they single out one specific harm to competition that warrants antitrust intervention, namely business conduct that adversely affects prices and output.[24]

Even though Bork used the terminology of 'consumer welfare', the Chicago School was largely unconcerned about business conduct which reduced consumer surplus and thus entailed a wealth transfer from consumers to producers.[25] The fact that monopoly or other forms of anticompetitive conduct reduces consumer surplus to the benefit of an increase of producer surplus was in the eyes of the Chicago Scholars irrelevant. Antitrust law, they argued, should abstain from taking into consideration such fairness concerns or wealth transfers. [26] The way how Bork used 'consumer welfare' thus, in reality, comes closer to a 'total welfare' standard,[27] as he likened consumer welfare with allocative efficiency.[28] From this perspective, the only evil of monopoly or firm conduct that the Chicago School is concerned about is the deadweight loss.[29] This deadweight loss results from the fact that some consumers will no more be able to buy the monopolised product and have to deflect their demand to a second-best option, which they prefer less and whose production costs society more than the production of the monopolised good.

The Chicagoans, however, pointed out that the finding that conduct is restricting output and entails a reduction in allocative efficiency is not sufficient to justify the conclusion that it has net adverse effects on consumer, or more precisely, total welfare, thus harming competition. Rather than merely inquiring into whether business conduct reduces allocative efficiency by lowering output, the antitrust inquiry should also take into account the extent to which these losses are potentially offset by gains in productive efficiency. Drawing upon the seminal work

[24] Bork (n 12) 123.
[25]For an insightful analysis B. Y. Orbach, 'The Antitrust Consumer Welfare Paradox' (2011) 7(1) Journal of Competition Law and Economics 133 138–149.
[26] Bork (n 12) 110–113. Posner (n 9) 21-24,28-29, 202-203.
[27] Fox and Sullivan (n 4), 957–959; Stucke, Maurice E. 'Reconsidering Antitrust's Goals' (2012) 53 B.C. L. Rev. 551 566; Stucke, Maurice E. (n 27), 563–566.
[28] Bork (n 12) 90.
[29] Posner (n 9) 26.

of Williamson,[30] Bork argued that antitrust law should only prohibit business practices bringing about a reduction in allocative efficiency that outweighs an increase in productive efficiency.[31] Drawing the right balance in this welfare trade-off between reductions in allocative and potential increases in productive efficiency is hence the essential challenge for antitrust law. Accordingly, Bork famously observed that the whole 'task of antitrust can be summed up as effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or net loss in consumer welfare.'[32]

The disruptive character and far-reaching implications of the Chicagoan critique of the economic and methodological shortcomings of the republican antitrust tradition and its attempt to reorganize antitrust policy around the sole objective of consumer welfare can hardly be overstated. The Chicagoan antitrust revolution dealt the ideal of republican liberty and, thus, the idea of a competition-democracy nexus a deathly blow. By declaring welfare maximisation as unique normative goal of antitrust policy and benchmark for the assessment of the legality of business practices, the Chicago School delegitimised the hitherto prevailing concern about the adverse, dominating impact of concentrated economic power on republican liberty as non-domination and the egalitarian, Jeffersonian ideal of a society ensuring economic opportunities of independent, small businessmen.[33] The Chicago School vilified republican antitrust as being inherently biased in favour of a privileged and inefficient class of small producers. In pursuing the goal of preserving a specific market structure and reining in the excessive concentration of economic power, the predominant republican antitrust policy of the time did nothing else than ensuring the survival of a small, yet inefficient middle-class at the expense of the silent majority of consumers.[34]

3 The Economic Critique of Republican Antitrust

The displacement of republican antitrust by the Chicago School antitrust paradigm raises the question of the reasons behind its ascent and the success of the consumer welfare standard. The Chicago School waged its attack on an antitrust tradition grounded in republican

[30] O. E. Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoffs' (1968) 58(1) The American Economic Review 18.
[31] Bork (n 12) 107–110.
[32] ibid 91.
[33] ibid 110–113. Posner (n 9) 18-22, 24.
[34] Bork and Bowman, Ward S. Jr. (n 8), 375–376; R. J. Peritz, 'A Counter-History of Antitrust Law' (1990) 39(2) Duke Law Journal 263 299–303.

liberty along two lines: one, discussed in this section, was economic; the other, discussed in the following section, was ideological.

This first line of attack was directed against the economic presuppositions underpinning republican antitrust. The Chicago critique particularly targeted the teachings of the Harvard School and the S-C-P paradigm that supported the republican hostility against industry concentration and bigness.[35] Based on empirical studies suggesting a high correlation between concentrated market structures and high profit margins, the Harvard School argued that high levels of industry concentration were indicative of a lack of competition and economic performance. It assumed that markups were primarily caused by high levels of industry concentration, which facilitate oligopolistic or monopolistic firm conduct.[36] On this basis, the S-C-P paradigm formulated the assumption that market structure shapes market conduct and economic performance.

This assumption about a link between market structure and performance was, in the eyes of the members of the Chicago School, a major driver of the hostile stance of republican antitrust against industry concentration and the intellectual breeding ground for an excessively interventionist antitrust policy. The Chicago School, therefore, spared no pains to unpick the methodological and theoretical premises of the S-C-P paradigm and to put the finger on what it perceived as economic flaws of the republican antitrust tradition. This economic line of attack dismantled the economic foundation of the structuralist approach of republican antitrust towards coordinated conduct (3.1), monopoly and oligopoly power (3.2), and merger policy (3.3). The Chicago critique thus conclusively severed the notion of competitive markets from competition as a polycentric market structure.[37]

3.1 The Chicago Critique of the Structuralist Approach towards Coordinated Conduct

With respect to coordinated and collusive conduct, the Chicago School challenged the Harvard School assumption that collusion is primarily caused by structural factors. While sharing the assumption of the S-C-P paradigm that coordination becomes easier, the fewer the

[35] See for a more detailed analysis of the S-C-P paradigm the discussion in Chapter 2. See also Bork (n 11), 251–253.
[36] J. S. Bain, 'Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-1940' (1951) 65(3) The Quarterly Journal of Economics 292; J. S. Bain, *Industrial Organization* (John Wiley & Sons 1959).
[37] In this sense, Stigler (n 1) 117.

number of market players and the higher the level of concentration in a given market,[38] the Chicago Scholars disputed the view that collusion is the inevitable outcome of a concentrated market structure. Accordingly, they regarded industry concentration as necessary, yet not sufficient condition of collusion.[39] Rather, based on the new insights in the economic theory of collusion pioneered by George Stigler, the Chicago School cast collusion primarily as a behavioural problem. It posited that even in highly concentrated, oligopolistic markets, collusion between firms is inherently unstable and could only be maintained if industry members can credibly detect and punish cheating.[40] This theory of instability of collusion in conjunction with the assumption that entry barriers are usually low[41] prompted some members[42] of the Chicago School to argue that coordinated conduct will only affect prices and output if the parties to a horizontal agreement or vertical agreement hold substantial market power.[43]

The Chicago School, moreover, also drew upon Roland Coase's work on the theory of the firm and insights from transaction cost theory [44] to criticise the strict approach towards horizontal and vertical agreements coined by the S-C-P paradigm. Chicago Scholars argued that the transaction cost theory suggested that anticompetitive collusion does not always constitute the sole explanation for contractual horizontal or vertical cooperation between independent firms. Instead, such contractual cooperation appeared in many cases as an efficient alternative to full vertical or horizontal integration by merger, as such contractual integration allowed firms to internalise transaction costs and organise their production in the most effective way. The concept of contractual integration,[45] thus, recast many contractual restraints that *prima facie* restricted polycentric competition amongst competitors as welfare-enhancing and *ergo* legitimate exercise of negative contractual liberty.[46] The Chicagoan take on transaction cost theory suggested that not only the relationship between firms and the market but also between

[38] D. F. Turner, 'The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal' (1962) 75(4) Harvard Law Review 655 665–666; C. Kaysen, 'Collusion Under the Sherman Act 1' (1951) 65(2) The Quarterly of Economics 263 265–266; Bain (n 36) 406–423.
[39] R. A. Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach' (1968-1969) 21 Stanford Law Review 1562 1571.
[40] G. J. Stigler, 'A Theory of Oligopoly: Reprinted from Journal of Political Economy Vol. LXXII, No1 (1964)' in G. J. Stigler (ed), *The Organization of Industry* (1968).Director and Levi (n 6), 281–282; Posner (n 4), 932. For a comprehensive discussion of the theory of collusion coined by Stigler Posner (n 39), 1569–1575.Posner (n 9) 60–69.
[41] Posner (n 4), 930–931.
[42] Other members of the Chicago School, such as Posner, however showed a stronger concern about collusion ibid 932.
[43] Director and Levi (n 6), 294–295.
[44] Coase, R. H. 'The nature of the firm' (1937) 4(16) Economica 386; R. H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law&Economics 1 16–18.
[45] Bork (n 12) 264; Posner (n 9) 29; Easterbrook (n 13), 4,6,13; Easterbrook (n 13), 4, 6, 13; L. G. Telser, 'Why Should Manufacturers Want Fair Trade' (1960) 3 Journal of Law and Economics 86.
[46] Bork (n 12) 264, 266; Bork (n 13), 837.

collusion and polycentric competition constitutes a continuum rather than a dichotomy. Contractual cooperation between competing firms was hence no longer perceived as a straightforward form of elimination of competition. In many cases, they were rather viewed as efficient forms of expansion of the firm by means of contract.[47]

On the basis of transaction cost economics, the Chicago School also dispelled the republican concern that those arrangements of vertical contractual integration would amount to an undue exercise of domination or private government beyond the perimeters of the firm. The Chicago Scholars fiercely disputed the republican assumption that relationships of subordination are incompatible with liberty, even if they are the result of a voluntarily concluded contract. They instead shed vertical restraints appeared in an entirely new light, portraying them as a legitimate exercise of contractual liberty, which enabled firms to overcome collective action and transaction cost problems and to protect their negative liberty and property rights against expropriation by competing 'free riders'.[48]

3.2 The Chicago Critique of the Structuralist Approach towards Monopoly and Oligopoly

The Chicago School also took aim at the hostile attitude of the S-C-P paradigm and republican antitrust towards monopolistic and oligopolistic firms. It warned that far-reaching attempts to regulate firm size and to de-concentrate monopolistic or oligopolistic industries floated by proponents of the republican approach and members of the Harvard School[49] would have disastrous consequences for the US economy and consumer welfare.[50] The core tenet of the S-C-P paradigm that high levels of industry concentration are indicative of a lack of competition and a decrease in economic performance lay at the centre of the Chicago School critique. Chicago Scholars successfully laid bare the theoretical and methodological flaws

[47] Bork (n 13), 837.
[48] See for a critical discussion Fox and Sullivan (n 4), 945-946, 976, 983-984.
[49] C. Kaysen and D. F. Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) 44, 77-81. D. F. Turner, 'The Scope of Antitrust and Other Economic Regulatory Policies' (1969) 82(6) Harvard Law Review 1207 1212–1231. See for the proposal of a 'Concentrated Industries Act' P. C. Neal and others, 'Report of the White House Task Force on Antitrust Policy' (1968-1969) 2(2) Antitrust Law & Economics Review 11. See for a subsequent proposal of an Industrial Reorganization Act introduced by Senator Hard S.1167 - Industrial Reorganization Act 1973. 93rd Congress (1973-1974); Editors, 'The Industrial Reorganization Act: An Antitrust Proposal to Restructure the American Economy' (1973) 73(3) Columbia Law Review 635. Schmalensee (n 17) 14–16.
[50] Bork (n 12) 92, 164-197; Posner (n 9) 101–117.

underpinning the basic claim of a correlation between industry structure, conduct and performance.[51]

Central element of the Chicagoan critique was that the S-C-P paradigm tended to automatically associate high concentration ratios and profit margins with anticompetitive oligopolistic or monopolistic conduct. As a consequence, it unduly overlooked alternative, pro-competitive explanations for firm size, high levels of industry concentration and profitability, which may equally be the result of superior productive or even dynamic efficiency. Chicago scholars argued that this disregard for the 'more efficient leader' problem explains why republican antitrust paid so little attention to efficiency considerations or even perceived efficiency as a competition problem.[52] By turning a blind eye to how monopoly power is obtained in the first place,[53] antitrust policy guided by the republican concern against industry concentration and size ignored the welfare effects of monopoly. An antitrust policy guided by the goal of preventing industry concentration would, therefore, necessarily harm consumer welfare by depriving them of the benefits of industrial growth and large-scale production.[54]

The Chicago School, moreover, argued that the hostility against industry concentration and firm size was predicated upon the Harvard School's excessively broad definition of barriers to entry. Chicago Scholars argued that most of what the Harvard School perceived as entry barriers were either rather easy to circumvent or the result of the superior efficiency of the incumbent firm. They, therefore, put forward a very narrow definition of entry barriers. This definition was limited to those obstacles, which were not based on efficiencies and which impose on new entrants substantially higher costs than those borne by the incumbent.[55] Under

[51] Director and Levi (n 6), 282, 285-286. Bork (n 12) 163–197. Y. Brozen, 'The Concentration-Collusion Doctrine' (1977) 46 Yale Law Journal; G. J. Stigler, 'Barriers to Entry, Economies of Scale, and Firm Size' in G. J. Stigler (ed), *The Organization of Industry* (1968) 70.H. Demsetz, 'Industry Structure, Market Rivalry, and Public Policy' (1973) 16(1) Journal of Law and Economics 1 1–4; S. Peltzman, 'The Gains and Losses from Industrial Concentration' (1977) 20 Journal of Law and Economics 229 262–263; H. Demsetz, 'Two Systems of Belief About Monopoly' in Goldschmid, Mann, Weston (ed), *Industrial Concentration: The New Learning* (Little Brown 1974) 166–174; W. Evans, L. M. Froeb and G. J. Werden, 'Endogeneity in the Concentration-Price Relationship: Causes, Consequences, and Cures' (1993) XLI(4) The Journal of Industrial Economics 432 432–433; R. Schmalensee, 'Inter-industry studies of structure and performance' in R. Schmalensee and R. D. Willig (eds), *Handbook of industrial organization: Volume 2* (Elsevier 1989). L. W. Weiss, 'The Concentration-Profits Relationship and Antitrust' in Goldschmid, Mann, Weston (ed), *Industrial Concentration: The New Learning* (Little Brown 1974); Bork (n 12) 180–181; D. L. Rubinfeld, 'On the Foundations of Antitrust Law and Economics' in R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008) 54; Schmalensee (n 17) 13–14; D. A. Crane, 'Structuralism - Introduction' in D. A. Crane and H. Hovenkamp (eds), *The making of competition policy: Legal and economic sources* (Oxford University Press 2013) 319–320.

[52] Director and Levi (n 6), 282–288. Bork (n 12) 163–197.Posner (n 9) 101–117.

[53] Bork (n 12) 164-165, 192-197; Posner (n 9) 113–116.

[54] Director and Levi (n 6), 283–285.

[55] Stigler (n 51) 67. Posner (n 9) 73–74. Bork (n 12) 310-319, 195-196; Posner (n 4), 929-932, 946-948.

this narrow definition, only state-created barriers to entry were considered likely to seriously prevent competition and, therefore, reasonably called 'entry barriers'.[56]

The assumption that entry barriers are in general low provided the Chicago School with further ammunition to challenge structural assumptions against concentrated markets. Assuming that market entry is normally easy, the Chicago School argued that even concentrated oligopolistic or monopolistic markets remain competitive and market power in those markets was ephemeral.[57] Any attempt by an incumbent to raise its market power and the ensuing prospect of supra-competitive profits would, at some point, automatically lure new entrants. The threat of entry and potential competition ensured that even incumbents in a highly concentrated industry remained constrained by potential competition. Conversely, based on the assumption that entry barriers are rare, Chicago Scholars posited that high levels of industry concentration could only be explained by the superior efficiency of the incumbents.[58]

The Chicago School thus blamed the S-C-P paradigm and republican antitrust for disregarding the role of productive efficiency as an explanation for monopoly and under-estimating the likelihood of entry and contestability of concentrated markets. The republican approach thus appeared to impose an 'artificial limitation on the growth of a firm.'[59] If antitrust law were to follow the republican logic underpinning *Alcoa* and progeny, it would not only impose too many restraints on the negative entrepreneurial freedom of big businesses but pervert antitrust law altogether by harming consumer welfare.[60] The Chicago School instead contended that firm size and industry structure are, in an overwhelming number of cases, the result of superior efficiency and, therefore, desirable.[61] Any attempt to impose limits on firm size or deconcentrate an industry is therefore doomed to fail. Introducing rivalry by breaking up monopolies and deconcentrating industries would necessarily come at the cost of replacing an efficient single producer with many less efficient, smaller producers and would thus force the industry to operate at higher costs than before.[62] Moreover, a situational standard, which prohibits monopoly or firm size beyond a certain threshold, will necessarily create incentives for firms to reduce output in order to escape antitrust liability.[63] The Chicago School, therefore,

[56] Bork (n 12) 196.Posner (n 9) 74.
[57] Rubinfeld (n 51) 54.
[58] Bork (n 12) 195–196; Posner (n 9) 114–115. Crane (n 51) 319.
[59] Director and Levi (n 6), 286; Bork (n 12) 170–171.
[60] Bork (n 12) 374, 380-381.
[61] Bork and Bowman, Ward S. Jr. (n 8), 368–369. Bork (n 12) 197, 164, 18-179–369; Posner (n 9) 113–116; Brozen (n 51), 827–831.
[62] Bork (n 12) 196; Posner (n 9) 112.
[63] Bork (n 12) 197; Posner (n 9) 116.

concluded that consumers will always be better off in the presence of a monopoly or highly concentrated industry than in the case of antitrust intervention that orders its de-concentration.[64]

The argument that monopoly power is in most circumstances contestable and constrained by market forces and entry[65] was also the starting point for the Chicago critique of the harsh treatment of specific forms of exclusionary conduct by powerful firms advocated by the Harvard School[66] and proponents of the republican approach. Bork strikingly argued that any kind of business activity excludes and harms competitors because even superior efficiency will, in the end, drive out competitors from the market.[67] Since powerful firms remain most of the time constrained by actual or potential competitors, they cannot derive from their market power any advantage over smaller competitors. On the contrary, smaller competitors can and should be expected to be able to compete on equal terms with the dominant firm. Most proponents of the Chicago,[68] and later also post-Chicago School,[69] therefore, argued that antitrust laws should only outlaw unilateral conduct that leads to the actual or likely foreclosure of competitors by means other than efficiency, thus causing price increases or restrictions in output to the detriment of consumer welfare.[70]

3.3 The Chicago Critique of the Structuralist Merger Policy

By successfully challenging the central assumption of the S-C-P paradigm that market concentration inevitably leads to anticompetitive outcomes, the Chicago School also put a strain on republican antitrust in the field of merger control. The Chicago School fiercely criticised the approach adopted by the Warren Court towards merger control as just another variant of the de-concentration policy towards monopoly adopted in *Alcoa* and progeny.[71] Chicago Scholars argued that the Warren Court, by adopting a broad interpretation of the incipiency doctrine and by seeking to preserve an industry composed by small players, had transformed the Clayton Act into a *de facto per se* prohibition of almost any merger.[72] This *de facto* illegality of mergers

[64] Bork (n 12) 196.
[65] ibid 179, 195, Chapter 4 and 16. Posner (n 9) 103, 114–116. Posner (n 4), 931, 932, 945-948.
[66] See for instance D. F. Turner, 'The Validity of Tying Arrangements Under the Antitrust Laws' (1958) 72 Harvard Law Review 50.
[67] Bork (n 12) 137.
[68]Bork even went as far as arguing that exclusionary conduct should be normally subject to a presumption of per se legality ibid 157. Other Chicago Scholars, such as Posner, rejected this extreme position and instead advocated an intervention against single-firm conduct which forecloses equally efficient competitors Posner (n 4), 928-929, 933; Posner (n 9) 4, 194.
[69] See for instance T. G. Krattenmaker and S. C. Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96(3) The Yale Law Journal 209.
[70] Director and Levi (n 6), 287, 293; Posner (n 9) 194–195.
[71] Posner (n 9) 118.
[72] Bork (n 12) 205.Posner (n 9) 122-123.

was the logical consequence of the fact that any merger must necessarily contribute to an increase in economic concentration. If it allows the parties to achieve higher efficiencies, mergers also inevitably pose a threat to the survival of smaller businesses.[73]

The republican hostility towards industry concentration through merger was increasingly challenged by the growing consensus amongst antitrust scholars of all shades that mergers most of the time tend to generate important efficiencies.[74] Commentators pointed out that a merger is nothing else than one way of how entrepreneurs exercise their negative contractual freedom to buy or sell a business. A firm owner may have manifold legitimate reasons to sell its business. Even more importantly, the prospect to be one day able to sell their business profitably may be a major incentive for entrepreneurs to start new firms, invest in their business and compete fiercely to become an attractive target for investment. A merger thus may be the ultimate form of reward for successful entrepreneurship. A well-functioning market for mergers and acquisitions, moreover, ensures that businesses are acquired by those buyers who know best how to manage them in the interest of consumers and to the greatest benefit of society. Mergers were also increasingly viewed as a way to discipline and enhance the performance of management since shareholders of firms plagued with inefficient management are more likely to agree to a takeover bid that would lead to a change in the management.[75] Most importantly, mergers, in many cases, allow the merging parties to achieve productive efficiencies and economies of scale. Mergers thus often constitute an alternative, often swifter, path to internal growth that allows firms to achieve an optimal firm size and efficient scale.[76]

Against the backdrop of these myriad efficiencies and pro-competitive explanations of mergers, the Chicago School criticised republican antitrust for its failure to set out a coherent theory why and when antitrust law should take a stricter stance against efficiencies achieved through external growth by merger than it does against efficiencies achieved through internal growth.[77] This failure, Chicago Scholars suggested, was the direct consequence of the erroneous equation of industry concentration and decrease in competition coined by the S-C-P paradigm and the fact that republican antitrust was grounded in a social rather than an economic theory

[73] Bork (n 12) 200, 203, 206, 216.
[74] Bork and Bowman, Ward S. Jr. (n 8); Bork (n 12) 198.
[75] H. G. Manne, 'Mergers and the Market for Corporate Control' (1965) 73(2) Journal of Political Economy 110. F. H. Easterbrook and D. R. Fishel, 'The Proper Role of a Target's Management in Responding to a Tender Offer' (1981) 94(6) Harvard Law Review 1161; E. B. Rock, 'Antitrust and the Market for Corporate Control' (1989) 77 California Law Review 1635.
[76] The discussion in this paragraph is based on D. F. Turner, 'Conglomerate Mergers and Section 7 of the Clayton Act' (1965) 78(7) Harvard Law Review 1313 1317; Bork (n 12) 199; Posner (n 9) 119.
[77] Bork (n 12) 199, 210; Posner (n 9) 119–121.

of competition and concentration.[78] Due to its economically unfounded hostility against industry concentration, republican antitrust policy appeared to inflict costs on the society in any instance where it led to the prohibition of a merger, which would allow a firm to achieve more swiftly or less costly optimal firm size than through internal growth. Republican antitrust, Chicago scholars warned, might even deprive society of efficient internal firm growth, if the additional costs the firm incurs because it cannot expand through merger prevented it from investing in internal growth.[79]

The way how republican antitrust treated merger-driven efficiencies were also a red rag to Chicago scholars. They argued that the Warren Court had created an efficiency offence against mergers creating large firms, [80] while carving out efficiency defences only for cases where the merger-driven efficiencies ensure the survival of financially weak firms or enhance the ability of small firms to compete more effectively with larger firms. The Warren Court thus indulged in what Bork labelled as undue 'market egalitarianism',[81] which 'protect[ed] competitors in the name of competition'.[82] To Chicagoans, republican antitrust thus did nothing else than imposing a tax on efficiency that expropriates the consumer in the interest of a relatively privileged and politically influential class of small, 'inept' entrepreneurs.[83]

The Chicago School responded to the failure of the Warren Court to put forward an economically consistent merger policy by arguing that the legality of mergers should be assessed on the sole basis of their effect on consumer welfare. Chicago Scholars asserted that mergers only lead in two situations to lower output and higher prices and thus harm total or consumer welfare: Either the merger between two firms creates a merged entity large enough to unilaterally raise prices and restrict output (merger to monopoly);[84] or the merger facilitates so-called tacit collusion.[85] The Chicago School thus dismissed a merger policy grounded in a structural or process-based understanding of competition. The Chicago School, instead, coined with the concepts of unilateral and coordinated effects two clearly articulated behavioural

[78] Posner (n 9) 121-122, 126. Bork (n 12) 202–203.
[79] Bork (n 12) 204, 206-207, 222; Posner (n 9) 119.
[80] Bork (n 12) 216; Posner (n 9) 128.
[81] Bork (n 12) 216. See also Williamson (n 30), 19.
[82] Bork and Bowman, Ward S. Jr. (n 8), 375.
[83] ibid 375–376.
[84] G. J. Stigler, 'Monopoly and Oligopoly by Merger: Reprinted from Papers and Proceedings, American Economic Review, Vol. XL, No. 2. (1950)' 96–103. Bork (n 12) 199, 200, 206, 210, 219-220.
[85] Stigler (n 84) 103–106; G. J. Stigler, 'Mergers and Preventive Antitrust Policy: Reprinted from University of Pennsylvania Law Review, Vol. 104, No 2 (1955)' 299–303; Stigler (n 40) 39–56. Posner (n 9) 118-119, 124-126; Posner (n 39), 1598-1605, also 1598-1605; J. B. Baker and C. Shapiro, 'Reinvigorating Horizontal Merger Enforcement' in R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008) 236–238.

theories of harm, which until today guide the analysis of how horizontal mergers affect prices, output and consumer welfare. The Chicago School thus rooted the analysis of mergers in a purely outcome-oriented understanding of competition, which focuses on the economic effects of mergers on consumer welfare.

While the Chicago scholars agreed that mergers should be adjudicated on the basis of a consumer welfare standard, considerable disagreement persisted as to the question of how this welfare trade-off should be balanced. Bork, who was largely sceptical about the stability of tacit collusion, suggested that only a merger to monopoly creating a merged firm with about 60-70% would be likely to restrict output. In his view, even a three-to-two merger should not be automatically presumed to give rise to any serious antitrust concerns and assessed under a rule of reason approach.[86] By contrast, Stigler[87] and Posner[88] attributed much more weight to the anticompetitive effects caused by mergers that lead to a market structure prone to tacit collusion.[89] They, therefore, recommended a presumption of illegality for mergers creating a merged entity whose market shares exceed 20%[90] or 30%,[91] and causing an increase in the degree of concentration amongst the three largest firms by 33%.[92]

At the same time, to provide for a carve-out for innocuous, efficiency-enhancing mergers, Stigler and Posner advocated safe-harbour thresholds for mergers leading to a combined market share of 5 to 10%.[93] For all mergers that lead to an increase in market shares and concentration in excess of the safe-harbour threshold, but which are not hitting the threshold of presumptive illegality, they advocated a rule of reason analysis that examines, apart from market shares, a number of additional behavioural factors to assess whether the merger is likely to lead to tacit collusion.[94] The Chicago School thus departed from the assumption of the S-C-P paradigm that any increase in industry concentration inevitably entails anticompetitive outcomes. In line with Stigler's theory of collusion, Chicago Scholars instead put the emphasis on behavioural and industry-specific factors as vital ingredients of stable coordination and collusion amongst horizontal competitors post-merger. In most cases, the anticompetitive effects of mergers, therefore, could not be inferred from an increase in industry concentration

[86] Bork (n 12) 221–222.
[87] Stigler (n 85) 300–303. See for Stigler's ground-breaking analysis of collusion Stigler (n 40) 39´-45.
[88] Posner (n 39), 1601–1605.
[89] ibid.
[90] Stigler (n 85) 302.
[91] S. C. Hemphill, 'Philadelphia National Bank at 50: An Interview with Judge Richard Posner' (2015) 80(2) Antitrust Law Journal 205.
[92] Posner (n 9) 126–127.
[93] Posner (n 39), 1602–1603. Stigler (n 85) 301–302.
[94] Posner (n 39), 1601.

alone. Apart from mergers in highly concentrated markets, merger policy must therefore be grounded in a case-by-case analysis of behavioural and market-specific factors in order to determine when a merger leads to anticompetitive effects.

The Chicago scholars moreover underscored the need to give appropriate weight to the potential procompetitive efficiencies generated by mergers.[95] Observing that efficiencies are extremely difficult to quantify and that the balancing of pro- and anticompetitive effects would confront courts with unsurmountable difficulties, they, however, rejected the introduction of an efficiency defence that would involve such a balancing exercise.[96] They instead suggested that the welfare trade-off between pro- and anticompetitive effects of mergers should be translated into legal rules or presumptions based on market shares. These presumptions would not only constitute an approximation of the likelihood and size of anticompetitive effects, but also of the likelihood and size of efficiencies generated by a merger. Lest these presumptions of illegality cause too high efficiency costs, the Chicago Scholars suggested that the prohibitive scope of those presumptions should be drawn narrowly. In other words, the more permissive the merger laws, the less merger policy will deprive society of efficiencies.[97]

4 The Consumer Welfare Standard and Negative Liberty

The standard account of the ascent of the Chicago School antitrust revolution mostly focuses on this economic line of attack, discussed in the previous section, through which the Chicago School assaulted republican antitrust and shook up its economic foundations. The conventional scholarly literature, thus, explains the rise of the Chicago School by the fact that it supplemented, for good or for bad, the multi-dimensional goals of republican antitrust with the single goal of welfare maximisation. In effect, by elevating price theory and economic welfare to the central normative benchmark and methodology for antitrust enforcement, the Chicago School claimed to purge antitrust from the ideological ballast of non-economic social and political goals.[98] This has prompted commentators to explain and bemoan the disappearance of the goal of liberty and the idea of a competition-democracy nexus from modern antitrust law by the fact that the Chicago School reduced the normative content antitrust

[95] (1993) 199, 221.
[96] Bork (n 12) 219–221; Posner (n 39), 1604–1605. Posner (n 9) 133–135. See however Williamson (n 30), 21–24.
[97] Posner (n 39), 1605; Posner (n 9) 134.
[98] Fox (n 4), 1155. R. J. Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2000) 238–239.

to applied economics.[99] This account, however, disregards that the motivation of the Chicago School's call for the adoption of the consumer welfare standard as the central normative benchmark for antitrust law ran much deeper than merely reconciling its application with welfare considerations. Antitrust scholarship, in fact, largely ignores that the consumer welfare standard served the Chicago School as an effective rhetorical and analytical device through which it successfully assaulted the value of republican liberty as normative bedrock of antitrust law.

It often goes unnoticed that it was a central achievement of the Chicago School to articulate a concise and versatile theory of negative liberty. With the help and under the guise of the consumer welfare framework, the Chicago scholars succeeded in what the proponents of the *laissez-faire* approach had failed during the late 19th and early 20th century. The framework of price theory and welfare maximization enabled the Chicago School to articulate a forceful theory of negative liberty in support of a *laissez-faire* approach that insulates negative entrepreneurial liberty and property rights from state interference.[100] One only has to scratch the surface of the Chicago programme to see that price theory and the goal of welfare maximisation provided some allure of scientific objectivity[101] to an inherently political attempt to re-align antitrust policy with the ideal of negative liberty as non-interference. Chicago Scholars themselves clearly articulated this link between negative economic liberty and the principle of wealth maximization (4.1). On the basis of this link, the Chicago School developed the consumer welfare standard as a framework to operationalize the value of negative liberty (4.2). The consumer welfare standard enabled the Chicago School to clearly identify when business conduct unduly impinges upon the negative economic liberty of other market participants and when antitrust intervention is warranted to prevent or remedy such illegitimate interference (4.2.1 and 4.2.2). In championing the consumer welfare standard as the cornerstone of modern antitrust analysis, the Chicago School displaced the thick concept of republican liberty as non-domination with a thinned-out understanding of negative liberty as non-interference. It, thus, laid the foundations of a *laissez-faire* antitrust policy that is primarily concerned with protecting negative entrepreneurial liberty from state intervention (4.3).

[99] Posner (n 4), 933–934; Pitofsky (n 4), 1051; Hovenkamp (n 2), 226–233; Fox (n 4), 1140, 1145, 1155; Fox and Sullivan (n 4), 956, 956-960; Fox (n 4), 918; Flynn (n 4), 338–339; Khan and Vaheesan (n 4), 269–277; Khan (n 4), 718–722; Khan (n 4), 972; Wu (n 4), 3; Wu (n 3) 83–92. J. J. Flynn, 'Antitrust Policy and the Concept of a Competitive Process' (1990) 35 N. Y. L. Sch. L. Rev. 893 893–895.
[100] See for a similar argument Peritz (n 34), 299–311; Fox (n 5), 1715; Fox (n 5), 558; Fox (n 4), 1156–1157.
[101] Fox (n 4), 1155. Peritz (n 98) 238–239.

4.1 The Link between Negative Liberty and the Consumer Welfare Standard

The link between negative liberty and the goal of consumer welfare emerges most clearly in the writings of Bork, Posner and Stigler. Bork understood consumer welfare as the consumers' 'expression of wants in the marketplace what things they regard as wealth.'[102] Welfare or wealth, in Bork's terms, is nothing else than the aggregate sum of all voluntary mutually beneficial market transactions by which consumers express their preferences, or willingness to pay, for the acquisition of a particular good, service, property right etc.. The competitive market system, by maximising welfare or wealth, enhances consumers' negative liberty to enter into voluntary contractual market exchanges. It does so, on the one hand, by maximising allocative efficiency: that is, by allocating resources in such a way that their use corresponds with how consumers define their wants and desires. By maximising allocative efficiency, competition, thus, enables a maximum of mutually beneficial transactions.[103] On the other hand, competition contributes to the maximisation of society's welfare and liberty of market participants by maximising productive efficiency. Competitive rivalry pushes the individual firms to develop the most effective way of producing and selling products that appeal most to the consumer wants.[104] In other words, competition compels firms to organise their production and sales in such a way that producers and consumers can enter into the highest possible number of voluntary mutually beneficial transactions. The economic success of a firm and, therefore, its firm size in the first place is nothing else than an expression of its success in satisfying consumer wants and in engaging in a maximum of mutually beneficial, voluntary transactions.[105]

Posner even made a more explicit attempt to link the Chicagoan goal of welfare maximisation with liberty and individual rights.[106] To this end, Posner suggested that the economic goals of welfare and efficiency are grounded in the ethical concept of wealth maximisation. Posner, in a similar vein as Bork, understood welfare or wealth as everything valuable in a society that market participants are willing to pay for or demand money for to give

[102] Bork (n 12) 90.
[103] ibid 91, 101.
[104] ibid 91, 104–106.
[105] ibid 104-106, 192.
[106] R. A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8(1) The Journal of Legal Studies 103 135, 140. Posner on this basis argues that the principle of wealth maximisation draws on both utilitarian and Kantian ethics R. A. Posner, 'Norms and Values in the Economic Approach to Law' in A. N. Hatzis and N. Mercuro (eds), *Law and Economics: Philosophical Issues and Fundamental Questions* (Routledge 2015) 10.

it up.[107] The principle of wealth maximisation, Posner argued, offers a strong normative justification for economic liberty, property rights, and their reassignment through free, competitive markets.[108] The principle of wealth maximization, in fact, provides a normative foundation, content and boundary for the scope of economic liberty because it forces the individual market participant to promote its self-interest by entering into mutually beneficial transactions. In a system governed by the principle of wealth maximisation, an individual can only pursue its self-interest and maximise its wealth by engaging in activities that benefit others at least as well as himself or herself.[109] Any form of interference with the sphere of autonomy or liberty of others is in such a system constrained by the need to engage in a voluntary contractual transaction with the other individual, or in other words, by one's willingness to pay the other market participant in compensation for this interference.[110] By drawing an explicit link between wealth maximisation and economic liberty, Posner, in a similar way as Bork, assumed that competition is socially desirable because it enables and forces market participants to engage in voluntary contractual transactions that are mutually beneficial. Monopoly or anticompetitive firm conduct are from this perspective only objectionable if they interfere with the economic liberty of other market participants, by depriving them of the possibility to enter into a mutually beneficial transaction, without offering any compensation.

Stigler, too, sought to anchor the economic goal of efficiency or wealth maximisation[111] in the value of liberty. Stigler argued not only with Bork and Posner that the goal of wealth maximisation ensures negative economic liberty by promoting the realization of a maximum number of voluntary transactions free of coercion within a given market or society.[112] He also assumed that the larger the sum of earnings and spending an individual could dispose of, the wider becomes its range of options and choices.[113] Competition by maximising wealth increases individual liberty because it broadens the range of options and opportunities market participants can choose from or endeavour in.[114] Monopoly or other anticompetitive conduct, hence,

[107] Posner (n 106), 119.
[108] Posner (n 106), 127; R. A. Posner, 'Wealth Maximization Revisited' (1985) 2 Notre Dame Journal of Law, Ethics and Public Policy 85 96, 99-101.
[109] Posner (n 106), 132.
[110] Posner (n 106) 10; Posner (n 108), 99–101.
[111] G. J. Stigler, 'Wealth, and Possibly Liberty' (1978) 7(2) The Journal of Legal Studies 213 217.
[112] ibid 212.
[113] ibid 213–214.
[114] ibid 214. Stigler's notion of liberty expressly differs here from Hayek who argued that negative liberty can only be understood as absence of coercion by other men Hayek, Friedrich A. von, *The Constitution of Liberty [1960]* (University of Chicago Press 2011) 60. See for discussion of this point Stigler (n 111), 214–216.

interferes and diminishes the liberty of consumers, by reducing their wealth and hence the range of their choice sets.

By adopting the value of welfare or wealth maximisation as the unique goal of competition law, the Chicago School thus substituted republican liberty by a narrower notion of negative economic liberty as non-interference as the ultimate normative aim of antitrust. Instead of being concerned about the potential domination and arbitrary interference by big business or by certain categories of business practices, the Chicago School only perceived monopoly or specific business conduct as objectionable if it leads to actual or likely interference with the liberty of other market participants by creating a deadweight loss, thereby depriving them of the opportunity to enter into mutually beneficial transactions, which are in line with their preferences.[115]

4.2 The Consumer Welfare Standard as Framework to Operationalise the Concept of Negative Liberty

The wealth maximisation principle and consumer welfare standard enabled the Chicago School to address two important boundary problems that plague any theory of liberty. The first boundary issue pertains to the question of when liberty is actually frustrated. In other words, it raises the question of which forms of conduct qualify as preventing conditions. [116] Which types of actions do constitute coercive interference or create clashes between spheres of liberties? The second boundary problem relates to the question of when and how such interference with liberty should be remedied by state interference and how clashes of liberty should be resolved.

Take, for instance, the example of the *Utah Pie* case. Three large, nation-wide producers of frozen dessert pie, Pet Milk, Continental Baking and Carnation, entered the local market for frozen pie in the Salt Lake City region. All three producers undercut the local incumbent Utah Pie while charging higher prices elsewhere. Utah Pie claimed that all three defendants, Pet Milk, Continental and Carnation, engaged in predatory pricing which interfered with its economic liberty and caused it (primary-line) injury. The first boundary issue here is whether the defendants, say Carnation, have actually interfered with and frustrated the liberty of Utah Pie or the consumers in the Salt Lake City region. If the first issue is answered in the affirmative, the second boundary question is whether antitrust law should intervene in order to remedy the

[115] Bork (n 12) 101.
[116] G. C. MacCallum, 'Negative and Positive Freedom' (1967) 76(3) The Philosophical Review 312 319–327; I. Carter, 'Liberty' in R. Bellamy and A. Mason (eds), *Political Concepts* (Manchester University Press 2003) 11–14.

loss in liberty suffered by Utah Pie or consumers and, to this end, require Carnation to desist from engaging in geographic price cutting. Note that from the perspective of negative liberty, this regulatory state intervention would also interfere and reduce the liberty of Carnation. We are suddenly no more confronted only with the question of how to prevent Carnation from interfering with Utah Pie's or consumers' economic liberty. Rather, any claim that one individual has impinged upon the sphere of liberty of another raises, in fact, a reciprocal issue that affects the liberty of the interferer (here Carnation) and the individuals with whose liberty it has interfered (here Utah Pie and consumers) alike.[117] Ultimately, the claim that Carnation has unduly interfered with Utah Pie's liberty raises the question of how we should balance the liberty of Utah Pie, as well as of the consumers in the Salt Lake City area, on the one hand, with the economic liberty of Carnation, on the other. In other words, should Carnation be allowed to interfere, say, with the liberty of Utah Pie? Or should Utah Pie and the consumers in the Salt Lake City area be entitled by means of antitrust law to interfere with the liberty of Carnation?[118]

4.2.1 Boundary Issue 1: Is there a Clash between Spheres of Economic Liberty?

The *Utah Pie* case is just one amongst a myriad of cases where the republican approach ran into a brick wall and failed to put forward a clear answer to both boundary issues sketched out above. By contrast, the Chicago School offered with the goal of wealth maximisation and the consumer welfare standard an elegant solution to this intricate problem. By enthroning consumer welfare as normative goal and benchmark to determine the legality of specific conduct under antitrust law, the Chicago School entrenched consumer welfare as the requisite standard to identify and solve conflicts of rights and liberties in antitrust cases.

First, the consumer welfare standard gives antitrust authorities and judges at hand a clear principle to determine those instances where business conduct constitutes objectionable interference with the economic liberty of other market participants. Chicago Scholars observed that any economic activity leads to some form of interference with the property rights or sphere of autonomy of other market participants in the broad sense of the word. [119] This confronts antitrust law with the challenge to differentiate between types of interference which constitute an impermissible invasion of other market participants' economic liberty and those which don't.

[117] Coase (n 44), 2.
[118] ibid.
[119] Coase, R. H. 'The Federal Communications Commission' (1959) 2 Journal of Law and Economics 1 27; Bork (n 12) 137.

In our example, there are two potential explanations for why the price cuts by Carnation may have caused injury to, or even drove Utah Pie from the market: either it abused its market power to undercut Utah Pie by charging unfair prices; or Utah Pie was simply less efficient and, therefore, could not match the price cuts by the defendant. The Warren Court, in keeping with a broadly construed notion of liberty as non-domination, held that the pricing policy by Carnation (and the two other defendants Pet Milk and Continental) had invaded Utah Pie's economic liberty. By contrast, Chicago Scholars and most contemporary antitrust scholars would certainly disagree with such a proposition.[120]

To Chicago Scholars, the Warren Court's adherence to a thick, republican notion of economic liberty in *Utah Pie* showcased the perverse outcomes of republican antitrust. The *Utah Pie* case did nothing less than condemning fierce price competition and shielding the market position of a less-efficient incumbent from larger entrants who threatened to erode its local monopoly. *Utah Pie* epitomised how the republican approach, relying on a thick notion of economic liberty, had failed to establish consistent standards to distinguish between anticompetitive foreclosure and injury inflicted on a competitor as the consequence of superior efficiency. Due to its failure to address this boundary issue and distinguish between permissible and impermissible interference, republican antitrust, instead of protecting competition, actually protected small local competitors and condemned larger business 'not of injuring competition but, quite simply, of competing.'[121] *Utah Pie* thus revealed how small, less efficient companies could harness republican antitrust to unduly interfere with the negative entrepreneurial liberty of more efficient businesses and thereby deprive consumers of the benefits of price competition.[122]

The *Utah Pie* case exemplifies how republican antitrust, in the absence of a clear boundary principle which defines when firm conduct unduly obstructs the economic liberty of other market participants, is prone to morph into an over-regulatory, if not paternalistic policy. Cases, such as *Utah Pie* or *Brown Shoe*, have become the most emblematic examples of how the Warren Court had turned the logic of antitrust on its head. In these cases, the Warren Court blend of republican antitrust failed to foster polycentric rivalry that would allow more efficient businesses to contest local monopolies or assault outdated distribution models and, thereby,

[120] Posner (n 9) 220–221; Easterbrook (n 13), 34 fn 71. P. Areeda and D. F. Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88(4) Harvard Law Review 697 726–727; L. A. Sullivan, *Antitrust* (West Publishing 1977) 685–687. J. D. Hurwitz and W. E. Kovacic, 'Judicial Analysis of Predation: The Emerging Trends' (1982) 35 Vanderbilt Law Review 63 86–92.
[121] Bork (n 12) 387.
[122] ibid.

drive prices down in the interest of consumers. Instead, republican antitrust degenerated into a policy that protected the interests of a relatively affluent class of small and independent business men. The reason for this failure was that the Warren Court associated the republican ideal of polycentric competition with the protection of the livelihood of a specific social stratum rather than the impersonal concept of market contestability. It thus transformed antitrust into a policy for the few, not the many.

The consumer welfare standard enabled the Chicago School to overcome this shortcoming of republican antitrust and to address the boundary issue of when business conduct gives rise to permissible and impermissible interference. Indeed, the consumer welfare standard allows decision-makers to delineate clearly the preventing conditions of economic liberty. In other words, the consumer welfare standard unequivocally defines the type of conduct that qualifies as undue interference with the economic liberty of other market participants. The original version of what Chicago Scholars dubbed 'consumer welfare standard' construed these preventing conditions very narrowly. The Chicagoan total welfare standard postulates that business conduct can only be considered anticompetitive if it entails a deadweight loss due to a restriction of output.[123]

From this perspective, to be considered as giving rise to undue interference with the economic liberty of other market participants, the conduct of monopolist A must restrict output and thus deflect some consumers, for instance, consumer B, to second-best, less preferred substitutes.[124] Not only does this standard allow the Chicago School to delineate precisely when businesses unduly interfere with the negative liberty of consumers, for instance, by entering into an output-restricting price-fixing cartel, but it also enables a decision-maker to decide when monopolist A impinges on the liberty of competitor C. Under the total welfare standard, the fact that monopolist A's conduct excludes competitor C from the market only amounts to undue interference with the negative liberty of competitor C, if it entails a decrease in output and thus a deadweight loss. In other words, monopolist A only impinges on the negative liberty of competitor C if its conduct prevents C from entering in mutually economic transactions with consumers, which cannot be offered by monopolist A. Applied to the example of *Utah Pie*, the Chicagoan consumer welfare standard suggests that the alleged predatory pricing by Carnation only impinged unduly on Utah Pie's liberty, if Utah Pie's foreclosure deprives consumers of the possibility to enter into mutually beneficial transactions. This would be the case if Utah Pie,

[123] ibid 110–113. Posner (n 9) 23–24.
[124] ibid.

absent the predatory pricing, could have produced frozen dessert pie at least as efficiently as Carnation. In short, unilateral conduct only constitutes an undue interference with the negative liberty of competitors if it leads to a reduction of output and a deadweight loss. This is only the case if the business conduct is likely to foreclose an equally or more efficient competitor.[125]

The Chicago School's reliance on a total welfare standard and a narrow definition of when business conduct may lead to undue interference with the negative liberty of consumers and competitors has elicited considerable criticism. [126] Numerous post-Chicago scholars have objected that the total welfare standard ignores wealth transfers from consumers to producers. To many commentators, a total welfare standard seemed incompatible with basic notions of fairness and at odds with the legislative intent of the Sherman Act.[127] Numerous post-Chicago scholars, therefore, called for the adoption of a genuine consumer welfare standard. Unlike the narrow focus of the Chicagoan total welfare standard on deadweight loss, a genuine consumer welfare standard centres on the reduction of consumer surplus and the wealth transfer from consumers to producers as the primary concern of antitrust policy. Despite persisting scholarly disagreement as to whether a total or consumer welfare is the more appropriate standard for antitrust law,[128] the competition law communities and antitrust authorities in the US, EU and across the world have opted for the adoption of a consumer welfare (i.e. surplus) standard.[129]

It is, however, important to note that this choice of a consumer instead of a total welfare standard does not constitute a fundamental departure from the welfare framework and the understanding of negative liberty originally coined by the Chicago School. The consumer welfare standard merely broadens the category of conduct, which qualifies as preventing conditions of economic liberty because they cause an illegitimate interference with the negative liberty of other market participants. Under the consumer welfare standard, business conduct by

[125] Posner (n 9) 194–197; R. A. Posner, 'Exclusionary Practices and the Antitrust Laws' (1974) 41(3) The University of Chicago Law Review 506.
[126] Fox and Sullivan (n 4), 957–959; Stucke, Maurice E. (n 27), 566; Stucke, Maurice E. (n 27), 563–566.
[127] R. H. Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings L.J. 65.
[128] J. Farrell and M. Katz, 'The Economics of Welfare Standards in Antitrust' (2006) 2(2) Competition Policy International 3; R. D. Blair and D. D. Sokol, 'Welfare Standards in U.S. and E.U. Antitrust Enforcement' (2012) 81 Fordham L. Rev. 2497 2499–2501; Orbach (n 25), 159–163.
[129] See for instance Antitrust Division of the US Department of Justice/Federal Trade Commission - Merger Guidelines 2010 2; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. OJ [2004] C 31/5 para. 8; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings. OJ [2008] C 265/6 para. 10; W. J. Kolasky, 'What is competition?' (28 October 2002) <http://www.justice.gov/atr/public/speeches/200440.htm> accessed 20 September 2014; N. Kroes, 'European Competition Policy – Delivering Better Markets and Better Choice' (SPEECH/05/512 15 September 2005) <http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm> accessed 23 March 2016.

monopolist A amounts to impermissible coercion, not only if it deprives consumer B of the ability to enter into mutually beneficial voluntary transactions, but also if it adversely affects the terms or conditions of those transactions or bargains to the benefit of monopolist A and at the expense of consumer B. This is, for instance, the case if monopolist A's conduct leads to higher prices (or lower quality etc.), thus entailing a wealth transfer from consumers to producers.

The adoption of a consumer welfare standard also slightly changes the conditions when conduct by monopolist A is to be considered as unduly interfering with the negative liberty of competitor C. This is no more only case if the exclusion of C leads to a dead-weight loss because consumers are deprived from entering with competitor C into mutually beneficial transactions that cannot be offered by monopolist A. Rather, under the consumer welfare approach the liberty of competitor C is also abrogated if consumers are deprived of the possibility to enter into market transactions with competitor C which are at least as mutually beneficial as those offered by monopolist A, and, therefore, suffer a reduction of consumer surplus due to higher prices (or lower quality etc.). Yet, post-Chicago scholars and antitrust enforcers widely followed the strategy proposed by the Chicago School to infer such adverse effects on consumer surplus form the exclusion of an equally or more efficient competitor.[130]

4.2.2 Boundary Issue 2: How to Manage Clashes between Spheres of Negative Liberty?

The Chicagoan consumer welfare standard not only provides for a precise tool to delineate when business conduct by monopolist A actually gives rise to undue interference with the negative liberty of consumer B or competitor C, but it also sets out a principled framework for balancing the rights and liberties of the relevant stakeholders, consumer B, competitor C and monopolist A. Indeed, Chicago and post-Chicago scholars alike consistently underscored the need to engage in a balancing of rights in order to decide when antitrust intervention is legitimate. This perception, in itself, illustrates how firmly the Chicagoan understanding of economic liberty is anchored in a conception of negative liberty. We have seen in the previous chapters that the proponents of a republican understanding of liberty recognise the possibility of non-arbitrary interference by public decision-makers who are subject to democratic and

[130] See in this respect Areeda and Turner (n 120). W. J. Baumol, 'Predation and the Logic of the Average Variable Cost Test' (1996) 39 J.L. & Econ. 49; H. Hovenkamp, 'The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal' (2015) 46 Review of Industrial Organization 209.

constitutional control.[131] They, therefore, do not view every form of state interference with the economic activities of market participants as abrogating their liberty. From the perspective of republican liberty, antitrust laws are not antonymous to liberty, when they are adopted in line with the principles of the rule of law and democratic processes, which ensure their non-arbitrary nature. On the contrary, by reducing the level of potential domination, antitrust rules even enhance liberty, although they interfere with and restrict choices or discretion of market agents.

This idea that non-arbitrary and, hence, non-dominating interference by public instances does not automatically frustrate the liberty of market participants is at the same time an inherent strength but also a shortcoming of the republican understanding of liberty. On the one hand, it provides a much stronger normative justification and more policy space for a society to create institutions that enhance a more resilient form of liberty than negative liberty does. On the other hand, the proposition that state interference, if taking a non-arbitrary form, does not reduce liberty bears the risk of paternalism, as it is exemplified by the Warren Court era.[132] *Utah Pie* shows how, in the absence of a clear boundary principle defining when state intervention amounts to coercion and a reduction of liberty, the republican idea of non-arbitrary state interference may easily transform into a slippery slope pushing antitrust towards an over-regulatory policy that stymies 'free enterprise' instead of promoting it.

The Chicago School reacted to this short-coming of republican antitrust by casting, in keeping with the tradition of negative liberty,[133] antitrust laws, in the same way as any other form of state intervention, as interference with the liberty of market participants and, hence, as coercion.[134] As antitrust law interferes with the choices of monopolist A to prevent or remedy invasions of the negative liberty of consumer B and/or competitor C, it necessarily reduces the negative liberty of monopolist A. Chicago scholars, therefore, assumed that the application of

[131] P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576 586–587; P. Pettit, 'Freedom in the Market' (2006) 5(2) politics, philosophy & economics 131 145–146.
[132] This arguably inherently paternalistic trait of republican liberty is only to a very limited extent acknowledged by its proponents. Philip Pettit, for instance, seeks to fence off this charge of paternalism by arguing that for state interference not to invade liberty, it must always account for the interests of the people whose choices are interfered with. Otherwise, it cannot be considered non-arbitrary. At first sight, this reads like a very strong limiting principle. Yet, Pettit further concedes that individuals' (long-term) *interests* do not necessarily coincide with their immediate *wishes*. If we transpose this reasoning to competition policy, republicans might argue that state interference is ultimately even in the interest of the perpetrator firm that is found to have violated competition law rules because the latter also benefits – at least in the long-run – from the preservation of a competitive market. Theoretically appealing though it is, it remains doubtful that antitrust defendants – such as Carnation in *Utah Pie* – would be persuaded by this argument. P. Pettit, *On The People's Terms : A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 58–59.
[133] P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997) 37-38, 42-44. Pettit (n 131), 596.
[134] Coase, R. H. (n 119), 14, 18, 27-29; Posner (n 106), 130; Posner (n 108), 102–103; Posner (n 106) 11; Bork (n 12) 133.

antitrust rules necessarily requires to balance the rights and interests of monopolist A and consumer B or competitor C. It is noteworthy that the way how the Chicagoan welfare standard structures this balance of rights is largely in accordance with how Jeremy Bentham and other proponents of negative liberty during the 18th and 19th century deemed it appropriate to resolve such clashes of rights.[135] Indeed, under the Chicagoan welfare standard, antitrust intervention to remedy the undue reduction of negative liberty of consumer B or competitor C caused by interfering conduct on the part of monopolist A is only permissible as long as the resulting increase in liberty of consumer B or competitor C more than compensates the reduction of the liberty of monopolist A as a consequence of state interference.

A central appeal of the Chicagoan consumer welfare standard is that it offers in the form of the wealth principle a handy device that allows the competition authority or court to compare and balance the otherwise incommensurable values of the liberty or rights of all relevant stakeholders. The Chicagoan wealth maximization principle, indeed, offers a common cardinal unit[136] to measure the offsetting effects of state interference with the liberty of monopolist A, consumer B and competitor C. It suggests that state intervention is only legitimate if the gains of total wealth as a consequence of the increase in liberty of consumer B or competitor C outweigh any potential reduction in wealth due to the state interference with the liberty of monopolist A. In other words, state intervention and coercion to remedy the interference with the liberty of B or C is only permissible if it maximises wealth more than does the unrestrained exercise of negative liberty by monopolist A.[137] Accordingly, antitrust intervention is only legitimate if it maximises the net expected liberty – measured in net expected welfare – in the society.[138]

The Chicago School implemented this balancing principle by using the Williamsonian trade-off model between productive and allocative efficiency[139] The potential trade-off between productive efficiency and allocative efficiency provided the Chicago School with a framework to balance the costs and benefits of the reduction of liberty of monopolist A and consumer B or competitor C. The Chicago School postulated that antitrust intervention is only warranted if the reduction in allocative efficiency and hence the liberty of consumer B or competitor C as the consequence of interfering conduct by monopolist A, is not outweighed by gains in the form of

[135] Pettit (n 131), 596, 598-599, 601; Pettit (n 133) 44, 46.
[136] For the need of such a common cardinal unit to carry out meaningful balancing see H. Hovenkamp, 'Antitrust Balancing' (2016) 12 N.Y.U. J.L. & Bus. 369 373.
[137] Posner (n 106), 130.
[138] See for a similar formulation Pettit (n 131), 145.
[139] Bork (n 12) 107–110; Posner (n 9) 23, 29.Williamson (n 30).

productive efficiency generated through the exercise of the negative liberty by monopolist A.[140] Under the total welfare standard adopted by the Chicago School, it is sufficient that the gains in productive efficiency that monopoly A derives from the exercise of its negative liberty are large enough to theoretically compensate consumers for the losses in allocative efficiency due to the deadweight loss. This balancing of rights relies on the principle of Kaldor-Hicks efficiency, which merely requires that monopolist A be theoretically capable of compensating other market players for their losses in liberty, without their being the need for any actual compensation.[141]

Post-Chicago antitrust analysis has largely endorsed the Chicagoan interpretation of the Williamsonian trade-off model as a predilect mechanism to balance the negative liberty of various market participants. Yet, as a consequence of the adoption of a consumer welfare instead of a total welfare standard, the balancing exercise differs from that envisaged by the Chicago scholars in two respects. First, the productive efficiencies must outweigh not only the deadweight loss but also any reduction in consumer surplus. This is the immediate consequence of the fact that proponents of a consumer welfare standard perceive not only the deadweight loss but also the wealth transfer resulting from anticompetitive conduct as undue interference and, hence, as a source of unfreedom. As a result, the gains in productive efficiency that monopolist A derives from the unrestricted exercise of its negative commercial liberty must be larger than under the total welfare standard in order to outweigh any losses in negative liberty, measured as wealth, on the part of consumer B and competitor C.

Second, under the consumer welfare standard, it is not sufficient that the gains in productive efficiency allow the monopolist A to theoretically compensate consumer B or competitor C for the reduction in liberty suffered. Rather, the monopolist A must actually compensate consumers B in order to make sure that no other market participant is worse off as a result of A's exercise of his negative liberty. The consumer welfare standard requires that the interfering business conduct generates Pareto-efficient, instead of Kaldor-Hicks or theoretically Pareto-efficient outcomes. The consumer welfare standard, thus, establishes a lower threshold for state interference (or conversely a stricter standard for rebutting the *prima facie* finding of undue interference based on gains in productive efficiency) than does the total welfare standard. The balancing within the post-Chicago consumer welfare standard, however, remains fully

[140] Bork (n 12) 107–110; Posner (n 9) 23, 29.Williamson (n 30).
[141] Posner (n 9) 23.Posner (n 106), 127; Posner (n 108), 102–103; Posner (n 106) 11; Coase, R. H. (n 119), 26–29; Coase (n 44), 10.

within the perimeters of the framework set out by the Chicago School to balance the rights and liberties of various market participants.

4.3 Negative Liberty as Entrepreneurial Liberty and the Rise of laissez-faire *Antitrust*

While relying on the Williamsonian trade-off model as the predilect framework for the balancing of rights for antitrust policy, the Chicago scholars insisted that efficiencies are often difficult to measure. Chicagoans were, therefore, highly skeptical about the ability of competition authorities and courts to carry out a balancing of productive and allocative efficiency in each and every case. At the same time, they asserted that in most cases no such balancing is necessary to decide whether antitrust intervention is justified. Apart from some rare exceptions, Chicagoans assumed that the effects of business conduct on productive and allocative efficiency pull most of the time in the same direction. Accordingly, most cases involve clear-cut welfare-enhancing conduct, which maximises both allocative and productive efficiencies. For this first category of cases, antitrust law should not interfere with the negative liberty of businesses. Only in a minority of cases, business conduct has clearly a detrimental effect on total welfare because it reduces allocative efficiency without generating any countervailing gains in productive efficiency. For this second category of cases, state interference is legitimate to remedy the reduction in the liberty of other market participants. The Chicago scholars were quite confident that antitrust rules could be designed in such a way that they only prohibit conduct falling within this second category.[142]

On this account, the Chicago School asserted that antitrust enforcers and courts would only be confronted with a small number of hard cases falling within the grey area where state intervention would require a difficult balancing exercise between the conflicting claims about negative liberty. How should antitrust policy approach and decide these tight cases? The Chicago School provided a simple rule of thumb as 'tie breakers':[143] in these tough cases, antitrust policy should 'play save' and opt for non-intervention.[144] Far from being grounded in robust economic theory or empirical findings, this preference for non-intervention was derived from the assumption or ideological 'belief'[145] that most business conduct being the outcome of entrepreneurial liberty is beneficial. At the same time, the Chicago School affirmed that the

[142] Bork (n 12) 108-109, 122-129; Posner (n 9) 29.
[143] Bork (n 12) 133.
[144] ibid.
[145] Coase (n 44), 133.

opposite is true for state intervention. For state interference or 'coercion' is, most of the time, more costly and harmful than private interference with other market participants' liberty.[146]

The Chicago School, thus, proposed a blueprint for antitrust policy which was clearly skewed in favour of the protection of negative entrepreneurial liberty of businesses and against state intervention to protect the liberty of consumers and competitors. In other words, the Chicago School posited that in most cases the loss in liberty resulting from state interference with business conduct is not compensated by any gains in the liberty and welfare on the part of consumers that would justify the interference in the first place.[147] Therefore, Chicago Scholars argued that antitrust rules should be designed in a way that accounts for the fact that most forms of business conduct and, hence, most forms of exercise of entrepreneurial liberty are pro-competitive or welfare neutral.

The Chicago antitrust revolution hence successfully brought antitrust law in line with a *laissez-faire* understanding of negative liberty as entrepreneurial liberty. This *laissez-faire* approach dispelled the republican concern that the economic liberty of competitors and consumers must be protected against the domination of powerful firms and big business. It, instead, claimed that it is the entrepreneurial liberty or the 'freedom of action of large business firms',[148] which has to be protected against any state intervention.[149] The Chicago School thus perceived economic liberty primarily as the unrestricted right of businesses to engage in welfare maximising behaviour and mutually beneficial transactions. 'Free enterprise' in the Chicagoan vocabulary stands in the first place for freedom from state interference, while it remains relatively sanguine about interference with economic liberty by private players.[150] Nobody was more candid about this ideological bias of the Chicagoan framework in favour of negative entrepreneurial liberty than Robert Bork. He posited that in the case of doubt 'the general preference for freedom should bar legal coercion'[151] and the 'firm should be better left alone.'[152]

[146] Bork (n 12) 133; Coase, R. H. (n 119), 18; Coase (n 44), 17–18. See for a critical discussion of those assumptions Fox and Sullivan (n 4), 957–959; Peritz (n 34), 306–307; Flynn (n 99), 900; E. M. Fox, 'The Efficiency Paradox' in R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008) 77.
[147] Bork (n 12) 134-135, 143-144, 157, 196.
[148] Posner (n 9) 26; Bork (n 11), 252–253.
[149] Posner (n 106), 127–130; Coase, R. H. (n 119), 17–18.
[150] Posner (n 106), 127–130; Fox (n 5), 1715.
[151] Bork (n 12) 133.
[152] ibid 196.

Despite its claim to scientific objectivity,[153] the Chicago School's attempt to re-build antitrust law on purely economic foundations thus turned out to be a profoundly ideological endeavour. The methodology of neoclassical price theory and the welfare standard served the Chicago School at the same time as a smokescreen to disguise a *laissez-faire* approach towards antitrust law[154] and as a handy device to make operational its central goal of preserving the negative entrepreneurial liberty of businesses against state coercion.[155] The economic framework of the consumer welfare standard lent theoretical and normative support for the transformation of antitrust law into a 'minimal law'[156] and the curtailing of state interference with the negative liberty of businesses. Chicago Scholars themselves underscored that the principle of wealth maximisation endowed negative contractual liberty and property rights with a higher level of protection against state interference, than did any deontological, Kantian justification of economic liberty, which would require regular state intervention to remedy undue interference with the rights of market participants.[157] While the Chicago School accused the republican approach of being biased towards the protection of a privileged and idle class of small and independent businessmen, the Chicagoan playbook for *laissez-faire* antitrust policy was in itself tweaked in favour of big business and to the detriment of small market players.[158] This pro-business attitude was, at least in part, grounded in the empirically unsupported assumption that firm size is positively correlated with efficiency and that large firms are, therefore, more efficient than smaller competitors.[159]

Until today, the central tenets of the Chicago School consumer welfare programme have become, albeit with some adjustments, the predominant framework for antitrust policy and law.[160] This does not mean that some of the teachings and most extreme positions of the Chicago School were not met with opposition and criticism. Yet, most of this critique came, as Herbert Hovenkamp observed, 'from inside' the consumer welfare model set out by the Chicago

[153] Posner for instance denied claims that the idea that the Chicago School's approach was influenced by a 'conservative […] antipathy to government intervention in the economy' but affirmed that it was simply an attempt to ground antitrust law in price theory. Posner (n 4), 928.
[154] This analysis clearly contradicts claims that the Chicago School 'did not fundamentally discard competition in favour of laissez-faire.' J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019) 42, 48.
[155] Fox (n 4), 1155.
[156] Fox and Sullivan (n 4), 958.
[157] Posner (n 106), 123–127.
[158] Peritz (n 34), 304–305; Flynn (n 99), 903–905.
[159] Peritz (n 34), 309–311.
[160] See for instance, the Supreme Court's endorsement of the Chicago consumer welfare standard in *Reiter v. Sonotone Corp.* 442 U.S. 330 (1979) 343.

School.[161] Post-Chicago scholars indeed endorsed the central proposition of the Chicago School, that consumer welfare constitutes the adequate normative benchmark to analyse the legality of business conduct.[162] Far from seeking to reverse the Chicago revolution, post-Chicago scholarship, for the most part, aimed at refining and improving the Chicago policy framework.[163]

The major innovation of post-Chicago antitrust was that it complemented the Chicago School's static analysis of business conduct through the lens of neoclassical price theory with a more dynamic, game-theoretic perspective that accounts for the strategic behaviour of businesses.[164] Consequently, post-Chicago antitrust identified a broader category of business conduct as having the potential to entail anticompetitive, welfare-reducing effects than did the Chicago School.[165] Yet, by endorsing the Chicagoan welfare model to determine when business conduct restricts competition,[166] post-Chicago antitrust remains firmly rooted in the logic of negative liberty.[167] It also continues to operate within the framework the Chicago School has set out to resolve clashes between spheres of economic liberty. Indeed, post-Chicago scholarship remained attached to the Chicagoan insight of potential trade-offs between allocative and productive efficiency, which militated against any outright condemnation of business conduct, but rather counselled for a casuistic analysis and balancing of its welfare effects.

The ascendancy of the consumer welfare framework has not been exclusively limited to the US. Over the last three decades, there is also a growing consensus amongst antitrust

[161] Hovenkamp (n 2), 256. See for a recent example for such a criticism ‚from inside' the consumer welfare model Baker (n 154) 3.
[162] Krattenmaker and Salop (n 69), 228.
[163] ibid 223.
[164] Posner (n 4), 939–942. O. E. Williamson, 'Predatory Pricing: A Strategic and Welfare Analysis' (1977) 87(2) The Yale Law Journal 284. Hovenkamp (n 2), 256–283; S. C. Salop and D. T. Scheffman, 'Raising Rivals' Costs: Papers and Proceedings of the Ninety-Fifth Annual Meeting of the American Economic Association' (1983) 73(2) American Economic Review 267; Krattenmaker and Salop (n 69); S. C. Salop and D. T. Scheffman, 'Cost-Raising Strategies' (1987) 36(1) The Journal of Industrial Economics 19; J. B. Baker, 'Recent Developments in Economics that Challenge Chicago School Views' (1989) 58(2) Antitrust Law Journal 645.
[165] W. E. Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago-Harvard Double-Helix' (2007) 1(1) Columbia Business Law Review 1 22–23.
[166] ibid 34–35. Bork (n 12) 91; L. Kaplow and S. Shavell, *Fairness versus welfare* (Harvard University Press 2002) 15; R. O'Donoghue and A. J. Padilla, *The law and economics of Article 82 EC* (Hart Publishing 2006) 4; M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 17.
[167] Kovacic (n 165), 35.

experts[168] and policy makers[169] in Europe that consumer welfare constitutes a central, if not unique, goal of EU competition law. As a consequence of this endorsement of a 'More Economic Approach', in the early 2000s, EU competition law has undergone several waves of 'modernisation', which sought to align the interpretation and application of EU competition rules with a consumer welfare standard.[170] This shift of EU competition law towards the More Economic Approach has indeed been portrayed and welcomed by many commentators as an attempt to emulate the insights of the Chicago and post-Chicago antitrust policy.[171] Against the backdrop of the convergence of competition law on both sides of the Atlantic towards the consumer welfare standard, Herbert Hovenkamp observed that '[f]ew people dispute that antitrust's core mission is protecting consumers' right to the low prices, innovation, and diverse production that competition promises.'[172] It is, therefore, no exaggeration to say that, over the last decades, the goal of consumer welfare and, with it, the narrow Chicagoan version of negative economic liberty have become the hegemonic credo of modern antitrust law.

5 The Displacement of the Structuralist Policy Objective of Republican Antitrust by the Consumer Welfare Standard

The previous section described how the Chicago School introduced with the consumer welfare standard a strong limiting principle for the promotion of competition through antitrust policy. The Chicago School championed the adoption of the consumer welfare standard to prevent republican antitrust law from promoting the diffusion of economic power. It warned that such a policy goal would eventually lead to the complete atomization of society and undermine negative entrepreneurial liberty.[173] In the aftermath of the Chicago School revolution, the consumer welfare standard has become the predominant framework under which

[168] Motta (n 166) 17.A. J. Padilla and C. Ahlborn, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) 2–3; A. C. Witt, 'From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really About More Economics?' (49) 2012(1) Common Market Law Review 217 244; O'Donoghue and Padilla (n 166) 4. See also Bork (n 11), 244.l S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010) 16, 24-27; European Commission, 'Report by the Economic Advisory Group on Competition Policy (EAGCP) - "An economic approach to Article 82"' (2005) 3 <http://ec.europa.eu/competition/antitrust/art82/> accessed 21 November 2015; A. Jones and B. E. Sufrin, *EU competition law: Text, cases, and materials* 43.
[169] Kroes, 'European Competition Policy – Delivering Better Markets and Better Choice' (n 129).
[170] R. Whish and D. Bailey, *Competition law* (Oxford University Press 2018) 53.
[171] Witt (n 168), 244.
[172] H. Hovenkamp, *The antitrust enterprise: Principle and execution* (Harvard University Press 2005) 1.
[173] Bork (n 13), 831-832, 837; Easterbrook (n 13), 13.

US antitrust law accommodates conflicting claims about economic liberty. In more recent days, it has also become the predominant framework for competition policy in Europe.

This section explores in more detail how the shift from a republican approach towards *laissez-faire* antitrust has transformed the policy objective guiding the application of all three pillars of US and EU competition law. The rise of the Chicago School in the US and the More Economic Approach in Europe went hand in hand with the decline of the structuralist policy objective that we have identified in Chapter IV as a central channel for the operationalisation of the ideal of republican liberty as non-domination through republican competition policy. When applying antitrust law to coordinated conduct (5.1), monopoly power (5.2) and mergers (5.3), US and EU enforcers and courts have increasingly disavowed the structuralist policy objective of preserving a polycentric market structure as an institution of antipower to the benefit of consumer welfare standard. As a consequence, all three pillars of antitrust law in the US and EU have been increasingly streamlined with the concept of negative liberty as non-interference. By superseding the concern about a polycentric market structure with the consumer welfare standard as the sole normative benchmark of antitrust law, the Chicago revolution triggered the thinning out of the concept of liberty protected by competition law.

5.1 Coordinated Conduct and the Rise of the Consumer Welfare Standard

The prohibition of anticompetitive agreements is the first area, which on both sides of the Atlantic has been increasingly aligned with the consumer welfare standard. From the late 1970s onwards, the US Supreme Court endorsed the consumer welfare standard as the relevant framework to assess the legality of agreements with § 1 of the Sherman Act (5.1.1). With the growing influence of the More Economic Approach at the turn of the century, the European Commission also established the consumer welfare standard as a litmus test to determine the legality of agreements under Art. 101 TFEU. After some hesitation, the EU Courts also seem to increasingly endorse the consumer welfare standard as the appropriate framework for the application of Art. 101 (1) TFEU (5.1.2). The structuralist policy objective of preserving competition as a polycentric market structure and as a safeguard of republican liberty against domination thus increasingly gave way to the goal of shielding the exercise of negative contractual liberty to the largest extent possible from state interference.

5.1.1 The Rise of the Consumer Welfare Approach and § 1 of the Sherman Act

A central criticism the Chicago School levelled against the republican approach was the sweeping prohibition of certain types of horizontal and vertical agreements as *per se* rule violation under § 1. The Chicago School took issue with the broad application of § 1 of the Sherman Act, which was used to prohibit agreements based on the mere fact that they restricted the independent decision-making of the parties and, thus, reduced the polycentric market structure. Chicago Scholars pointed out that the Supreme Court's approach entailed high welfare losses and unduly interfered with the contractual liberty of businesses, as it outlawed most forms of cooperation amongst competitors without assessing their likely effects on prices and output.[174] To limit antitrust intervention only to those instances of exercise of contractual liberty which interfered with the negative economic liberty of other market participants in a welfare-decreasing way, the Chicago School asserted that the legality of agreements with § 1 should be assessed based on a simple question: Does the agreement have as its sole purpose the elimination of competition and thus the maximisation of profits through the reduction of output? Or does it seek to maximise profits through the achievement of efficiencies in production and distribution?[175]

From the 1970s onwards, the US courts and US antitrust authorities increasingly aligned their interpretation of the antitrust rules with the precepts of the Chicago School. The concern about the concentration of economic power and liberty as non-domination gave way to the view that Congress had enacted the Sherman Act as 'consumer welfare prescription'.[176] In *GTE Sylvania,* the Supreme Court clarified that it would henceforth rely on a 'purely economic approach'[177] in interpreting § 1 of the Sherman Act. Accordingly, the essential task of antitrust analysis of agreements under § 1 of the Sherman Act was 'to distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'[178]

[174] Director and Levi (n 6), 294–295; Bork (n 13), 834.
[175] Bork (n 13), 834.
[176] *Reiter v. Sonotone Corp.* 442 U.S. 330 (1979) 343.
[177] *Cont'l T.V. v. GTE Sylvania,* 433 U.S. 36 (1977) Justice White concurring, 69.
[178] *Leegin Creative Leather Prods. v. PSKS, Inc.* 551 U.S. 877 (2007) 886; *Ohio v. American Express Co.* 585 U.S. ___ (2018) 9.

The Supreme Court, thus, subscribed to the Chicagoan view that efficiency[179] and consumer welfare constitute the 'fundamental goal[s] of antitrust law'.[180] It also espoused the economic goals of efficiency and consumer welfare as 'objective benchmarks'[181] to assess the legality of agreements under § 1. Under this modernised interpretation of the notion of restriction of competition, the negative consequence of a given agreement is no longer associated with its impact on the procedural, polycentric characteristics of competition, but only measured with regard to its effects on prices and output.[182] Anticompetitive harm is hence no more identified based on an outdated concern about preserving polycentricity as a safeguard against domination. On the contrary, it is determined by having regard to the impact of the agreement on the outcome of the competitive process. Concerns about liberty as domination thus yielded to the exclusive goal of consumer welfare as a benchmark to decide coordinated conduct unduly interferes with the negative liberty of other market participants.

5.1.2 The Rise of the Consumer Welfare Approach and Article 101 TFEU

In Europe, the broad application of Art. 101 (1) TFEU by the Commission and the EU Courts was also soon perceived as being in blatant conflict with economic theory and consumer welfare. Commentators became increasingly wary about the broad, form-based interpretation of Art. 101 (1) TFEU by the Commission and the Court. They criticised the Commission and Court for primarily focusing on the form of agreements and their impact on the market structure to determine their legality, rather than assessing their actual or likely effects on consumer welfare.[183] This form-based approach was disapproved for turning a blind eye to efficiency considerations[184] and curtailing the contractual liberty and property rights of firms.[185] Commentators laid the blame for this broad, form-based application under Art. 101 TFEU on the continuous influence of Ordoliberalism. The Commission's and Court's Ordoliberal interpretation of the concept of restriction of competition was said to treat any restriction of commercial freedom as a restriction of competition regardless of its effect on consumer

[179] *Cont'l T.V. v. GTE Sylvania,* (n 177) Justice White concurring, 69.
[180] *National Collegiate Athletic Ass'n v. Board of Regents* 468 U.S. 85 (1984) 107.
[181] *Cont'l T.V. v. GTE Sylvania,* (n 177) 53 fn 21.
[182] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1 (1979) 20; *National Collegiate Athletic Ass'n v. Board of Regents* (n 180) 100, 107, 113, 114-116; *FTC v. Indiana Federation of Dentists* 476 U.S. 447 (1986) 459.
[183] B. E. Hawk, 'System failure: Vertical Restraints and EC Competition Law' (1995) 32 Common Market Law Review 973 974–975.
[184] V. Korah, 'EEC Competition Policy—Legal Form or Economic Efficiency' (1986) 39(1) Current Legal Problems 85; V. Korah, 'From Legal Form Toward Economic Efficiency - Article 85 (1) of the EEC Treaty in Contrast to U.S. Antitrust' [1990] Antitrust Bulletin 1009, 79.
[185] V. Korah, 'The Rise and Fall of Provisional Validity: The Need for a Rule of Reason in EEC Antitrust' (1981) 3(2) Northwestern Journal of International Law & Business 320 354.

welfare.[186] Overall, the EU Court's and Commission's economic assessment of horizontal and vertical agreement was judged 'anaemic'[187] or even inexistent.

At the turn of the century, the European Commission reacted to this criticism by launching a fundamental overhaul of its interpretation of Art. 101 TFEU. The purpose of this modernisation initiative was to bring Art. 101 (1) in line with modern economic theory and the concern about consumer welfare, which the Commission identified as the ultimate goal of Art. 101 (1) TFEU.[188] Essential element of this modernisation initiative was the Commission's pledge to abandon its form-based approach, which prohibits any restriction of freedom of action and independent, polycentric decision-making of market players as a restriction of competition.[189] Instead, the Commission clarified that for an agreement to amount to a restriction of competition, it must be 'likely to affect competition in the market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected.'[190]

The Commission's modernisation of Art. 101 TFEU also put an end to the increasingly dysfunctional notification system for the application of the derogation under Art. 101 (3) TFEU. This old authorisation system, which required firms to notify their agreements for *ex ante* review to the European Commission to benefit from an exemption under Art. 101 (3) TFEU, lay at the heart of the republican approach towards anticompetitive agreements. The notification system indeed provided for an institutional mechanism that ensured a non-dominating and non-arbitrary process to legitimise agreements that *prima facie* appeared to amount to a restriction of competition and undue domination. Yet, this regime had increasingly collapsed under the excessive burden of the sheer number of notified agreements because the Commission simply lacked the resources to cope with the backlog of notifications. As a consequence, Art. 101 (3)

[186] Hawk (n 183), 973, 978.
[187] ibid 375.
[188] Commission Green Paper on Vertical Restraints in EC Competition Policy. COM (96) 721 paras. 10-14; Communication from the Commission on the application of the Community competition rules to vertical restraints - Follow-up to the Green Paper on vertical restraints. OJ [1998] C 365/3 pp. 3-4. See also Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ [2001] C3/2 paras. 6-7. Guidelines on the application of Article 81(3) of the Treaty. OJ [2004] C 101/97 para. 5. Commission notice - Guidelines on Vertical Restraints. OJ [2000] C 291/1 para. 7. Guidelines on the application of Article 81(3) of the Treaty (n 188) para. 13. Guidelines on Vertical Restraints. OJ [2010] C 130/01 para. 7.
[189] Guidelines on the application of Article 81(3) of the Treaty (n 188) para. 24, fn. 31.See in this regard also Case T-112/99 *Métropole télévision (M6) and Others v Commission* ECLI:EU:T:2001:215 para. 76. Case C-309/99 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98 para. 97.
[190] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (n 188) para. 19; Guidelines on the application of Article 81(3) of the Treaty (n 188) para. 24; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. OJ [2011] C 11/01 para. 27.

TFEU failed to provide firms with a meaningful possibility to exempt pro-competitive agreements from the application of Art. 101 (1) TFEU.

The Modernisation Regulation 1/2003 EC[191] replaced the old authorisation regime with a decentralized system under which the firms would carry out a self-assessment of the compliance of their agreements with the cumulative conditions of Art. 101 (3) TFEU [192] The primary goal of this reform was to harness the potential of Article 101 (3) TFEU to operate as a rule-of-reason like balancing mechanism of pro- and anticompetitive effects of agreements *prima facie* caught by Art. 101 (1) TFEU. This reform of Art. 101 (3) thus constituted a crucial step to align the application of Art. 101 TFEU fully with the consumer welfare standard. It transformed Art. 101 (3) TFEU into a framework to carry out a balancing of rights to decide when the exercise of contractual freedom and property rights should be shielded from antitrust intervention because their expected welfare gains exceed their losses. The transformation of Art. 101 (3) into a rule of reason and the adoption of a consumer welfare standard was clearly geared towards encouraging the procompetitive use of entrepreneurial liberty by enhancing the legal certainty under Art. 101 (3) TFEU.

The Commission's More Economic Approach was, however, initially met with a considerable dose of scepticism on the part of the Court of Justice, which continued to adhere to a procedural understanding of competition as polycentric process and market structure. The Court indeed fenced off attempts by the Commission, national courts,[193] and the General Court[194] to read a consumer welfare standard into Article 101 (1) TFEU.[195] It dismissed the view that the finding of a restriction of competition within the meaning of Article 101 (1) TFEU would require the showing of some negative competitive outcomes, such as higher prices or harm to consumer welfare.[196] The Court thus clearly rejected a consequentialist interpretation of competition that merely focuses on its outcome and impact on consumer welfare or

[191] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ [2003] L 1/1 Art. 1 (2).
[192] ibid.
[193] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:110 paras. 22, 35, 45, 55.
[194] Case T-213/01 *Österreichische Postsparkasse v Commission* ECLI:EU:T:2006:151 para. 115. Case T-168/01 *GlaxoSmithKline Services v Commission* ECLI:EU:T:2006:265 paras. 118-120, 147.
[195] Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:343 paras. 36-37. Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 193) para. 56; Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610 paras. 63-64.
[196] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 193) para. 56; Case C-8/08 *T-Mobile Netherlands BV and Others* (n 195) paras. 36-37.

interests.[197] The Court instead reaffirmed its procedural understanding of competition as polycentric market structure, which has an intrinsic, deontological value. [198] The Court thus clearly rejected the consumer welfare standard as the litmus test for the legality of agreements under Art. 101 (1) TFEU. It, instead, reaffirmed that 'Article [101 TFEU], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.'[199]

The Court of Justice's opposition to the More Economic Approach is, however, increasingly crumbling. In recent years, the Court started to attribute a more explicit weight to efficiency and welfare considerations when interpreting Art. 101 TFEU. In *Cartes Bancaires* and subsequent cases, the Court took the view that the by-object category should only apply to agreements which according to economic experience lead 'to fall in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.'[200] Recent case law thus suggests that the concept of a 'restriction of competition' by-object is directed against those agreements that negatively affect outcome-oriented variables of competition, such as price and output, and hence undermine allocative efficiency and consumer welfare. At the same time, while never explicitly overruling prior case law that accounted for non-efficiency public policy goals under Art. 101 (3) TFEU, [201] the EU Courts have endorsed the Commission's narrow interpretation of Art. 101 (3) TFEU as a mechanism to weigh off anticompetitive effects with narrowly defined cost and quality efficiencies.[202]

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[197] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 195) para. 38. Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 193) paras. 58-60.
[198] ibid para. 58. See for a similar argument Opinion of Advocate General Kokott in Case C-293/13 P *Fresh Del Monte Produce* ECLI:EU:C:2014:2439 para. 215; Opinion of Advocate General Kokott in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2014:2437 para. 113.
[199] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 195) para. 38; Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2015:184 para. 125; Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* (n 193) paras. 58, 60; Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* (n 195) para. 63. See more recently Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* (n 199) para. 125.
[200] Case C-67/13 P *Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204 para. 51. Case C-345/14 *Maxima Latvija* ECLI:EU:C:2015:784 para. 19; Case T-472/13 *Lundbeck v Commission* ECLI:EU:T:2016:449 para. 341; Case T-469/13 *Generics (UK) v Commission* ECLI:EU:T:2016:454 para. 135; Case T-762/14 *Philips and Philips France v Commission* ECLI:EU:T:2016:738 para. 56; Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* (n 199) para. 115.
[201] Case 26/76 *Metro v Commission* ECLI:EU:C:1977:167 para. 21; Case 42/84 *Remia v Commission* ECLI:EU:C:1985:327 para. 42; *Cases T-528/93, T-543/93, T-546/93 Metropole and Others v Commission* ECLI:EU:T:1996:99 para. 118.
[202] Whish and Bailey (n 170) 168; Case T-168/01 *GlaxoSmithKline Services v Commission* (n 194) paras. 247-308. Upheld by Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* (n 195) para. 68-168; Case T-111/08 *MasterCard and Others v Commission* ECLI:EU:T:2012:260 paras. 194-237; Case T-491/07 *Groupement des Cartes Bancaires v Commission* ECLI:EU:T:2012:633 paras. 361-465; Case T-472/13

The interpretation of Art. 101 (1) TFEU by the Commission and the EU Courts thus seems to converge slowly towards the consumer welfare standard. Endorsing a welfarist understanding of the notion of restriction of competition, the EU Commission and Courts no longer prohibit agreements based on the potential domination they bring about by restricting the polycentric decision making of market participants. Rather, they increasingly endorse the consumer welfare standard as the relevant framework to identify when an agreement adversely interferes with negative economic liberty of other market participants. This is only the case if the agreement, in addition to a limitation of polycentricity, entails an adverse effect on output-oriented parameters of competition and hence negative welfare effects. With the rise of the consumer welfare approach, Art. 101 (3) TFEU has morphed into a framework to balance conflicting claims about negative liberty and decide whether the cost of antitrust intervention, in the form of a reduction of contractual liberty on the part of the parties, is outweighed by the gains in liberty on the part of consumers and competitors owing to the remedial action.

5.2 Monopoly Power and the Rise of the Consumer Welfare Standard

The ascent of the Chicago School and the More Economic Approach have also fundamentally transformed the attitude of antitrust law towards monopoly power. The Chicago School succeeded in delegitimising the hostile stance of republican antitrust against industry concentration, firm size and monopoly power. Instead, it entrenched the consumer welfare standard as normative benchmark to identify the situations where monopoly power raises competition concerns. Accordingly, monopoly power is only objectionable in the rare occasions where unilateral firm conduct leads to welfare losses in the form of lower output and higher prices. In the aftermath of the Chicago School revolution, the US courts largely jettisoned any situational or conduct tests, which were grounded in concerns about the concentration of economic power. Instead, the US courts endorsed the consumer welfare approach as the relevant framework to determine when single firm conduct violates § 2 of the Sherman Act or other antitrust statutes (5.2.1). With the rise of the More Economic Approach in Europe, the consumer welfare standard increasingly shaped the interpretation and application of Art. 102 TFEU by the European Commission. Following a phase of initial opposition, the EU Courts

Lundbeck v Commission (n 200) paras. 344-366. See, however, the General Court's judgement in Stim v Commission suggests that cultural diversity could be taken into account under Art. 101 (3) TFEU Case T-451/08 *Stim v Commission* ECLI:EU:T:2013:189 paras. 101-102; G. Monti and J. Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' (2017) 42(5) European Law Review 635 648–650.

increasingly align their interpretation of Art. 102 TFEU with a consumer welfare approach (5.2.2). On both sides of the Atlantic, the concern about the domination emanating from an excessive concentration of economic power thus has been largely marginalized. So too, has the structural objective of preserving a polycentric market structure as an institution of antipower become irrelevant. Instead, the consumer welfare standard has also become the framework to clarify when the exercise of monopoly power unduly interferes with the negative liberty of other market participants and when state intervention is warranted to prevent or remedy this interference. Concerns about liberty as non-domination thus have given way to an approach, which is merely concerned about negative economic liberty as non-interference.

5.2.1 The Rise of the Consumer Welfare Standard and the Regulation of Monopoly Power under US Antitrust

The Chicago School analysis of unilateral conduct fundamentally reshaped the approach of the Supreme Court and lower courts towards monopolistic firms. The US courts largely jettisoned their hostile approach towards powerful firms, which was grounded in a concern about the domination flowing from the excessive concentration of economic power. They instead increasingly adopted a consumer welfare standard when assessing the legality of exclusionary conduct of powerful firms under § 2 of the Sherman Act.

In the aftermath of the Chicago School revolution, the Supreme Court increasingly aligned the prohibitive scope of antitrust law towards unilateral conduct by dominant firms with the Chicagoan definition of anticompetitive foreclosure as conduct which excludes rival firms 'on some basis other than efficiency.'[203] Under this consumer welfare approach, the legality of single-firm conduct with § 2 of the Sherman Act has to be examined through a two-step analysis. First, it has to be established whether the defendant possesses monopoly power and that its conduct has an actual or likely anticompetitive effect by foreclosing competitors by means other than competition on the merits and giving rise to consumer harm in the form of higher prices or lower output.[204] Second, in *Aspen Skiing*[205] and *Eastman Kodak*[206], the Court recognised that defendants should have the opportunity to proffer a pro-competitive business justification for their *prima facie* anticompetitive conduct.

[203] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985) 605. The majority here explicitly quoted Bork (n 12) 138.
[204] *United States v. Microsoft Corporation* 253 F.3d 34 (D.C. Cir.2001) 50-51, 58-59.
[205] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (n 203) 608.
[206] *Eastman Kodak Co. v. Image Tech. Servs.* 504 U.S. 451 (1992) 483.

The interpretation of § 2 of the Sherman Act and other antitrust rules governing single-firm conduct has thus moved away from the structuralist policy objective of preserving a polycentric market structure as a safeguard of republican liberty. Instead of focusing on the impact of the monopoly power or the conduct of a powerful firm on the structure of the market, the US Courts have fully endorsed the consumer welfare standard to resolve the two essential boundary issues of negative liberty. First, they rely on the consumer welfare standard to identify when dominant firm conduct gives rise to undue interference with the liberty of other market participants. Second, by recognizing the possibility of balancing pro- and anticompetitive effects under § 2, US courts also rely on the consumer welfare approach to identify when the reduction of liberty on the part of a monopolist as the result of antitrust intervention is outweighed by the gains of liberty on the part of competitors and consumers thanks to remedying antitrust intervention.

5.2.2 The Rise of the Consumer Welfare Standard under Art. 102 TFEU

From the early 1990s onwards, the abuse of dominance case law of the Court of Justice and the Commission also faced mounting criticism by the proponents of a More Economic Approach.[207] Emulating the Chicago School critique, numerous scholars disapproved the case law of the EU Courts and the Commission for giving too little weight to consumer welfare and efficiency considerations. Commentators voiced a growing discontent about the Court's form-based approach that inferred the anticompetitive effects of single-firm conduct from its legal and economic form. In their view, this formalistic approach, on the one hand, failed to inquire into whether the conduct of dominant firms actually harmed consumer welfare. On the other hand, it was also lambasted for disregarding the potential efficiencies of dominant firm conduct.[208] The form-based application of Art. 102 TFU and the principle of special

[207] V. Korah, 'Tetra Pak II - Lack of reasoning in Court's judgment' (1992) 18(2) European Competition Law Review 98; J. D. Veltrop, 'Tying and Exclusive Purchasing Arrangements under EC Competition Law' (1994) 31 Common Market Law Review 549; D. Ridyard, 'Exclusionary pricing and price discrimination abuses under Article 82 - an economic analysis' (2002) 23(2) European Competition Law Review 286; D. Ridyard, 'Tying and bundling - cause for complaint?' (2005) 26(6) European Competition Law Review 316; J. Temple Lang and R. O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82' (2002) 26 Fordham Int'l L.J. 83; J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 25(5) European Competition Law Review 263; J. S. Venit, 'Article 82: The Last Frontier - Fighting Fire with Fire' (2004) 28(4) Fordham International Law Journal 1157; O'Donoghue and Padilla (n 166); C. Ahlborn, D. S. Evans and A. J. Padilla, 'The Antitrust Economics of Tying: a Farewell to Per se Illegality' (2004) 49(1-2) Antitrust Bulletin 287; Economic Advisory Group on Competition Policy (EAGCP), 'An economic approach to Article 82' (2005) accessed 4 April 2015. For a comprehensive overview on this criticism and the literature see A. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 69–73.

[208] Padilla and Ahlborn (n 168) 22 ff.

responsibility attached to the finding of dominance[209] were portrayed as an emblematic example for an overly rigid and economically uninformed Ordoliberal interpretation of competition law, that unnecessarily cumbered dominant firms with an additional regulatory burden.[210] Owing to its inbuilt hostility against market power and the reliance on form-based presumptions, the abuse of dominance case law was blamed for unduly chilling the incentives of dominant firms to compete aggressively and, thus, stymying efficiencies and innovation to the detriment of consumers.[211]

The proponents of a More Economic Approach, therefore, urged the Commission and the EU Courts to jettison their form-based and structuralist approach towards dominant firms, which was informed by abstract concerns about the potential domination of concentrated market power.[212] The application of Art. 102 TFEU should, instead, exclusively focus on the welfare effects of unilateral conduct on consumers.[213] To this end, the analysis of single-firm conduct should turn upon the question of whether the dominant firm conduct merely excluded less efficient competitors by virtue of superior efficiency, or whether it foreclosed equally efficient competitors in a way that eventually harms consumers.[214] At the same time, the assessment of Art. 102 TFEU should also account for the manifold pro-competitive rationale of exclusive dealing agreements,[215] tying arrangements, [216] rebates,[217,] and aggressive above- and below-cost pricing.[218]

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[209] Economic Advisory Group on Competition Policy (EAGCP) (n 207) 15.
[210] Venit (n 207), 1158.
[211] Padilla and Ahlborn (n 168) 25 ff.
[212] Economic Advisory Group on Competition Policy (EAGCP) (n 207) 14.
[213] ibid 2, 9.
[214] ibid 7.
[215] Veltrop (n 207), 550–551.P. Lugard, 'Eternal Sunshine on a Spotless Policy? Exclusive Dealing Under Article 82 EC' (2006) 2(sup 1) European Competition Journal 163 165, 170, 178-179. Economic Advisory Group on Competition Policy (EAGCP) (n 207) 48.
[216] Korah (n 207), 100–101. Veltrop (n 207), 551. Ahlborn, Evans and Padilla (n 207), 287-288, 313, 317-323-324. Economic Advisory Group on Competition Policy (EAGCP) (n 207) 23-24, 39-41. Stillman, Robert, Kühn, Kai-Uwe, Caffarra, Cristina, 'Economic Theories of Bundling and Their Policy Implications in Abuse Cases: An Assessment in Light of the Microsoft Case' (2005) 1(1) European Competition Journal 85 103–106, 11. Ridyard (n 207), 316, 318. B. Nalebuff, 'Bundling, tying and portfolio effects: Conceptual issues: Part 1' (2003). DTI Economics Paper 1 11, 18,20-21, 31-33; M. Dolmans and T. Graf, 'Analysis of Tying under Art. 82 EC: The European Commission's Microsoft Decision in Perspective' (2004) 27(2) World Competition 225 244.
[217] For a discussion of procompetitive efficiencies of rebates O'Donoghue and Padilla (n 166) 375–379. Economic Advisory Group on Competition Policy (EAGCP) (n 207) 36–37. Venit (n 207), 1176–1177. Kallaugher and Sher (n 207), 277, 280-283. Ridyard (n 207), 286-288, 290, 293. Temple Lang and O'Donoghue (n 207), 108–111.
[218] Ridyard (n 207), 295–297. C. Ahlborn and B. Allan, 'The Napp Case: A Study of Predation' (2003) 26(2) World Competition 233 244; De la Mano, Miguel and B. Durand, 'A Three-Step Structured Rule of Reason to Assess Predation under Article 82: Office of the Chief Economist - Discussion Paper' (2005) 7, 16; Economic Advisory Group on Competition Policy (EAGCP) (n 207); D. Howarth, 'Unfair and Predatory Pricing under Article 82 EC: From Cost-price Comparisons to the Search for Strategic Standards' in C.-D. Ehlermann and G. Amato (eds), *EC Competition Law: A Critical Assessment* (Hart 2005) 293.

This academic criticism of the form-based approach under Art. 102 TFEU and the calls for a More Economic Approach had an important bearing on the Commission's modernisation reform of Art. 102 TFEU. This reform culminated in the publication of the so-called 'Guidance Paper'.[219] Like under Art. 101 TFEU, the Commission's modernisation initiative was driven by the objective of reconciling the interpretation of Art. 102 TFEU with the consumer welfare ad insights of modern economics. Unlike in its Guidelines under Art. 101 TFEU and EU merger control, the Commission, however, stopped short off explicitly elevating consumer welfare to the supreme goal of Art. 102 TFEU. The Guidance, nonetheless, signalled that the Commission would concentrate its enforcement strategy on exclusionary conduct that is most harmful to consumer welfare.[220]

The Commission, moreover, encoded the consumer welfare standard in the legal test it pledged to use henceforth in order to determine when dominant firm conduct constitutes an abuse of dominance in breach of Art. 102 TFEU. The Guidance Paper clarified that for unilateral conduct of a dominant firm to run afoul of Art. 102 TFEU, it must lead to a reduction in consumer welfare. [221] This means that the exclusion of competitors must hamper competition to the extent that the dominant firm is able to raise prices to the detriment of consumers.[222] The Commission thus introduced an additional element into the test of legality under Art. 102 TFEU. This new test requires, along with the exclusion of competitors, the showing – based on quantitative or qualitative evidence – that the conduct is likely to lead to consumer harm.[223] The Guidance Paper thus advocated a test which substantially raised the bar for the finding of an abuse of dominance under Art. 102 TFEU.

The Guidance Paper also incorporated the dogma of the More Economic Approach that EU competition law, and Art. 102, in particular, should not be used to protect competitors instead of competition.[224] The Commission observed that the market exit of less efficient competitors was fully in line with, or even the quintessence of, competition on the merits.[225] It thus openly disavowed the form-based approach, which had put considerable importance on the protection of residual competition and the preservation of a competitive market structure as an institutional safeguard of republican liberty against the potential domination by dominant firms.

[219] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Guidance Paper. OJ [2009] C 45/7.
[220] ibid paras. 5-6.
[221] ibid para. 23.
[222] ibid para. 19.
[223] ibid.
[224] ibid para. 6.
[225] ibid.

The Commission instead enthroned the consumer welfare standard as the relevant framework to decide when dominant firm conduct unduly interferes with the negative liberty of other market participants. Lastly, this alignment of Art. 102 TFEU with the consumer welfare standard was perfected with the development of an efficiency defence under Art. 102 TFEU. The Commission thus recognised the possibility of dominant firms to proffer, alongside with an 'objective justification', evidence showing that the procompetitive efficiencies of its conduct outweigh any consumer harm. [226]

Just as under Article 101 TFEU, the Court initially also remained reluctant to endorse the Commission's shift toward a More Economic Approach and consumer welfare standard as set out in the Guidance Paper. On the contrary, the Court emphasized the soft-law character of the Guidance Paper, holding that it does not have a legally binding effect on national competition authorities or courts.[227] A few months after the publication of the Guidance Paper, the Court in *France Telecom* also rejected the argument by Advocate General Mazàk that the primary purpose of Art. 102 TFEU was 'to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors'.[228] The Court, instead, in a number of cases reaffirmed the position that the foreclosure of a competitor by dominant firm conduct may create in itself anticompetitive harm by further weakening the 'effective competition structure'[229] and allowing the dominant firm to reinforce its dominant position.[230]

In recent years, one can nonetheless discern a creeping shift in the EU Courts' interpretation of Art. 102 TFEU towards an effects-based approach increasingly anchored in the consumer welfare standard. Recent cases emphasise that Art. 102 TFEU only applies to

[226] Until the publication of the Commission Discussion Paper efficiency considerations played only a limited role under the objective justification. It was in the Discussion Paper that the Commission set out for the first time how the efficiency defence would operate under Art. 102 TFEU DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses 2005, Discussion Paper paras. 79, 84-92. See Case T-228/97 *Irish Sugar v Commission* ECLI:EU:T:1999:246 para. 189. A. Llorens Albors, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' (2007) 44(6) Common Market Law Review 1727 1746; P.-J. Loewenthal, 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28(4) World Competition 455 465. Llorens Albors (n 226), 1729–1735; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 219) paras. 28-31.

[227] Case C-23/14 *Post Danmark II* ECLI:EU:C:2015:651 para. 52.

[228] Opinion of Advocate General Mazák in Case C-202/07 P *France Télécom v Commission* ECLI:EU:C:2008:520 para. 74. Quoting Opinion of Advocate General Jacobs in Case C-7/97 *Oscar Bronner* ECLI:EU:C:1998:264 para. 58.

[229] Case C-202/07 P *France Télécom v Commission* ECLI:EU:C:2009:214 para. 105. Quoting Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* ECLI:EU:C:1973:22 para. 26. Case C-549/10 *P Tomra and Others v Commission* ECLI:EU:C:2012:221 paras. 41-42.See also the structuralist definition of abuse in Case C-23/14 *Post Danmark II* (n 227) paras. 26, 69-72.

[230] Case C-202/07 P *France Télécom v Commission* (n 229) para. 112.

exclusionary conduct that forecloses competitors who are as efficient as the dominant firm.[231] The Court clarified that it was not the role of Art. 102 TFEU and of the principle of special responsibility to 'ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.'[232] Accordingly, the Court explained that, as a matter of principle, 'not every exclusionary effect is necessarily detrimental to competition'. [233] On the contrary, 'competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers.'[234] Accordingly, the distinction between legitimate and anticompetitive single-firm conduct hinges on whether it has 'an exclusionary effect on competitors considered to be as efficient as it is itself'.[235]

The Court also, at least in part, endorsed the consumer welfare standard as the appropriate framework for carrying out a balancing of rights to determine when the application of Article 102 TFEU is warranted. In *British Airways*, *Post Danmark I*, *Intel* and *Generics*, the Court followed the Commission's blueprint of an efficiency defence, set out for the first time in the 2005 Discussion Paper.[236] The dominant firm can hence no more only escape from Article 102 TFEU by showing that its exclusionary conduct is objectively justified, but it can also demonstrate that the anticompetitive effects of its conduct are outweighed by pro-competitive efficiencies.

The concern about republican liberty, which informed the goal of preserving a polycentric market structure as the underpinning rationale of the classical Art. 102 case law, has lost ground over the last years. This conversion of the interpretation of Art. 102 TFEU to a consumer welfare approach is certainly less complete than in the US. Unlike their US counterparts, neither the EU Courts nor the Commission have entirely discarded the structural goal of preserving a polycentric market structure to the benefit of a consumer welfare

[231] Case C-280/08 P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603 paras. 83-85, 177, 202-203. Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83 paras. 24-25; Case C-209/10 *Post Danmark A/S v Konkurrenceråd*et ECLI:EU:C:2012:172 para. 21; Case C-413/14 P *Intel v Commission* ECLI:EU:C:2017:632 paras. 133-134.
[232] Case C-209/10 *Post Danmark A/S v Konkurrenceråd*et (n 231) para. 21.
[233] ibid para. 23.
[234] Case C-209/10 *Post Danmark A/S v Konkurrenceråd*et (n 231) para. 23; Case C-413/14 P *Intel v Commission* (n 231) para. 134.
[235] Case C-209/10 *Post Danmark A/S v Konkurrenceråd*et (n 231) para. 25; Case C-413/14 P *Intel v Commission* (n 231) para. 136.
[236] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Discussion Paper (n 226) paras. 84-92. Case C-95/04 P *British Airways plc v Commission of the European Communities* ECLI:EU:C:2007:166 para. 86; Case C-209/10 *Post Danmark A/S v Konkurrenceråd*et (n 231) paras. 41-42; Case C-413/14 P *Intel v Commission* (n 231) para. 140; Case C-307/18 *Generics (UK) and Others* ECLI:EU:C:2020:52 paras. 165-172.

standard.[237] Yet, their interpretation of Art. 102 increasingly relies on the consumer welfare standard as the appropriate framework to identify when dominant firm conduct unduly interferes with the negative liberty of other market participants and thus engenders an adverse effect on the competitive market structure that warrants antitrust intervention.[238] By increasingly endorsing a welfarist standard, the Commission and the EU Courts appear to progressively narrow the concept of abuse of dominance to conduct that interferes with the negative economic liberty of other market participants in a way that reduces the volume or adversely affects the terms of mutually beneficial transactions which would have been otherwise carried out in the market. At the same time, the recognition of an efficiency defence under Art. 102 also allows for a balancing of rights that is in line with the concept of negative liberty. Under this balancing of rights, antitrust intervention is only warranted if the loss in entrepreneurial liberty – measured in terms of pro-competitive efficiencies – as the consequence of antitrust intervention is compensated by the gains in negative liberty of other market participants – measured in terms of losses in consumer welfare – as a result of the remedying intervention.

5.3 Merger Policy and the Rise of the Consumer Welfare Standard

Merger policy is the pillar of antitrust in which the rise of the consumer welfare standard has been most consequential. The concern about consumer welfare has largely displaced the structural policy objective, which shaped the republican approach towards mergers control in the US (5.3.1) and the EU (5.3.2). Both merger regimes have jettisoned a republican approach, which perceived excessive levels of industry concentration as a source of domination and unfreedom. Instead, the consumer welfare standard has emerged as the exclusive framework to determine when mergers give rise to anticompetitive effects because they are likely to allow the merged firm or non-merging firms to unduly interfere with the economic liberty of consumer and competitors.

[237] Case C-52/09 *TeliaSonera Sverige* (n 231) paras. 24, 27.Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 231) para. 20. Case C-23/14 *Post Danmark II* (n 227) para. 59. Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929 para. 110; Case C-307/18 *Generics (UK) and Others* (n 236) paras. 147-148, 156, 161.

[238] Case C-52/09 *TeliaSonera Sverige* (n 231) para. 32; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 231) paras. 21-25; Case T-851/14 *Slovak Telekom v Commission* (n 237) para. 108; Case C-413/14 P *Intel v Commission* (n 231) paras 133-136.

5.3.1 The Rise of the Consumer Welfare Standard and US Merger Policy

The Chicago critique of the republican merger policy embodied in the Warren Court case law and the 1968 Merger Guidelines fundamentally reshaped the US merger policy. The 1982 Merger Guidelines adopted by the US Department of Justice under the direction of William Baxter, who was importantly influenced by the Chicago School thinking,[239] obliterated the structuralist thrust of the Warren Court case law and the 1968 Guidelines. The prevention of industry concentration in its incipiency and the preservation of a polycentric market structure as the policy goals of the republican approach towards merger policy gave way to the consumer welfare standard. Merger policy was no longer directed against the creation of situations of excessive concentration of economic power. Instead, the 1982 Guidelines limited the task of merger policy to the prevention of the exercise of market power, that is, the ability of the merging or non-merging firms to ‚profitably to maintain prices above competitive levels for a significant period of time.'[240] Under the auspices of the consumer welfare standard, the purpose of merger control was henceforth the prevention of mergers leading to a misallocation of resources and a wealth transfer from consumers to producers.[241]

The consumer welfare standard thus considerably narrowed the circumstances in which industry concentration and mergers give rise to antitrust concerns and unfreedom.[242] US merger policy departed from an approach grounded in republican liberty, which warrants the prohibition of a merger on the mere basis of the potential harm or domination resulting from an increased level of economic concentration and, hence, the mere *existence* of concentrated power. The prevention of domination resulting from increases in market concentration ceased to be the central goal of merger policy. US merger policy also jettisoned all non-economic considerations and values that the republican approach associated with a decentralised market structure. The consumer welfare standard, instead, provided a framework to identify when a merger allows the merged entity to *exercise* market power and to interfere with the economic liberty of other market participants in a welfare-decreasing manner. By accounting for the pro-competitive efficiencies of mergers, the consumer welfare standard also provided a calculus to decide when the costs of antitrust interference with the contractual liberty of the merging parties

[239] C. Shapiro, 'The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years' (2010) 77 Antitrust Law Journal 701 705 fn. 15.
[240] 1982 Merger Guidelines 2.
[241] ibid.
[242] Bork (n 12) 199.

are outweighed by the benefits of increased negative liberty that consumers and competitors enjoy thanks to the prevention of interference resulting from an anticompetitive merger.

The adoption of the consumer welfare approach thus curtailed the sweeping scope of the structuralist republican merger policy, which considered even mergers giving rise to slight increases in market concentration as a source of unfreedom. The consumer welfare standard ensured that merger policy only interfered with the negative liberty of the merging parties when there was a clear risk that the merger led to a welfare-decreasing interference with the economic liberty of other market participants. Mergers were not anymore treated as an anomality in a competitive economy, but they were considered as just another exercise of contractual liberty and alternative form of competition, which most of the time does not give rise to any competition concern.

5.3.2 The Rise of the Consumer Welfare Standard and EU Merger Policy

In the early 2000s, the structuralist approach of EU merger policy also came under mounting pressure. Commentators increasingly criticized the form-based approach underpinning the structuralist dominance-test. Instead of simply inferring anticompetitive effects of mergers from an increase in concentration and the creation of a dominant position, the Commission should inquire into whether a specific transaction gives rise to adverse effects on consumer welfare.[243] Many commentators, therefore, championed the abandoning of the dominance test to the benefit of a substantial lessening of competition test (SLC), which governed the assessment of mergers under the US Clayton Act and had been adopted as the legal test for merger control in the UK in 2002.[244] Various commentators nourished the hope that the transition from what was perceived as an overly formalistic 'dominance test' to the SLC test would require the Commission to abandon its static and structural merger analysis.[245] Under the SLC test, the Commission would have to expand its analysis beyond the finding of an adverse effect on market structure, by looking at the likely effects of the merger on consumer welfare and balancing them with potential pro-competitive efficiencies.[246]

[243] For a more detailed account of the „More Economic Approach"-reform see Witt (n 168), 221–226; Witt (n 168), 221–226.
[244] J. Vickers, 'Merger policy in Europe: retrospect and prospect' (2004) 25(7) European Competition Law Review 455 457; S. Völcker, 'Mind the Gap: Unilateral Effect Analysis Arrives in EC Merger Control' 2004(395-410) European Competition Law Review 395; I. Kokkoris, *Merger control in Europe: The gap in the ECMR and national merger legislations* (Routledge 2011) 38; Witt (n 168), 221–226.
[245] V. Verouden, C. Bengtsson and S. Albaek, 'Draft EU Notice on Horizontal Mergers: A Further Step toward Convergence, The' (2004) 49 Antitrust Bull. 243 247.
[246] Verouden, Bengtsson and Albaek (n 245), 243; A. Lindsay and A. Berridge, *The EU merger regulation: Substantive issues* (Sweet & Maxwell 2012) 43.

These calls for a More Economic Approach had an important bearing on the modernisation of the EU merger policy by the European Commission which culminated in the adoption of a revised EU Merger Regulation in 2004,[247] as well as the publication of Guidelines on horizontal (2004)[248] and non-horizontal vertical and conglomerate (2008)[249] mergers. The revised EU Merger Regulation put an end to the structuralist approach under the old dominance test. The new Merger Regulation indeed replaced the dominance test with the so-called Significant Impediment of Competition (SIEC) test which prohibits mergers

> *which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.*[250]

The revised Merger Regulation and the Horizontal Merger Guidelines clarified that under this new test, the creation or strengthening of a dominant position is only one amongst a number of anticompetitive effects that would give rise to a SIEC.[251] Conversely, the Commission also signalled that a SIEC could no longer be simply inferred from the finding of dominance.[252] The Horizontal Merger Guidelines made it plain that the Commission would henceforth assess the competitive effects of mergers on the basis of the consumer welfare standard.[253] In a similar vein as the 1982 Merger Guidelines in the US, the Horizontal Merger Guidelines thus disavowed a structuralist approach, which is directed against industry concentration and the creation or strengthening of a dominant position as such. They instead underlined that the EU Commission would only challenge those mergers, which deprive consumers of the benefits of effective competition by significantly increasing the market power

[247] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. OJ [2004] L 24/1.
[248] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (n 129).
[249] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (n 129).
[250] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 247) Art. 2 (3).
[251] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 247) rec. 25; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (n 129) paras. 4, 22, 25.
[252] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (n 129) para. 22.
[253] Commission Guidelines on the assessment of horizontal mergers. O.J [2004] C 31/5 para. 8.I. Kokkoris and H. A. Shelanski, *EU merger control: A legal and economic analysis* 37. Interestingly, the General Court also aligned its interpretation of the test under the first EU Merger Regulation with this reading, holding that the finding that the merger leads the to the creation or strengthening of a dominant position is a necessary, but not sufficient condition to find a SIEC. Case T-87/05 *EDP v Commission* ECLI:EU:T:2005:333 paras. 45, 49-50.

of firms,[254] thus enabling 'one or more firms to profitably increase prices' or deteriorate other parameters of competition.[255]

The adjustment of EU merger control with the consumer welfare standard also became manifest in the growing emphasis the revised Merger Regulation and Guidelines put on positive, efficiency-enhancing effects of mergers.[256] Even though the Council and the Commission refrained from recognising any formal 'efficiency defense',[257] they, nonetheless, inserted a strong commitment in the new Regulation[258] and Guidelines[259] to take into account potential efficiencies as countervailing factors within the framework of the competitive effects of mergers. If the parties can put forth evidence that the merger will generate verifiable, substantial, merger-specific, and timely efficiencies that are likely to outweigh the potential price increases and consumer harm resulting from anticompetitive effects, the merger will not be considered as leading to a SIEC.[260]

The adoption of the consumer welfare standard thus aligned EU merger policy with the overarching value of negative liberty as non-interference and displaced the republican ideal of liberty as non-domination. EU merger policy has, indeed, largely abandoned concerns about the adverse effect of increases in the concentration of economic power through the strengthening or creation of a single or collective dominant position on republican liberty. Rather, it relies on the consumer welfare approach to identify when mergers lead to an illegitimate interference with the negative liberty of other market participants as the result of the exercise of market power.[261] At the same time, the consumer welfare standard, by accounting for pro-competitive efficiencies of mergers, also provides a principled framework to decide when a merger interferes with the negative liberty of other market participants to the extent that the costs of state intervention are outweighed by its benefits. Under the modernized merger policy, state interference with the commercial liberty of the merging parties is only permissible, as long as the ensuing reduction of the negative liberty of the parties is outweighed

[254] Commission Guidelines on the assessment of horizontal mergers (n 253) para. 8.
[255] ibid.
[256] Verouden, Bengtsson and Albaek (n 245), 278–280; Witt (n 168), 242.
[257] Witt (n 168), 243.
[258] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 247) rec. 29.
[259] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (n 129) paras. 76-88.
[260] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ [1989] L 395 rec. 29; Commission Guidelines on the assessment of horizontal mergers (n 253) paras. 76-88.
[261] See for a very broad notion of consumer welfare as well-being 'The function of [EU competition] rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union' Case T-399/16 *CK Telecoms UK Investments v Commission* not yet published para. 93.

by the gains in liberty on the part of consumers and competitors resulting from the prevention of consumer harm.

6 Conclusion

This chapter inquires into the reasons for the decline of republican liberty as non-domination and the idea of a competition-democracy nexus as the normative foundation of competition law on both sides of the Atlantic. To this end, it retraces how the Chicago School antitrust revolution and the rise of the consumer welfare standard have transformed the application of all three pillars of antitrust on both sides of the Atlantic. Unlike conventional antitrust scholarship, this chapter does not exclusively describe the ascent of the Chicago School in the US and the More Economic Approach in Europe as the displacement of an approach pursuing multiple economic, social and political goals by the sole economic goal of consumer welfare and hence, as a triumph of economics over politics or ideology. Rather, this chapter shows how the Chicago School harnessed the consumer welfare standard to displace the ideal of republican liberty as non-domination by a thinner understanding of negative economic liberty as non-interference.

In essence, the central policy prescription of the Chicago School and More Economic Approach was that competition authorities and courts should jettison under all three pillars of competition law a structural approach, which judged the legality of agreements, single-firm conduct and mergers based on their impact on a competitive market structure. Chicago scholars and proponents of a More Economic Approach, instead, argued that agreements, unilateral conduct and mergers should only be assessed based on their actual or likely effect on consumer welfare. The proponents of a consumer welfare standard thus called upon competition authorities and courts to abandon the structural understanding of competition as a polycentric market structure that served as policy objective through which republican antitrust had operationalized the goal of preserving republican liberty against the potential domination flowing from instances of concentrated economic power.

From the 1970s onwards, the US courts and antitrust enforcers incrementally endorsed the Chicagoan antitrust programme and substituted the policy objective of preserving competition as a polycentric market structure and institutional safeguard of liberty as non-domination with the exclusive goal of consumer welfare. Economic concentration and market power as such were no more perceived as a restriction of competition. Nor were they viewed

as an obstacle to economic liberty. Competition was increasingly defined and assessed against its economic outcomes, instead of being associated with a deconcentrated market structure and polycentric process. The rise of the More Economic Approach at the beginning of the 2000s, triggered a similar development in the EU, as the Commission and, albeit to a lesser extent, the EU Courts increasingly gravitate towards an interpretation of EU competition rules in consonance with the consumer welfare approach. The consumer welfare standard has certainly not dislodged the concern about the preservation of a competitive market structure from EU competition law to the same extent as it has been the case in US antitrust. Also, the degree of alignment of EU competition rules with the consumer welfare standard differs across the three pillars, with the abuse of dominance case law certainly lagging behind the rules on collusion and merger control. Nonetheless, under all three pillars, the Commission and the EU judiciary have increasingly recourse to the consumer welfare framework as the relevant benchmark to determine when the weakening of a competitive market structure warrants competition law intervention.

While this shift from a structuralist to a welfarist policy objective is well-documented, existing scholarship largely ignores that with the endorsement of the consumer welfare standard, US antitrust law and EU competition law have also been increasingly aligned with the logic of negative liberty. This chapter shows that the Chicago School put forward the consumer welfare standard as a principled framework to deal with two boundary issues, which the republican approach had failed to address. First, the consumer welfare standard allows decision-makers to clearly circumscribe the circumstances under which the exercise of entrepreneurial liberty interferes with the sphere of autonomy of other market participants in a way that amounts to an undue obstruction of liberty. Compared with the republican approach, the rise of the consumer welfare standard in US and EU competition policy has entailed a considerable narrowing of the situations when an agreement, single-firm conduct, or merger can be considered to restrict competition and frustrate economic liberty of other market participants. Under the consumer welfare standard, this is only the case if the agreement, single-firm conduct or merger leads to actual or likely interference with the choices of other competitors and consumers to the extent that consumers are deprived of the possibility to enter into mutually beneficial transactions, which would otherwise be generated by competition.

Second, the Chicago School also offered with the consumer welfare standard a principled framework to carry out a balance of rights in line with the negative concept of liberty to decide when antitrust intervention is permissible to prevent or remedy such an illegitimate

interference with the negative economic liberty of market participants. By expressing economic liberty as wealth, the consumer welfare approach offered a handy device and a common cardinal unit to compare and balance the otherwise incommensurable values of the liberty of all relevant market participants. The consumer welfare standard thus gives a clear indication as to when state interference is permissible to guard the liberty of market participants against interference. This is the case if the agreement, single-firm conduct, or merger leads to a reduction in negative liberty of market participants – measured as welfare loss – of a magnitude that clearly outweighs the reduction of negative entrepreneurial liberty – measured as productive efficiencies – of the parties to the agreement, the merger or the dominant firm as a consequence of the state interference. Accordingly, state interference through competition law intervention is only legitimate if the anticompetitive effects of the agreement, unilateral conduct or merger in terms of welfare losses exceed their pro-competitive efficiencies or welfare gains.

By narrowing the concept of restriction of competition to welfare decreasing interference with the negative liberty of market participants and by introducing with the efficiency defence a balancing of rights that operates in line with the logic of negative liberty, the consumer welfare standard fundamentally curtailed the prohibitive scope of antitrust rules. As a consequence, it achieved the paramount objective underpinning the Chicagoan critique of republican antitrust: it set the foundations of *laissez-faire* antitrust, which insulates most exercises of the negative entrepreneurial liberty by businesses from state intervention. The consumer welfare approach, in fact, provided the key to unshackle the Behemoths and free them from the cage of tight rules created by republican antitrust law.

The shift from a republican to a negative understanding of liberty as the underpinning normative foundation of antitrust or competition law has also made the idea of a link between competition and democracy obsolete. The republican tradition had consistently underscored the interdependence[262] between the economic, social and political sphere. This interdependence is grounded in the republican belief that the realisation of the ideal of republican liberty requires a specific form of domination-free, republican government and society: in short, a republican democracy.[263] The realisation of the ideal of republican liberty and a republican democracy presupposes not only the elimination of instances of political and social, but also economic domination. This republican opposition to all forms of domination lay at the core of the

[262] W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 304–308; Pitofsky (n 4), 1152.
[263] Pettit (n 131), 601; Pettit (n 132) 22.

republican idea of a competition-democracy nexus and informed the structural approach of republican antitrust in the US and in Europe.

By jettisoning the ideal of republican liberty as non-domination and replacing it with a narrow, negative understanding of liberty as non-interference the Chicago and Post-Chicago antitrust movements also severed this link between competition and democracy. Unlike republican liberty, negative liberty is not inextricably linked with a specific form of government.[264] This has been perhaps most impressively shown by the role, the Chicago School and some of its figureheads, such as Milton Friedman and Friedrich August von Hayek, played in the ascent of the authoritarian Pinochet regime in Chile.[265] The Chilean experiment indeed showed that authoritarianism is not incompatible with negative economic liberty and competitive markets. Nor does negative liberty presuppose the absence of concentrated power, the elimination of subordination and the equality of status, which the republican tradition perceived as the economic corollary of a republican democracy. On the contrary, negative liberty remains agnostic about imbalances of economic power, dependence or subordination, as long as it does not involve involuntary interference.[266]

This chapter shows that decline of the idea of a competition-democracy nexus into irrelevance was not only the passive consequence of a shift from republican to negative liberty as the normative foundation of modern antitrust. On the contrary, Chicago and post-Chicago antitrust have actively purged antitrust law from the idea of a competition-democracy nexus by championing the consumer welfare approach and disparaging the consideration of non-economic values as populism. As a consequence, the concentration of economic power is no longer considered as a source of unfreedom and threat to a democratic society and polity. Instead, within the framework of modern *laissez-faire* antitrust, economic power only raises concerns if it is *exercised* in the form of market power, that is, if it entails output restrictions or price increases. The dominating effects of the mere *existence* of concentrated economic power and its adverse effects beyond the strict perimeters of the market, for instance, on democracy, falls outside the analytical realm of modern antitrust. With the rise of the consumer welfare standard as a framework to operationalise negative liberty, the concern about republican liberty

[264] Hayek, Friedrich A. von, *The Road to Serfdom* (Routledge 2001) 72–74; I. Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty : incorporating Four essays on liberty/ Isaiah Berlin* (Oxford University Press 2002) 178; Pettit (n 132) 22.
[265] J. G. Valdés, *Pinochet's economists : the Chicago school in Chile* (Cambridge University Press 1995); J. Meadowcroft and Ruger William, 'Hayek, Friedman, and Buchanan: On Public Life, Chile, and the Relationship between Liberty and Democracy' (2014) 26(3) Review of Political Economy 358; B. Caldwell, Montes and Leonidas, 'Friedrich Hayek and His Visits to Chile' (2015) 28(3) The Review of Austrian Economics 261.
[266] Pettit (n 132) 11.

as non-domination and the idea of competition-democracy nexus have largely vanished from the normative landscape of modern competition law.

CHAPTER VII – THE OPERATIONALISATION OF LAISSEZ-FAIRE ANTITRUST AND THE DECLINE OF REPUBLICAN LIBERTY

> *It is my belief that economists, and policy-makers generally, have tended to over-estimate the advantages which come from governmental regulation. But this belief, even if justified, does not do more than suggest that government regulation should be curtailed.*[1]
>
> *The firm is better left alone.*[2]

1 Introduction

The previous chapter traced how the ascent of the Chicago School antitrust paradigm triggered the decline of republican antitrust and the idea of a competition-democracy nexus. It described how US antitrust and EU competition have increasingly jettisoned the concern about republican liberty and, instead, adopted the consumer welfare standard as a framework to align all three pillars of competition law with the value of negative liberty. The Chicago School revolution thus succeeded in substituting a narrow, negative concept of negative economic liberty as non-interference for the thick concept of republican liberty, understood as non-domination, as the normative foundation of antitrust law. Since negative, unlike republican liberty, is not closely associated with a republican or democratic form of government, this thinning out of the value of economic liberty competition law is supposed to protect, inevitably also severed the link between competition, competition law, and democracy that underpinned the idea of a competition democracy-nexus.

The analysis of the previous chapter focuses on how this shift from republican to *laissez-faire* antitrust manifested itself in the transformation of the policy objective of competition law. With the rise of the Chicago-inspired antitrust thinking, US and EU competition law increasingly abandoned the goal of preserving a polycentric market structure to the benefit of consumer welfare as the central policy objective of antitrust law. This chapter further explores

[1] R. H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law&Economics 1 18.
[2] R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 196.

this transformation in greater depth. It inquires into how this transformation also reshaped what we have identified as the major policy instruments through which republican antitrust had operationalised the concern about republican liberty as non-domination: namely, the role of presumptions, the standard of proof and the understanding of the costs and benefits of antitrust law.

Alongside with the readjustment of the overarching policy objective, the recalibration of these three policy parameters constituted the major channels or vectors of the transformation of republican into *laissez-faire* antitrust. This chapter thus seeks to enhance our understanding of how modern antitrust operationalises negative economic liberty and how the shift from republican to *laissez-faire* antitrust has affected the concrete interpretation and application of competition law. Only by understanding how this shift reconfigured the concrete application of competition law on both sides of the Atlantic, one can fully grasp how the rise of consumer welfare standard displaced republican liberty as non-domination by a thinned out understanding of negative liberty as non-interference and led to the disappearance of the idea of a competition-democracy nexus.

In focusing on the recalibration of these three policy instruments, this chapter makes two contributions to the existing literature. First, it shows that the rise of *laissez-faire* antitrust and the decline of the idea of a competition-democracy nexus was more than just the result of the crowding out of political goals by the economic goal of consumer welfare under the auspices of the Chicago School. The analysis of this chapter thus goes beyond the standard account of the rise of the Chicago School and the More Economic Approach. Existing scholarly literature, indeed, mostly focuses on how the rise of the Chicago School and the More Economic Approach has displaced a multi-value approach by the single goal of consumer welfare and has transformed the legal analysis to identify when an agreement, unilateral conduct or merger amounts to a violation of competition law.[3] This chapter complements this conventional

[3] R. A. Posner, 'The Chicago School of Antitrust Analysis' (1979) 127(4) University of Pennsylvania Law Review 925 933–934; R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051 1051; H. Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84(2) Michigan Law Review 213 226–233; E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140 1140, 1145, 1155; E. M. Fox and L. A. Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming from-Where Are We Going' (1987) 62 N.Y.U. L. Rev. 936 956, 956-960; E. M. Fox, 'The Battle for the Soul of Antitrust' (1987) 75(3) California Law Review 917 918; J. J. Flynn, 'The Misuse of Economic Analysis in Antitrust Litigation' (1980) 12 Sw. U. L. Rev. 335 338–339; L. M. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harv. L. & Pol 235 269–277; L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710 718–722; L. M. Khan, 'The Ideological Roots of America's Market Power Problem' [2018] Yale Law Journal Forum 960, 972; T. Wu, 'After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice' 2018 Competition Policy

account by focusing on how the shift from republican to *laissez-faire* antitrust has recalibrated the use of legal presumptions, the standard of proof and the error-cost framework as the essential parameters of republican antitrust.

Second, this chapter challenges the view that the decline in the role of legal presumptions,[4] the readjustment of the standard of proof,[5] and a recalibration of the error-cost framework[6] were the logical consequence of the conversion towards the consumer welfare approach and the attempt of the Chicago-inspired antitrust movement to enhance the economic accuracy and precision of antitrust enforcement. The chapter challenges the conventional account that portrays the recalibration of these policy instruments as the main channel through which a new economic understanding of competition law coined by Chicago ideas has been incorporated into competition enforcement. This chapter, instead, argues that the finetuning of these three policy instruments also served as central transmission belt to translate a new, negative understanding of economic liberty into concrete antitrust policy. By exploring how the transformation of competition law along these three vectors has contributed to an alignment of antitrust policy with the logic of negative liberty, this chapter also shows how the recalibration of the use of legal presumptions, the standard of proof and the error-cost framework have contributed to a decline of the role of republican liberty and the idea of a competition-democracy nexus.

In so doing, the chapter offers a different perspective on the rise of the Chicago School and the More Economic Approach. This redesigning of legal presumptions, the standard of proof and the error-cost framework not only enhanced the precision of antitrust enforcement but also led to a decline in the protective scope of antitrust law. Instead of ensuring a 'probabilistically unweighted' protection of liberty, *laissez-faire* antitrust only guarantees a probabilistically weighted protection of market participants against actual or likely

International 3; T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018) 83–92.

[4] Fox and Sullivan (n 3), 954; D. A. Crane, 'Rules versus Standards in Antitrust Adjudication' (2007) 64 Wash. & Lee L. Rev. 49; Khan and Vaheesan (n 3), 272–295; A. Christiansen and W. Kerber, 'Competition Policy with Optimally Differentiated Rules Instead of per se Rules vs. Rule of Reason' (2006) 2(2) Journal of Competition Law and Economics 215; S. C. Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (2017) <https://scholarship.law.georgetown.edu/facpub/2007/>.

[5] D. Bailey, 'Standard of proof in EC merger proceedings: A common law perspective' (2003) 40(4) Common Market Law Review 845.

[6] A. Devlin and M. Jacobs, 'Antitrust Error' (2010) 52 Wm. & Mary L. Rev. 75; J. B. Baker, 'Taking the Error out of "Error Cost" Analysis: What's Wrong With Antitrust's Right' (2015) 80(1) Antiturst Law Journal 1; P. Larouche and M. P. Schinkel, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act' (TILEC Discussion Paper No. 2013-02, Tilburg 2013)) 13; H. First and S. Weber Waller, 'Antitrust's Democracy Deficit' (2013) 81(5) Fordham Law Review 2750-2572.

interference.[7] This curtailing of the scope of antitrust law and thinning out of the type of economic liberty guaranteed by antitrust law was primarily motivated by the ideological goal of shielding negative entrepreneurial liberty from state intervention.

This chapter is divided into three parts. Section 2 describes how the rise of *laissez-faire* antitrust has eroded the importance of presumptions of illegality for competition law enforcement on both sides of the Atlantic (Section 2). Section 3 shows how the shift of antitrust law from a republican to a *laissez-faire* approach led to a tightening of the requisite standard of proof or threshold of anticompetitive harm for finding a violation of competition rules. With the rise of the Chicago-inspired More Economic Approach, US and EU competition law have shifted towards a standard of proof, which in line with the probabilistic logic of negative liberty requires the showing of actual or likely, rather than potential harm. (Section 3). The third change which precipitated the shift from republican to *laissez-faire* antitrust was the incremental endorsement of the Chicagoan understanding of the costs and benefits of state intervention by the US and EU antitrust authorities and courts. The application of all three pillars of competition law nowadays follows the presumption that the costs of an erroneous antitrust intervention exceed the costs of erroneous non-intervention. This error-cost framework, coined by the Chicago School, suggests that in the case of doubt, antitrust law intervention should err on the side of non-intervention and under-enforcement. The error-cost framework as source-code of modern antitrust law enforcement is hence increasingly skewed in favour of preserving the negative liberty of businesses. (Section 4).

2 The Decline of Presumptions of Illegality and the Operationalisation of Negative Liberty

Presumptions of illegality have been a central feature of republican antitrust (see Chapter V). These presumptions served republican antitrust as a transmission belt to give effect to the overarching value of republican liberty as non-domination and its operationalisation through the structuralist policy objective of preserving a polycentric market structure. Republican antitrust thus relied on broadly construed presumptions of illegality to create conclusive or *prima facie* rules against specific forms of agreements, unilateral conduct, and mergers. These presumptions were based on the adverse effect of specific forms of business conduct on the polycentric market structure and the resulting potential harm and domination.

[7] P. Pettit, 'Freedom in the Market' (2006) 5(2) politics, philosophy & economics 131 137–138.

With the ascent on the consumer welfare standard, this extensive use of presumptions became a red-rag for the Chicago scholars and the proponents of the More Economic Approach. Indeed, they identified the extensive use and broad scope of presumptions of illegality as a significant source of welfare losses and a clear symptom for the lack of economic sophistication and accuracy of republican antitrust. Most importantly, the use of overly broad presumptions of illegality led to what they perceived as undue or excessive state interference with the negative entrepreneurial liberty of businesses. The proponents of a *laissez-faire* antitrust, therefore, advocated the adoption of the more versatile rule of reason standard, which requires an inquiry into the actual or likely effects of business conduct on consumer welfare, as the predilect adjudicative framework to implement the consumer welfare standard and the goal of negative liberty through antitrust policy. [8]

The rise of *laissez-faire* antitrust prompted a steep decline in the importance of presumptions of illegality and triggered their alignment with the goal of negative liberty. With the ascent of the consumer welfare standard, US and EU courts and enforcers have importantly curtailed the scope of form-based presumptions of illegality to the benefit of a rule of reason analysis that inquires into the case-specific effects of the agreement, unilateral conduct or merger at issue. The remaining presumptions of illegality also experienced a fundamental reinterpretation of their underpinning rationale. Instead of being informed by the concern about potential domination, presumptions of illegality are increasingly considered as mere generalisations of the actual or likely welfare effects of specific conduct (2.1). As US and EU Courts increasingly adopted a sliding-scale multi-stage rule of reason analysis as the default approach for antitrust analysis, they curtailed not only the scope of presumptions of illegality but also lightened their weight (2.2). In addition to eroding the role of presumptions of illegality, the US and EU courts also increasingly rely on presumptions of legality to insulate to the largest extent possible the entrepreneurial liberty of businesses from antitrust intervention (2.3). This decline of the role of presumptions of illegality, the rise of a sliding-scale approach and the

[8] R. H. Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1966) 75(3) The Yale Law Journal 775 832–840; Opinion of Advocate General Roemer in Case 56/65 *Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:17; Opinion of Advocate General Roemer in Case 56/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:19.V. Korah, 'From Legal Form Toward Economic Efficiency - Article 85 (1) of the EEC Treaty in Contrast to U.S. Antitrust' [1990] Antitrust Bulletin 1009, 1021. V. Korah, 'The Rise and Fall of Provisional Validity: The Need for a Rule of Reason in EEC Antitrust' (1981) 3(2) Northwestern Journal of International Law & Business 320 354. J. S. Venit, 'Slouching towards Bethlehem: The Role of Reason and Notification in EEC Antitrust Law' (1987) 10(1) B. C. Int 17 44; B. E. Hawk, 'System failure: Vertical Restraints and EC Competition Law' (1995) 32 Common Market Law Review 973 974; R. Wesseling, *The modernisation of EC antitrust law* (Hart 2000) 81–101.

proliferation of presumptions of legality have aligned all three substantive pillars of US and EU antitrust with the logic of negative liberty (2.4).

2.1 The Shrinking Scope of Presumptions

The shrinking of presumptions of illegality to the benefit of a rule of reason analysis of coordinated conduct (2.1.1), unilateral conduct (2.1.2) and mergers (2.1.3) is perhaps the most obvious transformation that drove the shift from republican to *laissez-faire* antitrust. This narrowing of legal presumptions also brought about a reduction in the scope of economic liberty of market participants under the republican approach, while firmly shielding negative entrepreneurial liberty against state intervention.

2.1.1 The Shrinking Scope of Presumptions of Illegality Against Coordinated Conduct

A key feature of the growing influence of the Chicago School and More Economic Approach on the interpretation of § 1 of the Sherman Act and Article 101 TFEU is the shrinking scope of presumptions of illegality against certain forms of coordination amongst competitors. With the ascent of the consumer welfare standard, US[9] and EU courts[10] have increasingly disavowed the broad application of form-based legal presumptions. From the late 1970s onwards, the Supreme Court increasingly incorporated the Chicagoan precept that *per se* rules should be limited to a 'small group of restraints',[11] such as horizontal price-fixing and market sharing agreements, which are highly likely to diminish output without generating any redeeming efficiencies.[12] More recently, the Court of Justice of the EU has also clarified that the presumption of illegality under the by-object category must be applied restrictively[13] and

[9] *Cont'l T.V. v. GTE Sylvania*, 433 U.S. 36 (1977) 46–47, 58. Quoting Chief Justice Hughes *Appalachian Coals, Inc. v. United States* 288 U.S. 344 (1933) 360, 377. See also the *GTE Sylvania* Court criticising the formalistic approach of the majority in *Schwinn Cont'l T.V. v. GTE Sylvania*, (n 9) 54. See for the *Leegin* Court's criticism of *Dr. Miles* being grounded in a 'formalistic legal doctrine' rather than 'demonstrable economic effects.' *Leegin Creative Leather Prods. v. PSKS, Inc.* 551 U.S. 877 (2007) 887–888. the proposition that '[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disavowed in antitrust law' *Eastman Kodak Co. v. Image Tech. Servs.* 504 U.S. 451 (1992) 466–467; *Ohio v. American Express Co.* 585 U.S. ___ (2018) 10–11.

[10] Case C-67/13 P *Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204 para. 58.

[11] *Ohio v. American Express Co.* (n 9) 8.

[12] *White Motor Co. v. United States* 372 U.S. 253 (1963) 263; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1 (1979) 26. *National Collegiate Athletic Ass'n v. Board of Regents* 468 U.S. 85 (1984) 100, 107. *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 886; *Ohio v. American Express Co.* (n 9) 8; *California Dental Assn. v. FTC* 526 U.S. 756 (1999) 777. See for instance Bork (n 8), 838–839; Posner (n 3), 925, 932; F. H. Easterbrook, 'The limits of Antitrust' (1984) 63(1) Tex. L. Rev. 1 2; F. H. Easterbrook, 'Workable Antitrust' (1986) 84(1696) Michigan Law Review 1701.

[13] Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) para. 58. See also Case C-345/14 *Maxima Latvija* ECLI:EU:C:2015:784 para. 18; Case C-469/15 P *FSL and Others v Commission* ECLI:EU:C:2017:308 para. 103; *Opinion of Advocate General Wathelet in* Case C-373/14 P *Toshiba*

only covers those agreements whose adverse effects on consumer welfare are so likely that any assessment of their actual effects becomes redundant.[14]

While narrowing the scope of presumptions against coordinated conduct, the US Supreme Court and EU courts increasingly rely on a casuistic, rule or reason-like analysis to ascertain the actual or likely effects of coordinated conduct.[15] The rule of reason or effects-based analysis has thus been enthroned on both sides of the Atlantic as default legal and analytical category for the enforcement of § 1 of the Sherman Act[16] and Art. 101 (1) TFEU.[17] The application of presumptions of illegality under the *per se* rule and by-object category, are, by contrast, increasingly considered the exception.[18]

Instead of adopting an unstructured version of the rule of reason analysis and engaging in a sweeping balancing of pro-and anticompetitive effects,[19] the US courts over time devised the rule of reason as a 'three-step, burden-shifting framework' to identify the competitive 'net effect' of a restraint.[20] Each step of this burden-shifting rule of reason reallocates the burden of proof between the parties. In a first step, the antitrust plaintiff has to put forth a *prima facie* showing that the agreement at issue restricts competition by demonstrating that it has an actual or likely substantial anticompetitive effect.[21] If the antitrust plaintiff has discharged its burden of proofing a *prima facie* anticompetitive restraint, in a second step, the burden shifts to the

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Corporation v Commission ECLI:EU:C:2015:427 para. 26; Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* ECLI:EU:C:2019:678 para. 40.

[14] Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) paras. 51, 57.

[15] *Cont'l T.V. v. GTE Sylvania,* (n 9) 49-51, 54-55.*Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 895. *National Soc. of Professional Engineers v. United States* 435 U.S. 679 (1978) 691–692.*Brooke Group v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1993) 237; *Ohio v. American Express Co.* (n 9) 17. See however *Ohio v. American Express Co.* (n 9) Justice Breyer, dissenting 22-23. See in this sense also the Court of Justice's observation that too broad an application of the presumption of illegality under the by-object category would unduly relieve the Commission from its 'obligation to prove the actual effects on the market of agreements.' Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) para. 58; Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* ECLI:EU:C:2014:1958 para. 58.

[16] *Cont'l T.V. v. GTE Sylvania,* (n 9) 49; *Ariz. v. Maricopa County Medical Soc.* 457 U.S. 332 (1982) 343; *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 885.

[17] Guidelines on the application of Article 81(3) of the Treaty. OJ [2004] C 101/97 para. 24, see also 17-18; Communication from the Commission on the application of the Community competition rules to vertical restraints - Follow-up to the Green Paper on vertical restraints. OJ [1998] C 365/3 p. 3-4.

[18] *Cont'l T.V. v. GTE Sylvania,* (n 9) 58; *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 895.

[19] *Chicago Board of Trade v. United States* 246 US 231 (1918).

[20] *Ohio v. American Express Co.* (n 9) 9.*California Dental Assn. v. FTC* (n 12) Justice Breyer dissenting, 782, 793. *Ohio v. American Express Co.* (n 9) Justice Breyer, dissenting, 2-3, 8. See for a general discussion H. Hovenkamp, 'The Rule of Reason' (2018) 70 Fla. L. Rev. 81 102–118. for the very limited role of 'balancing' in the rule of reason analysis H. Hovenkamp, 'Antitrust Balancing' (2016) 12 N.Y.U. J.L. & Bus. 369 371, 374-375.

[21] *FTC v. Indiana Federation of Dentists* 476 U.S. 447 (1986) 461–462; *National Collegiate Athletic Ass'n v. Board of Regents* (n 12) 110. *California Dental Assn. v. FTC* (n 12) 783. *Ohio v. American Express Co.* (n 9) 9. ibid Justice Breyer, dissenting 2. *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 885- 886, 897-898. *Copperweld Corp. et al. v Independence Tube Corp.* 467 U.S. 752 (1984) 768.

defendant who has to rebut the presumption of unreasonableness, by advancing a pro-competitive justification for the restraint.[22] If the defendant carries the burden by showing procompetitive effects, the burden once more shifts to the plaintiff who has to make the case that the procompetitive efficiencies can be obtained through less restrictive means or that 'on balance' the procompetitive efficiencies do not outweigh the anticompetitive effects of the agreement. [23]

The modernisation of Art. 101 (3) TFEU by Regulation 1/2003 and the 2004 Commission's Guidelines also paved the way for a burden-shifting rule of reason analysis under Art. 101 TFEU. By transforming the application of Art. 101 (3) TFEU from a notification into a self-assessment regime, the modernization initiative opened the door for a rule of reason like assessment and 'balancing' of anti- and pro-competitive effects under Art. 101 (3) TFEU.[24] In narrowing down the type of benefits that qualify for an exemption under Art. 101 (3) to purely economic price and non-price efficiencies,[25] the Commission sought to ensure the commensurability of the values taken into account and reduce the complexity of the balancing under Art. 101 (3) TFEU. In enhancing the administrability of Art. 101 (3) TFEU, the reform sought to encourage the use of Art. 101 (3) TFEU by defendants (and courts) to fully exploit its potential to rebut the finding of a *prima facie* of anticompetitive effects by showing that the net welfare effect of their agreement is positive and that there is no less restrictive way to achieve these efficiencies.[26]

2.1.2 The Shrinking Scope of Presumptions of Illegality Against Monopoly Power and Unilateral Conduct in US and EU Competition Law

A similar retreat of presumptions of illegality can also be discerned in the realm of unilateral conduct. This process already initiated years before the Chicago School revolution reached the pinnacle of its influence. In *Grinnel*, [27]decided in 1966, the Supreme Court unequivocally ruled out for good the application of any situational standard under § 2 of the Sherman Act which would trigger a presumption of illegality for monopolistic firms in the absence of exclusionary conduct. The Court, instead, fashioned the basic conduct test that until

[22] *FTC v. Indiana Federation of Dentists* (n 21) 459. *California Dental Assn. v. FTC* (n 12) 787. *Ohio v. American Express Co.* (n 9) 9. ibid Justice Breyer dissenting, 3, 24-25.
[23] *Ohio v. American Express Co.* (n 9) 10; *Ohio v. American Express Co.* (n 9) Justice Breyer, dissenting 3.
[24] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ [2003] L 1/1; Guidelines on the application of Article 81(3) of the Treaty (n 17).
[25] Guidelines on the application of Article 81(3) of the Treaty (n 17) paras. 59-72.
[26] See for an insightful discussion A. C. Witt, 'Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order' (2012) 8(3) Euro Comp J 443.
[27] *United States v Grinnel Corp.* 284 U.S. 563 (1966).

today governs the application of the prohibition of monopolization under § 2 of the Sherman Act. This two-pronged test assumes that

> *the offense of monopoly under the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.*[28]

The Court, thus, re-established in full force the principle announced in *US Steel*[29] that size as such is not unlawful under § 2; or, in other words, the 'possessing of monopoly power is not itself an antitrust violation.'[30]

Grinnel marked an early response by the Supreme Court to mounting criticism of the hostile stance against monopoly power underpinning the republican approach in *Alcoa,*[31] *American Tobacco*[32] and subsequent cases.[33] Non-Chicago[34] and Chicago Scholars[35] alike objected that this line of cases created an undue presumption against monopoly power and size as such. The date of the *Grinnel* judgment also illustrates that the first cracks in the republican approach were showing already prior to the end of the Warren Court era in 1969 – the year that we use as a bright-line to roughly delineate the 'republican era' in US antitrust. The fact that *Grinnel* was decided only one year before *Utah Pie,* [36] moreover, illustrates that the transition from the republican towards a *laissez-faire* approach was not a linear one, but permeated by numerous ideological tensions and contradictions. The far-reaching implications of *Grinnel* on the interpretation of § 2 of the Sherman Act were therefore not immediately obvious. This also explains why the *Grinnel* was initially received with little enthusiasm by Chicago School scholars.[37]

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[28] ibid 570.
[29] *United States v. U. S. Steel Corp.* 251 U.S. 417 (1920) 451.
[30] *United States v. Microsoft Corporation* 253 F.3d 34 (D.C. Cir.2001) 51, 58.
[31] For a discussion of these cases, see Chapter IV and V. *United States v. Alcoa* 148 F.2d 416 (2d Cir. 1945) 427–432.
[32] *American Tobacco Co. v. U.S.* 328 U.S. 781 (1946). 809–814.
[33] *United States v. Griffith* 334 U.S. 100 (1948) 107; *United States v. Paramount Pictures* 334 U.S. 131 (1948) 173–174; *Schine Theatres v. United States* 334 U.S. 110 (1948) 129–130.
[34] M. A. Adelman, 'Effective Competition and the Antitrust Laws' (1948) 61(8) Harvard Law Review 1289 1308–1311.
[35] A. Director and E. H. Levi, 'Law and the Future: Trade Regulation' (1956) 51 Nw. U. L. Rev. 281 284–290; R. H. Bork and Bowman, Ward S. Jr. 'The Crisis of Antitrust' (1965) 65(3) Columbia Law Journal 363 369–371.
[36] *Utah Pie Co. v. Continental Baking Co.* 386 U.S. 685 (1967).
[37] For instance, Bork writing in 1978, only mentioned *Grinnel* in a footnote Bork (n 2) 172.

It was not before the late 1970s, that the lower courts[38] and the US Supreme Court[39] began to harness the *Grinnel* test as a scaffolding for a rule of reason analysis[40] that determines the legality of unilateral conduct under § 2 of the Sherman Act on the basis of its impact on consumer welfare. Akin to the modernised rule of reason under § 1 of the Sherman Act, this rule of reason framework operates as a three-step burden shifting-mechanism.[41] By gradually developing a rule of reason approach towards monopolistic firms, the US courts thus realigned the § 2 analysis with *Standard Oil*, which had established the rule of reason as the overarching adjudicative principle to assess the legality of business conduct not only under § 1 but also § 2 Sherman Act.[42]

As a result of this shift towards a burden-shifting rule of reason approach, presumptions of illegality against unilateral conduct have largely disappeared in US antitrust. The US courts reacted to the Chicago School's 'single monopoly profit'[43] critique and its refinement by post-Chicago analysis[44] by abandoning structural presumptions against exclusive dealing

[38] See for instance the Court of Appeals for the 9th Circuit holding that 'The defendant's acts are properly analyzed analogously to contracts, combinations and conspiracies under § 1 of the Sherman Act: the test is whether the defendant's acts, otherwise lawful, were *unreasonably* restrictive of competition' *Cal. Computer Prod. v. Int'l Business Machines* 613 F.2d 727 (9th Cir. 1979) 735–736 and fn. 9; see also *MCI Communications Corp. v. American Tel. & Tel. Co.* 708 F.2d 1081 (7th Cir. 1983) 1106–1111. The case law of this time, however, also exhibits how much lower courts struggled to square the *Grinnell* formula with earlier cases such as *Alcoa*, *American Tobacco* or *Griffith.* This for instance, clearly transpires from *Berkey Photo*. In this case, the Court of Appeals for the 2nd Circuit noted: 'Thus, the rule of *Grinnell* must be read together with the teaching of *Griffith,* that the mere existence of monopoly power "whether lawfully or unlawfully acquired," is in itself violative of § 2, "provided it is coupled with the purpose or intent to exercise that power."' *Berkey Photo, Inc. v. Eastman Kodak Co.* F.2d 263 (2d Cir. 1979) 274–275; cf. 281. Cert. denied *Berkey Photo, Inc. v. Eastman Kodak Co.* 444 U.S. 1093 (1980). See for a similar struggle *Telex Corp. v. Int'l Business Mach. Corp* F.2d 894 (10th Cir. 1975) 926–927.

[39] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985) 596 fn. 19; *Eastman Kodak Co. v. Image Tech. Servs.* (n 9) 481; *United States v. Microsoft Corporation* (n 30) 58; *Verizon Communications Inc v Law Offices of Curtis Trinko* 540 US 398 (2004) 407; *Pacific Bell Telephone Co. dba AT&T California, et al. v. linkLine Communications, Inc. et al.* 555 U.S. 438 (2009) 7.

[40] *United States v. Microsoft Corporation* (n 30) 59; M. S. Popofsky, 'Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules' (2005) 73 Antitrust L.J. 435 437-448, 456.

[41] *United States v. Microsoft Corporation* (n 30) 50-51, 58-59.

[42] ibid 59.

[43] Director and Levi (n 35), 288–296. Bowman, Ward S. Jr. 'Tying Arrangements and the Leverage Problem' (1957) 67 Yale Law Journal 19 19, 21, 23–24, 27-29; Bork and Bowman, Ward S. Jr. (n 35), 366–368. Bork (n 2) 140-143, 156, 299-303, 306-307, 309, 324-328, 365, 373-381. R. A. Posner, *Antitrust Law* (University of Chicago Press 2001) 199–201. Posner (n 3), 926.

[44] By pointing out the limitations of the 'singe monopoly profit' theorem and pointing out the various strategic uses of exclusive dealing and tying, the post-Chicago Scholarship did not endorse the Chicago view that exclusive dealing and tying should subject to a presumption of *per se* legality. M. Whinston, 'Tying, Foreclosure, and Exclusion' (1990) 80(4) American Economic Review 837 838. S. C. Salop and D. T. Scheffman, 'Raising Rivals' Costs: Papers and Proceedings of the Ninety-Fifth Annual Meeting of the American Economic Association' (1983) 73(2) American Economic Review 267 267–268; T. G. Krattenmaker and S. C. Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96(3) The Yale Law Journal 209 209 213-214, 224-231, 234-238, 249, 252, 254-255, 267–268.P. Bolton and P. Aghion, 'Contracts as Barriers to Entry' (1987) 77(3) The American Economic Review 388 399. E. B. Rasmusen, J. M. Ramseyer and Wiley, John S. Jr. 'Naked Exclusion' (1991) 81 American Economic Review 1137 1137-1138,

agreements which foreclose a high market share[45] and by importantly narrowing the *per se* rule against tying.[46] The dissenting Justices in *Jefferson Parish*,[47] lower courts[48] and commentators even went one step further and pushed for full alignment of the antitrust treatment of tie-ins with the rule of reason assessment of exclusive dealing agreements.[49] Under this rule of reason analysis, the factfinder would focus on the 'quantitative' and 'qualitative substantiality' of the agreement at issue,[50] by inquiring into the magnitude and strength (e.g. duration,

1143. Whinston (n 44). J. Carbajo, D. de Meza and D. Seidman, 'A Strategic Motivation for Commodity Bundling' (1990) 38(3) Journal of Industrial Economics 283. B. Nalebuff, 'Bundling' (1999). Yale ICF Working Paper 99-14. B. Nalebuff, 'Bundling, tying and portfolio effects: Part 2: Case studies' (2003). DTI Economics Paper 1. B. Nalebuff, 'Bundling, tying and portfolio effects: Conceptual issues: Part 1' (2003). DTI Economics Paper 1. B. Nalebuff, 'Bundling as Entry Barrier' (2004) 119(1) The Quarterly Journal of Economics 159. B. Nalebuff, 'Exclusionary Bundling' (2005) 50(3) Antitrust Bulletin 321. E. Elhauge, 'Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory' (2009) 123 Harvard Law Review 397 413–417. C. Ahlborn, D. S. Evans and A. J. Padilla, 'The Antitrust Economics of Tying: a Farewell to *Per se* Illegality' (2004) 49(1-2) Antitrust Bulletin 287 325–328. D. W. Carlton, 'A General Analysis of Exclusionary Conduct and Refusal to Deal: Why Aspen and Kodak Are Misguided' (2001) 68(3) Antitrust Law Journal 659 667–668, 671, 675. D. W. Carlton and M. Waldmann, 'The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries' (2002) 33(2) RAND Journal of Economics 194. J. P. Choi and C. Stefanadis, 'Tying, Investment and the Dynamic Leverage Theory' (2001) 32 RAND Journal of Economics 52. R. C. Feldmann, 'Defensive Leveraging in Antitrust' (1998-1999) 87 Georgetown Law Journal 2079.

[45] The Supreme Court developed for the first time a rudimentary rule of reason approach in *Tampa Electric Co. v. Nashville Coal Co.* 365 U.S. 320 (1961) 328-329, 334. J. M. Jacobson, 'Exclusive Dealing, Foreclosure and "Consumer Harm"' (2002) 75 Antitrust Law Journal 311 322, 324. In *Omega* the Court of Appeals for the 9th Circuit upheld an exclusive dealing agreement despite of the substantial foreclosure rate of 38% and the defendant's market share of 55% under § 3 of the Clayton Act *Omega Environmental, Inc. v. Gilbarco, Inc.* 127 F. 3d 1157 (9th Circ. 1997) 1162–1163. In *CDC* Court of Appeals for the 2nd Circuit upheld an exclusive dealing agreement despite the defendant's large market share of 80 % under § 3 Clayton and §§ 1 and 2 Sherman Act. *CDC Technologies, Inc. v. IDEXX Laboratories, Inc.* 186 F.3d 74 (2d Cir. 1999) 80–81; *United States v. Microsoft Corporation* (n 30) 70.

[46] *U. S. Steel Corp v. Fortner Enterprises (Fortner II)* 429 U.S. 610 (1977) 620–622. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* 466 U.S. 2 (1984) 11, 16-18, 21; *Eastman Kodak Co. v. Image Tech. Servs.* (n 9) 462; *Illinois Tool Works Inc. v. Independent Ink, Inc.* 547 U.S. 28 (2006) 37. For the claim that *Jefferson Parish* never created a real *per se* rule but rather a structured rule of reason E. Elhauge, 'Rehabilitating Jefferson Parish: Why ties without a substantial foreclosure share should not be *per se* legal' (2016) 80(463) Antitrust Law Journal 463–464.

[47] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (n 46) Justice O'Connor concurring, with whom the Chief Justice Powell, and Justice Rehnquist joined 35-44.

[48] *United States v. Microsoft Corporation* (n 30) 59, 84, 90-93.

[49] H. Hovenkamp, 'Tying and the Rule of Reason: Understanding Leverage, Foreclosure, and Price Discrimination' (2011) 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759552>; D. S. Evans, 'The Poster Child for Antitrust Modernization' (2005) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=863031> accessed 7 August 2019.

[50] Jacobson (n 45), 322. *United States v. Microsoft Corporation* (n 30) 60, 70-71. *LePage's Inc. v. 3M* 324 F.3d 141 (3d. Cir. 2003) 159, 161. *United States v. Dentsply Int'l, Inc.* 399 F.3d 181 (3d Cir. 2005). 189–191, 193; *McWane, Inc. v Federal Trade Commission* No. 14-11363 (11th Circ. 2015) 35.

terminability)[51] of its foreclosure rate and effect.[52] Such a rule of reason analysis would also account for potential pro-competitive efficiencies of the tying agreements.[53]

A similar erosion of presumptions of illegality also reshaped the approach of US courts towards pricing conduct by dominant firms. In *Matsushita* (1986)[54] and *Brooke Group* (1993),[55] the Supreme Court jettisoned the republican view, most prominently embodied by *Utah Pie,* that aggressive non-linear pricing strategies by large companies are tainted with the inherent tendency to undermine a polycentric market structure and foreclose competitors.[56] Instead, the Court endorsed the emerging view, shared by Chicago and Harvard Scholars alike, that aggressive pricing by large firms is most of the time pro-competitive.[57] Although post-Chicago

[51] *Barry Wright Corp. v. ITT Grinnell Corp*. 724 F.2d 227 (1st Cir. 1983) 237. *Roland Machinery Company v. Dresser Industries Inc.* 749 F. 2d 380 (7th Cir. 1984) 395. *Omega Environmental, Inc. v. Gilbarco, Inc.* (n 45) 1163. *CDC Technologies, Inc. v. IDEXX Laboratories, Inc.* (n 45) 80. *Concord Boat Corp. v. Brunswick Corp.* 207 F.3d 1039 (8th Cir. 2000) 31. Dissenting Statement of Commissioner Joshua D. Wright in in the matter of MCWANE, INC. ET AL. Docket No. 9351 43–44. *ZF Meritor, LLC v. Eaton Corp.* 696 F.3d 254 (3d Cir. 2012) 31–33. Some courts have however refrained from endorsing a presumption of *per se* legality of exclusive dealing agreements with a duration of less than one year as suggested by Judge Posner in *Roland*. See for instance *LePage's Inc. v. 3M* (n 50) 157; *United States v. Dentsply Int'l, Inc.* (n 50) 194. *McWane, Inc. v Federal Trade Commission* (n 50) 35.

[52] *United States v. Microsoft Corporation* (n 30) 61; Elhauge (n 44), 400, 446-447. D. S. Evans and M. Salinger, 'Why do firms bundle and tie?: Evidence from Competitive Markets and Implications for Tying Law' (2005) 22(1) Yale Journal on Regulation 37 84–89. Carlton (n 44), 671, 675. D. W. Carlton and K. Heyer, 'Appropriate Antitrust Policy Towards Single-Firm Conduct: Extraction vs. Extension' (2007-2008) 20 Antitust 50 50–54. D. W. Carlton and M. Waldmann, 'Brantley versus NBC Universal: Where's the Beef?' (2012) 8(2) Competition Policy International 1 10–12. Evans, 'The Poster Child for Antitrust Modernization' (n 49) 17. E. Hovenkamp and H. Hovenkamp, 'Tying Arrangements and Antitrust Ham' (2010) 52(4) Arizona Law Review 925 966–967. B. H. Kobayashi, 'Spilled ink or economic progress: The Supreme Court's decision in Illinois Tool Works v Independent Ink' (2008) 53(1) Antitrust Bulletin 5 29–33. Some authors even call for a presumption of *per se* legality of tying agreements Ahlborn, Evans and Padilla (n 44), 290, 330-339. K. N. Hylton and M. Salinger, 'Tying Law and Policy: A Decision-Theoretic Approach' (2001) 69 Antitrust Law Journal 502, 506-507, 525-526. See for a critical discussion Elhauge (n 44), 400; Elhauge (n 46), 464–465.

[53] Hylton and Salinger (n 52), 499–505.

[54] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574 (1986) 589, 595; *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 226.

[55] *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 223, 226.

[56] *Utah Pie Co. v. Continental Baking Co.* (n 36). Bork (n 2) 387.

[57] Bork (n 2) 145, 149, 151-154; Posner (n 3), 940. Posner (n 43) 207-208, 210-211. Easterbrook (n 12), 26–27; L. G. Telser, 'Cutthroat Competition and the Long Purse' (1966) 9 Journal of Law and Economics 259 264. P. Areeda and D. F. Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88(4) Harvard Law Review 697 697–698.

Scholarship pointed out that predatory pricing may be a more recurrent[58] and successful[59] exclusionary strategy than the Chicago School suggested, [60] the Supreme Court deliberately adopted a two-pronged legal test, which makes it very difficult,[61] if not impossible, for plaintiffs to prove an anticompetitive predatory pricing scheme. Pursuant to the *Brooke Group* test, to sustain a predatory pricing case, a plaintiff has to show two elements. First, it has to demonstrate that the predator does not comply with the so-called 'Areeda-Turner test', as he sets its prices below an appropriate measure (such as AVC)[62] of its incremental costs.[63] Second, the plaintiff also has to demonstrate that the predator has a 'reasonable prospect', or under §2 of the Sherman Act, a 'dangerous probability' of successful recoupment.[64]

In *Brooke Group* and subsequent cases,[65] the Court thus established the incremental price-cost[66] test as '*a specific application of the "rule of reason" to exclusionary pricing*

[58] B. S. Yamey, 'Predatory Price Cutting: Notes and Comments' (1972) 15(1) The Journal of Law and Economics 129; E. H. Cooper, 'Attempts and Monopolization: A Mildly Expansionary Answer to the Prrophylactive Riddle of Section Two' (1974) 72(3) Michigan Law Review 373; R. O. Zerbe and Donald S. Cooper, 'An Empirical and Theoretical Comparison of Alternative Predation Rules' (1982) 61 Texas Law Review 655; M. R. Burns, 'New Evidence on Predatory Price Cutting' (1989) 10(4) Managerial and Decision Economics 327. For studies contradicting the sweeping claim that predatory pricing schemes are rare and rarely successful published shortly after F. Scott-Morton, 'Entry and Predation: British Shipping Cartels 1879-1929' (1997) 6 Journal of Economics & Management Strategy 679; D. Genesove and W. P. Mullin, 'Predations and its Rate of Return: The Sugar Industry, 1887-1914' (1997). NBER Working Pa*per se*ries 6032; R. O. Zerbe and M. T. Mumford, 'Does Predatory Pricing Exist: Economic Theory and the Courts after Brooke Group' (1996) 41(4) Antitrust Bulletin 949. For a discussion of these studies see P. Bolton, J. F. Brodley and M. H. Riordan, 'Predatory pricing: Strategic theory and legal policy' (2000) 88(8) Georgetown Law Journal 2239 2243–2246.
[59] O. E. Williamson, 'Predatory Pricing: A Strategic and Welfare Analysis' (1977) 87(2) The Yale Law Journal 284 285–286. W. J. Baumol, 'Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing' (1979) 89 Yale Law Journal 1 2–3. Posner (n 3), 925, 942; Posner (n 43) 218–219; J. F. Brodley and G. A. Hay, 'Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards' (1980-1981) 66 Cornell Law Review 738 753. The Supreme Court also ignored lower court cases which adopted alternative tests to the Areeda-Turner test *International Air Industries, Inc. v. American Excelsior Co.* 517 F.2d 714 (5th Cir.1975) 724.*William Inglis & Sons Baking Co. v. ITT Continental Baking Co. Inc.* 668 F.2d 1014 (9th Cir.1981) 1025; *Transamerica Computer Co. v. International Business Machines Corp.* 698 F.2d 1377 (9th Circ. 1983) 1386–1387. For an insightful discussion of those alternative tests and the decision to follow the Areeda-Turner test see *Barry Wright Corp. v. ITT Grinnell Corp.* (n 51) 231.
[60] J. S. McGee, 'Predatory Price Cutting: The Standard Oil (N. J.) Case' (1958) 1 Journal of Law and Economics 137. Koller, Roland H. II, 'The Myth of Predatory Pricing: An Empirical Study' (1971) 4(4) Antitrust Law & Economics Review 105; Bork (n 2) 144–145; Posner (n 43) 207-208, 210-211; Easterbrook (n 12), 34 fn. 71. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (n 54) 589. *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 226.
[61] ibid.
[62] ibid 223 fn 1.
[63] ibid 223. Areeda and Turner (n 57), 698-699, 711, 717-718.
[64] The Court went as far as affirming that this is even the case when price cutting is used to discipline a maverick in an oligopolistic market and thus allows firms to maintain supra-competitive prices *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 224.
[65] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* 549 U.S. 312 (2007) 325. *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 39) 414; *Pacific Bell Telephone Co. dba AT&T California, et al. v. linkLine Communications, Inc. et al.* (n 39) 11.
[66] *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 223. Areeda and Turner (n 57), 698-699, 711, 717-718.

conduct."[67] The Court thus made it clear that only pricing conduct that actually or likely interferes with an equally efficient competitor whose foreclosure entails consumer harm in the form of price increases would be considered an obstacle to economic liberty of other market participants. The Court thus relied on the price-cost test and recoupment filter to implement the consumer welfare standard as a legal benchmark to decide when dominant firm conduct jeopardises negative economic liberty and when the foreclosure of competitors is legitimate because it results from superior efficiency.

The decline of legal presumptions and the slow conversion towards an effects-based rule of reason approach have also made inroads into the application of Art. 102 TFEU to unilateral conduct by dominant firms. The European Commission, and in recent times also the Court of Justice[68] have increasingly followed the calls of the proponents of a More Economic Approach to operationalise the consumer welfare standard by abandoning the form-based to the benefit of a rule of reason approach. The proponents of the More Economic Approach championed the idea that the Commission and EU Courts should inquire into the actual effects of single-firm conduct, rather than simply inferring the anticompetitive effect of dominant firm conduct from its form. [69] In reaction to this criticism, the Commission and, more recently, the EU Courts have increasingly disavowed the role of form-based presumptions of illegality under Art. 102 TFEU. Instead, they have insisted on the importance of a casuistic analysis, which inquires into the actual or likely effects of dominant firm conduct on equally efficient competitors[70] and accounts for all the circumstances of the case.[71] At the same time, the Commission and the Court of Justice have become more attuned to the argument that welfare effects of unilateral conduct are often ambiguous, and that the assessment of unilateral conduct should, therefore, involve a rule of reason-like balancing of the pro- and anticompetitive effects of exclusionary conduct.[72]

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[67] *ZF Meritor, LLC v. Eaton Corp.* (n 51) 273.
[68] Case C-413/14 P *Intel v Commission* ECLI:EU:C:2017:632 paras. 137-140.
[69] Economic Advisory Group on Competition Policy (EAGCP), 'An economic approach to Article 82' (2005) 3-4, 7, 15 accessed 4 April 2015; R. O'Donoghue and A. J. Padilla, *The law and economics of Article 82 EC* (Hart Publishing 2006) 16–18.
[70] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Guidance Paper. OJ [2009] C 45/7 paras. 8, 20, 23-27. Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83 paras. 31, 39-40; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172 paras. 22, 25.
[71] Case C-52/09 *TeliaSonera Sverige* (n 70) para. 28; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 70) para. 26.
[72] Economic Advisory Group on Competition Policy (EAGCP) (n 69) 9-10,13; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 28-31; Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83 para. 76; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 70) paras. 40-42.

The Commission reacted to the widespread criticism against the form-based approach towards non-price conduct, [73] by significantly relaxing the existing legal presumptions against exclusive dealing and tying arrangements.[74] Although the Commission and the EU judicature have not explicitly overruled the presumption of illegality against exclusive dealing agreements[75] and tie-ins[76] by dominant firms, they have recognised the need for a more detailed analysis of their foreclosure effects. In more recent cases, they particularly relied on the showing of a substantial foreclosure rate, the importance of the foreclosed distribution channels and potential counterstrategies available to competitors to determine the lawfulness of exclusive dealing[77] and tying[78] under 102 TFEU.

A similar decline of the role of presumptions of illegality to the benefit of a rule of reason approach can also be observed in the field of unilateral pricing conduct by dominant firms. Unlike the US Courts, the EU Commission and the EU Courts refused to align their analysis of predatory pricing with the under-inclusive *Brooke Group* test by introducing the requirement of showing recoupment in addition to below-cost pricing.[79] The European

[73] J. D. Veltrop, 'Tying and Exclusive Purchasing Arrangements under EC Competition Law' (1994) 31 Common Market Law Review 549 551–552. Ahlborn, Evans and Padilla (n 44), 324–330. Economic Advisory Group on Competition Policy (EAGCP) (n 69) 25-26, 39, 41, 47-49. Stillman, Robert, Kühn, Kai-Uwe, Caffarra, Cristina, 'Economic Theories of Bundling and Their Policy Implications in Abuse Cases: An Assessment in Light of the Microsoft Case' (2005) 1(1) European Competition Journal 85 89–102, 109-110. Nalebuff (n 44) 9-10, 24-27, 39-62. D. Ridyard, 'Tying and bundling - cause for complaint?' (2005) 26(6) European Competition Law Review 316 317. P. Lugard, 'Eternal Sunshine on a Spotless Policy? Exclusive Dealing Under Article 82 EC,' (2006) 2(sup 1) European Competition Journal 163 166–169, 173-174, 178.

[74] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 46 (exclusive dealing) and 49 (tying).

[75] Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36 para. 89; Case C-413/14 P *Intel v Commission* (n 68) para. 137.

[76] Case No COMP/37.792 Microsoft. C (2004)900 final para. 841.Case T-201/04 *Microsoft Corp v Commission* ECLI:EU:T:2007:289 paras. 857, 868. See also Case No COMP/39.530 Microsoft (tying). OJ [2010] C 36/7 para. 34; Case No COMP/AT.40099 Google Android. C(2018) 4761 final para. 749.

[77] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 34-36, 20.Case T-65/98 *Van den Bergh Foods Ltd v Commission of the European Communities.* ECLI:EU:T:2003:281 para. 160; J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 25(5) European Competition Law Review 263 272; O'Donoghue and Padilla (n 69) 352, 359; J. S. Venit, 'Article 82: The Last Frontier - Fighting Fire with Fire' (2004) 28(4) Fordham International Law Journal 1157 1159.

[78] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 48, 52-53. Case No COMP/37.792 Microsoft (n 76) para. 841.Case T-201/04 *Microsoft Corp v Commission* (n 76) paras. 857, 868; Case No COMP/39.530 Microsoft (tying) (n 76) paras. 39-58; Case No COMP/AT.40099 Google Android (n 76) paras. 773-877; 896-993.

[79] The Court, indeed, rejected a recoupment requirement for the fining of predatory pricing in breach of Art. 102 TFEU Case C-202/07 P *France Télécom v Commission* ECLI:EU:C:2009:214 paras. 110, 113. For calls for the adoption of a recoupment test V. Korah, 'Tetra Pak II - Lack of reasoning in Court's judgment' (1992) 18(2) European Competition Law Review 98 101. E. P. Mastromanolis, 'Predatory pricing strategies in the European Union: a case for legal reform' (4) 1998(211) 193 U.S. 197 (1904) 218–219, 222-224; C. Ahlborn and B. Allan, 'The Napp Case: A Study of Predation' (2003) 26(2) World Competition 233 246; S. Kon and S. Turnbull,

Commission, instead, increasingly accounted for the arguments by the proponents of the More Economic Approach who called for the abandoning of a *per se* illegality approach against below-cost pricing. Commentators, instead, suggested that the analysis of predatory pricing should be grounded in the strategic models of post-Chicago economics.[80] Even if the Court has reaffirmed the *prima facie* illegality of below AVC-pricing,[81] the Commission seems to have largely abandoned or at least weakened, this presumption of illegality for below-cost (AVC) pricing. The Guidance Paper and recent decisional practice suggest that, while being a necessary condition for finding abusive predatory pricing, below-cost pricing is no more sufficient but must be backed up by additional evidence which sustains a credible predation story in line with post-Chicago models of predation strategies.[82]

2.1.3 The Shrinking Scope of Structural Presumptions in US and EU Merger Policy

Over the last decades, US and EU merger control have also experienced a decline in the scope of structural presumptions. This shrinking of structural presumptions was driven by the Chicago School critique of the S-C-P paradigm. Chicago and post-Chicago scholarship that had called into doubt the strict relationship between industry concentration and profits, which lay at the heart of the structuralist approach. [83]

'Pricing and the dominant firm: implications of the Competition Commission Appeal Tribunal's judgment in the Napp case' (2003) 24(2) European Competition Law Review 70 75–76; De la Mano, Miguel and B. Durand, 'A Three-Step Structured Rule of Reason to Assess Predation under Article 82: Office of the Chief Economist - Discussion Paper' (2005) 27; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:1998:518 para. 136. Economic Advisory Group on Competition Policy (EAGCP) (n 69) 52. See however for a more cautious discussion pointing out that the absence of recoupment may contribute to the signalling theories of predatory pricing O'Donoghue and Padilla (n 69) 258–259..

[80] Economic Advisory Group on Competition Policy (EAGCP) (n 69) 18-19, 20–21. De la Mano, Miguel and Durand (n 79) 8–12. O'Donoghue and Padilla (n 69) 243–244.

[81] Case C-202/07 P *France Télécom v Commission* (n 79) para. 109.

[82] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 68, 20. For a recent example for such a strategic analysis of predatory pricing Summary of Commission Decision in Case AT.39711 — Qualcomm (predation)). OJ [2019] C 375/25 paras. 12-13.

[83] See in this respect the discussion in Chapter 5. See for a discussion of the impact of economic analysis on the decline of the structural presumption C. Shapiro and H. J. Hovenkamp, 'Horizontal Mergers, Market Structure, and Burdens of Proof' (2018) 127 Yale Law Journal 1996 1998, 2001-2002, 2004-2007; S. C. Salop, 'The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach' (2015) 80(2) Antitrust Law Journal 269 276–278; S. P. Sullivan, 'What Structural Presumption: Reuniting Evidence and Economics on the Role of Market Concentration in Horizontal Merger Analysis' (2016) 42 J. Corp. L. 403 409-410, 417; Kwoka, John E. Jr. 'The structural presumption and the safe harbor in merger review: false positives, or unwarranted concerns?' (2017) 81(3) Antitrust Law Journal 827 841–844. For the relevant literature, discussing empirical, theoretical and methodological problems of the S-C-P paradigm see chapter 6.

From the 1970s onwards, the US courts and competition authorities reacted to the severe Chicago critique of the merger policy of the Warren Court era, by importantly curtailing the scope of structural presumptions. The Supreme Court never fully overruled the structural presumption established in *Philadelphia National Bank*. It, however, insisted in *General Dynamics* that, albeit being an important factor for the analysis of mergers, a substantial increase in the level of market concentration brought about by a merger is not conclusive evidence for the finding of a substantial lessening of competition (SLC) but merely creates a rebuttable presumption of anticompetitive harm.[84] *General Dynamics* and subsequent cases[85] thus brought about an important shift away from the republican approach under the Warren Court era. Concerns about economic concentration alone were suddenly no longer deemed sufficient to block a merger. Rather, the Supreme Court recognised the need to consider additional evidence in the form of structural, behavioural, or performance factors that suggest that the merger is likely to harm competition.[86] Lower US courts further curtailed the role of structural presumptions in merger cases. Most prominently, *Baker Hughes*[87] and *Heinz*[88] disavowed the structural approach of the Warren Court era, which in several cases had treated the showing of relatively small increases in concentration as conclusive evidence for the anticompetitive effects of mergers.[89]

This erosion of the structural presumption and shift towards a rule of reason analysis was also importantly driven by the 1982 and subsequent Merger Guidelines published by the Department of Justice. These Guidelines attributed significantly less weight to market share and concentration thresholds while shifting the focus on the analysis of anticompetitive unilateral and coordinated effects.[90] The narrowing of the scope of structural presumptions crystalised in the steady increase of the concentration ratios triggering the presumption that a merger will give rise to a Substantial Lessening of Competition ('SLC'). The 1982 Guidelines significantly raised this bar. The Department of Justice clarified that it would only challenge a horizontal merger between firms with a market share of respectively 5 and 10% entailing a market concentration of 1800 HHI or more. This threshold was further elevated in the most recent 2010 Joined Guidelines published by the Department of Justice and the FTC. The

[84] *United States v. General Dynamics* 415 U.S. 486 (1974) 498. Posner (n 43) 129.
[85] *United States v. General Dynamics* (n 84) 500. *United States v. Marine Bancorporation* 418 U.S. 602 (1974). *U. S. v. Citizens & Southern National Bank* 422 U.S. 86 (1975).
[86] L. A. Sullivan, *Antitrust* (West Publishing 1977) 600–601.
[87] *United States v Baker Hughes, Inc* 908 F. 2d 981 (D.C. Cir. 1990).
[88] *FTC v H.J. Heinz Co.* 246 F.3d 708 (D.C.Cir. 2001).
[89] Sullivan (n 83), 416–420.
[90] C. Shapiro, 'The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years' (2010) 77 Antitrust Law Journal 701 705.

Guidelines state that only mergers in markets with a concentration ratio in excess of 2500 HHI between firms with a market share of, for instance, 20% and 5% or 10% and 10%, would give rise to a presumption that the merger will lead to a SLC. The concentration ratios triggering a presumption of illegality under the 2010 Guidelines, pale in comparison with those of the 1968 Guidelines, which provided for the challenge of any acquisition by a firm with a market share of 15% of any other firm holding a market share of 1% in highly concentrated markets.[91] The scope of the presumption of illegality under US merger policy has thus been radically cut back. While the republican approach of the Warren Court era had relied on the structuralist presumption to block numerous mergers in relatively unconcentrated mergers, under the 2010 Merger Guidelines, a presumption of illegality is only triggered by a tiny minority of mergers in highly concentrated markets.

EU merger policy has witnessed a similar decline in the importance of structural presumptions as US merger control. This erosion of structural presumptions ushered in with the judgment by the Court of First Instance in the *Airtours*. In this judgment, the Court of First Instance made it plain that the Commission has to go beyond the analysis of structural factors in order to substantiate the finding that a merger leads to a SIEC by creating a collective dominant position. Accordingly, the finding of a collective dominance could no more be inferred from a change in the market structure and other structural factors alone. *Airtours*, instead, required the Commission to assess whether structural and behavioural factors prevailing in the market suggest that tacit collusion is a likely and stable outcome of a merger.[92]

This demise of structural presumptions in EU merger policy carried forward with the reform of the EU Merger Regulation. This reform resulted in the replacement of the 'dominance test' by the new 'SIEC' test in Art. 2 (3) of the revised Merger Regulation 139/2004.[93] Under the old dominance test of Regulation 4064/89 EC[94], the finding that a merger leads to the creation or strengthening of a dominant position was sufficient to create a presumption of a SIEC and, hence, of illegality.[95] By contrast, the establishment of the SIEC test cast doubt on this presumption. It instead aligned EU merger policy with a rule of reason-type analysis, which

[91] Merger Guidelines - 1968 1968 para. 5.
[92] Case T-342/99 *Airtours v Commission* ECLI:EU:T:2002:146 paras. 61-62. This test has been reaffirmed by the Court of Justice in Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* ECLI:EU:C:2008:392 paras. 119-127.
[93] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. OJ [2004] L 24/1.
[94] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ [1989] L 395 Art. 2 (3).
[95] See literature discussed in Chapter 5 and G. Monti, *EC Competition Law* (Cambridge University Press 2007) 249–250.

warrants an inquiry into the actual or likely anticompetitive effects of a merger to support a finding of a SIEC. This substitution of the formalistic dominance test by the reformed SIEC test was welcomed by commentators who hoped that the new substantive test would align merger control with an 'effects-based' approach. It was argued that under the new SIEC test, the Commission could no longer simply rely on concentration ratios and the market share of the merged entity to infer that the merger leads to anticompetitive effects. Rather, under the new test, the Commission would have to expand its analysis beyond the finding of a concentrated market structure and look at the likely effects of the merger before adopting a decision.[96]

These hopes of the proponents of the More Economic Approach were, at least in part, fulfilled. The decline of structural presumptions culminated in an outright rejection of any form of structural presumption of illegality in the 2004 Horizontal Merger Guidelines. The Guidelines clarified that market shares and concentration ratios only serve as a first useful indication of anticompetitive effects of mergers.[97] By no means do they give rise to any legal presumption.[98] The Guidelines, moreover, suggested that the major thrust of merger analysis will lie on mergers in highly concentrated markets with a post-merger HHI in excess of 2000 and giving rise to an increase of concentration of 150 HHI points or more.[99] The Guidelines thus limited the scope of merger control to highly concentrated markets with roughly five equally sized firms.[100]

The Guidelines also importantly qualified the weight of the finding of single and collective dominance on the analysis of anticompetitive effects of mergers.[101] While the finding of dominance may be an important indication as to the likelihood and magnitude of competitive harm, the Guidelines insisted that it would still be necessary to determine whether the merger is likely to lead to anticompetitive effects. Instead of merely relying on the finding of single or collective dominance on the basis of structural factors, the Commission would, therefore, in every case have to examine the anticompetitive effects of mergers on the basis of two clearly

[96] V. Verouden, C. Bengtsson and S. Albaek, 'Draft EU Notice on Horizontal Mergers: A Further Step toward Convergence, The' (2004) 49 Antitrust Bull. 243 243, 247. A. Lindsay and A. Berridge, *The EU merger regulation: Substantive issues* (Sweet & Maxwell 2012) 43.
[97] Commission Guidelines on the assessment of horizontal mergers. O.J [2004] C 31/5 para. 14.
[98] ibid para. 21.
[99] ibid para. 20.
[100] 10000/2000 = 5 G. Niels, H. Jenkins and J. Kavanagh, *Economics for Competition Lawyers* (Oxford University Press 2011) 130.
[101] Commission Guidelines on the assessment of horizontal mergers (n 97) para. 4.

articulated theory of harms, namely coordinated effects[102] and non-coordinated, unilateral[103] effects.

This disavowal of structural presumptions and the declining importance of structural factors has also been confirmed by the EU judicature. The EU Courts have clearly rejected any presumption of illegality of mergers under the EU Merger Regulation, akin to the presumption of illegality of state aid under Art. 107 and 108 TFEU.[104] More recent case law also suggests that the assessment of concentration ratios is not always required for the assessment of a merger.[105] Nor does concentration in excess of the safe harbour screens of the Guidelines create any form of presumption of anticompetitive effects.[106] The Commission and the General Court further clarified that high or even very high market shares are not conclusive evidence for anticompetitive effects.[107] The probative weight of high market shares as proxies for anticompetitive effects is particularly limited in fast-growing, dynamic industries in which high market shares may evaporate within a relatively short period of time.[108] Most recently, the General Court vehemently reaffirmed the rejection of any notion of structural presumptions under the EU Merger Regulation. In *CK Telecoms*, the General Court annulled the European Commission's decision to block a merger that would have reduced the number of operators in the UK market for mobile telecommunication from four to three. The General Court's reasoning, in this case, heavily turned on the concern that the undemanding test based on which the Commission found that the merger would entail unilateral effects would inevitably give rise

[102] ibid 39–57.
[103] ibid para. 24-38. The Guidelines specify that the unilateral effects analysis applies to mergers that lead to the creation of a non-dominant and dominant firm alike. ibid para. 28.
[104] Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* (n 92) para. 48.Case T-79/12 *Cisco v Commission* ECLI:EU:T:2013:635 para. 48; H. Schweitzer, 'Judicial Review in EU Competition Law: Chapter in Damien Geradin & Ioannis Lianos (eds.), Research Handbook on EU Antitrust Law, Edward Elgar Publishing, Forthcoming' 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129147> accessed 18 April 2019.
[105] Case No COMP/M.4071 - APOLLO/AKZO NOBEL IAR. OJ [2006] C 176/14 paras. 51-74. Case T-282/06 *Sun Chemical Group*, [ECLI:EU:T:2007:203] (General Court of the European Union) para. 140, 142; Case T-405/08 *Spar Österreichische Warenhandels v Commission* ECLI:EU:T:2013:306 para. 64-69.
[106] Commission Guidelines on the assessment of horizontal mergers (n 97) para. 21; Case T-282/06 *Sun Chemical Group* (n 105) para. 138; Case T-405/08 *Spar Österreichische Warenhandels v Commission* (n 105) para. 68. In both judgments, the General Court however pointed out that the higher the margins between the HHI and the concentration ratios set out in the Guidelines, the more they are indicative of competition concerns.
[107] Case No COMP/M.4071 - APOLLO/AKZO NOBEL IAR (n 105) paras. 51-74; Case T-282/06 *Sun Chemical Group* (n 105) paras. 130-142.
[108]Case T-79/12 *Cisco v Commission* (n 104) paras. 69, 74; Case No COMP/M.7217 – Facebook/ WhatsApp. C(2014) 7239 final para. 99. For a similar argument in a decision predating the reform of the Merger Regulation Case No COMP/M.2256 Philips/Agilent. SG(2000)D/286492 paras. 30-31.

to what it perceived as an undue presumption against four-to-three mergers in oligopolistic markets.[109]

The shift from republican to *laissez-faire* antitrust thus manifests itself in an incremental downsizing of the scope of legal presumptions under all three pillars of US and EU antitrust. What prompted this contraction in the scope of presumptions of illegality? The main driver behind this narrowing of legal presumptions was the gradual shift in the rationale that informed the remaining presumptions of illegality. With the rise of the consumer welfare standard, the type of harm inferred under these presumptions was no longer the adverse effect that certain forms of conduct have on a polycentric market structure and the resulting potential domination. On the contrary, under the *laissez-faire* approach, the sole type of harm, which was deduced under these presumptions, was harm to consumer welfare.

This transformation of the rationale of presumptions illustrates how the ascent of consumer welfare standard has stripped them of their structuralist and republican content. Legal presumptions ceased to embody concerns about potential domination flowing from the elimination of polycentricity, which had so prominently featured in republican antitrust law. Under *laissez-faire* antitrust, the only reference point of these presumptions is harm to consumer welfare. [110] The remaining presumptions thus operated as generalisation about the adverse effect of certain agreements, unilateral conduct or mergers on consumer welfare. They were grounded in the assumption that for certain types of agreements an 'inquiry into the effect upon competition and economic justification would be similarly irrelevant' because judicial experience and analysis show that they lack any pro-competitive justification.[111] Presumptions of anticompetitive harm were henceforth increasingly perceived as nothing more than a shortcut for a rule of reason inquiry into the welfare effects of specific types of coordinated conduct[112]

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[109] Case T-399/16 *CK Telecoms UK Investments v Commission* not yet published paras. 174, 249.

[110] *Cont'l T.V. v. GTE Sylvania,* (n 9) 50 fn. 16; *Ariz. v. Maricopa County Medical Soc.* (n 16) 343; *FTC v. Superior Court Trial Lawyers Ass'n* 493 U.S. 411 (1990) 432.; Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* (n 15) paras. 26-30, 35, 42. The Advocate General even suggested in a footnote that the by-object category can be understood as a mere application of the by-effect category. ibid para. 45, fn. 26. See also in this respect, the proposition that there is 'no ontological difference' between by object and by effect restrictions, which are merely two alternative procedural devices to assess whether an agreement has an anticompetitive effect Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) paras. 24, 27, 32, 50; Guidelines on the application of Article 81(3) of the Treaty (n 17) para. 21.

[111] *United States v. Topco Assocs. Inc.* 405 U.S. 596 (1972) 607–609. *White Motor Co. v. United States* (n 12) 263. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (n 12) 9. *National Collegiate Athletic Ass'n v. Board of Regents* (n 12) 100, in particular fn. 21. *Ariz. v. Maricopa County Medical Soc.* (n 16) 344. *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 886. Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) para. 51.

[112] *National Soc. of Professional Engineers v. United States* (n 15) 692. *Cont'l T.V. v. GTE Sylvania,* (n 9) 50. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (n 12) 8, 9; *Ariz. v. Maricopa County Medical Soc.*

or increases in concentration as the consequence of a merger.[113] Only those types of conduct, which could be predicted with confidence to entail the welfare-reducing interference with negative liberty of other market participants, could thus trigger a presumption of illegality. By narrowing the type of harm a decision-maker may permissibly infer under presumptions of illegality, the *laissez-faire* approach importantly limited the type of conduct to which presumptions of illegality might apply.

This shift in the focal point of presumptions of illegality from market structure to consumer welfare had an important implication. Chicago and Post-Chicago scholars showed that many forms of conduct that detracted to the polycentric functioning of markets or increased the level of concentration did not entail consumer harm. By affirming that the structuralist S-C-P paradigm had exaggerated the extent to which a reduction of the polycentric functioning or market structure entails harm to consumer welfare, the Chicago School had weakened the case of republican antitrust for a broad application of legal presumptions. Indeed, only a small fraction of the conduct which appeared inherently anticompetitive under the republican approach because it adversely affected the market structure, continued to raise concerns under the *laissez-faire* approach because it was reducing consumer welfare.

As a result, the jettisoning of market structure and republican liberty as the reference point of legal presumptions fundamentally curtailed the situations in which an increase in industry concentration or decrease in polycentric rivalry allowed a decision-maker to draw a permissible inference about consumer harm. By streamlining the rationale of presumptions of illegality with the consumer welfare standard, *laissez-faire* antitrust shrunk the scope of presumptions of illegality to a narrow category of conduct, which could be conclusively presumed to lead to a welfare-decreasing interference with the economic liberty of other market participants. It thus, on the one hand, fundamentally curtailed the scope of legitimate state intervention with negative entrepreneurial liberty. On the other hand, this alteration of the

(n 16) 344; Easterbrook (n 12), 9-10, 15-16; Popofsky (n 40), 454–455; Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 2; Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* (n 15) para. 31; Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) paras. 51, 57.

[113] G. J. Stigler, 'The Measurement of Concentration' 30–36. G. J. Stigler, 'Mergers and Preventive Antitrust Policy: Reprinted from University of Pennsylvania Law Review, Vol. 104, No 2 (1955)' 300–303. See for Stigler's ground-breaking analysis of collusion G. J. Stigler, 'A Theory of Oligopoly: Reprinted from Journal of Political Economy Vol. LXXII, No1 (1964)' in G. J. Stigler (ed), *The Organization of Industry* (1968) 39–45, 55. R. A. Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach' (1968-1969) 21 Stanford Law Review 1562 1601–1605; Posner (n 43) 131–132; 1982 Merger Guidelines 14, 18; Antitrust Division of the US Department of Justice/Federal Trade Commission - Merger Guidelines 2010 3; Commission Guidelines on the assessment of horizontal mergers (n 97) paras. 18, 27.

rationale underpinning the presumptions of illegality also brought about a shrinking of the protective scope of antitrust law. Presumptions of illegality ceased to guard market participants against potential domination flowing from a decrease in the polycentric market structure. The rationale of legal presumptions thus is a far cry from the goal of protecting competitive opportunities of 'smaller and less powerful'[114] and averting 'great aggregations of economic power'.[115]

2.2 The Emergence of a Sliding-Scale Approach and the Decreasing Weight of Remaining Presumptions

The rise of the consumer welfare standard did not only precipitate the shrinking of the scope of the presumptions of illegality. The shift from a republican towards a *laissez-faire* approach was also marked by a decrease in the weight of the remaining presumptions of illegality. Instead of fully jettisoning legal presumptions to the benefit of a freewheeling rule of reason approach, *laissez-faire* antitrust sought to maintain at least some presumptions of illegality to ensure the administrability and procedural economy of antitrust law. While retaining some presumptions of illegality to ensure that antitrust law can effectively cope with economic complexity and uncertainty, *laissez-faire* antitrust has been at pains to reduce the constraints these presumptions impose on negative entrepreneurial liberty to a minimum. With the rise of the *laissez-faire* antitrust, courts and competition authorities on both sides of the Atlantic sought to achieve an optimum mix between ensuring the procedural economy and administrability of antitrust through the use of presumptions on the one hand, and safeguarding the flexibility of the rule of reason analysis to shield negative entrepreneurial liberty from wrongful inferences on the other. To minimise the risk of erroneous inferences resulting from an overly rigid use of presumptions of illegality, US (2.3.1) and EU (2.3.2) courts increasingly blended presumptions of illegality and by-effects analysis into a structured, sliding-scale rule of reason analysis.

2.2.1 The Rise of the Sliding-Scale Approach and the Alleviating of the Weight of Presumptions of Illegality in US Antitrust Law

With the ascent of Chicago School and post-Chicago thinking, the US Supreme Court began to blur the lines between the *per se* rule and rule of reason approach. The Court, indeed, reverted to the original formulation of the rule of reason in *Standard Oil*. In this case, the Court

[114] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (n 12) Justice Stevens dissenting, 35.
[115] ibid Justice Stevens dissenting, 37.

had not limited the rule of reason standard to a certain category of restraints of trade. On the contrary, it had suggested that the legality of all types of agreements and unilateral conduct with § 1 and § 2 of the Sherman Act must be assessed based on the standard of reason.[116] The Supreme Court's reformed approach to the *per se* rule/rule of reason divide anew reaffirmed the rule of reason standard as the overarching, adjudicative principle of antitrust analysis under § 1 and § 2 of the Sherman Act.[117] The *per se* rule itself thus became just one expression of the rule of reason as the meta-principle of the interpretation of the Sherman Act.[118]

The emergence of the sliding-scale approach was driven by the growing awareness amongst US Supreme Court that the obviousness of anticompetitive effects and, hence, the restrictive potential of a specific agreement is a question of degree.[119] The antitrust analysis of various types of agreements thus may warrant different levels of analytical depth and might give rise to presumptions of varying strength.[120] On the one hand, the Court observed that in some instances the *per se* rule could only be established after some form of economic analysis of the likely competitive effects of the agreement at stake, focusing on the parties' market power, incentives and ability to restrict competition. [121] On the other hand, the Court also acknowledged that in many instances 'no elaborate industry analysis is required to demonstrate' the anticompetitive effects of a particular conduct under the rule of reason analysis.[122] In some cases, the unreasonableness of an agreement can be established 'in the twinkling of an eye' on the basis of a truncated rule of reason analysis.[123] The Supreme Court thus increasingly recognised that there is no longer a 'categorical line' between the *per se* and rule of reason categories.[124] Instead of hinging upon the classical *per se* rule/rule of reason dichotomy, US Courts increasingly endorsed the argument of the Chicago School that the rule of reason

[116] *Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1911) 60–61.
[117] *National Soc. of Professional Engineers v. United States* (n 15) 690; *National Collegiate Athletic Ass'n v. Board of Regents* (n 12) 103; *FTC v. Indiana Federation of Dentists* (n 21) 458. This test is largely identical with the test set out in *Standard Oil Co. of New Jersey v. United States* (n 116) 58.
[118] Popofsky (n 40), 454, 457.
[119] *National Collegiate Athletic Ass'n v. Board of Regents* (n 12) 104 fn 26.
[120] ibid 104 fn 26. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (n 46) 11; *California Dental Assn. v. FTC* (n 12) 779. Easterbrook (n 12), 18–19.
[121] *National Collegiate Athletic Ass'n v. Board of Regents* (n 12) 104 fn 26. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (n 46) 11; *California Dental Assn. v. FTC* (n 12) 779. Easterbrook (n 12), 18–19.
[122] *National Soc. of Professional Engineers v. United States* (n 15) 692; *FTC v. Indiana Federation of Dentists* (n 21) 459; *California Dental Assn. v. FTC* (n 12) 770; *Federal Trade Commission v Actavis et al.* 570 U.S. 136 (2013) 20.
[123] *National Collegiate Athletic Ass'n v. Board of Regents* (n 12) 109 - 110 in particular fn 39. *California Dental Assn. v. FTC* (n 12) 769–771, 779-780; *Federal Trade Commission v Actavis et al.* (n 122) 20.
[124] *California Dental Assn. v. FTC* (n 12) 780.

analysis should be structured around a number of filters which organise a stepwise burden-shifting analysis of the reasonableness of an agreement operating along a wide spectrum. [125]

In adopting this sliding-scale approach, the US courts eventually collapsed the legal categories of *per se* rules and the rule of reason into a single sliding-scale analysis under the overarching standard of reason. This sliding-scale analysis harnessed the remaining presumptions of illegality as a burden-shifting device. Instead of using legal presumptions as binary switches that provide clear-cut answers as to the legality or illegality of certain agreements, the US courts increasingly relied on these presumptions to assign the initial and offsetting burden of proof and their respective weight between the parties in a way that is to the largest possible degree aligned with the likelihood of specific conduct to give rise to anticompetitive effects. For each stage, the sliding-scale approach designs the height of the burden of proof in accordance with the strength of the presumption and the quality of fact-specific evidence put forward by the parties showing the likelihood or absence of anticompetitive effects of a given agreement.[126] This staggered rule of reason blends presumptions of anticompetitive effects, previously falling within the domain of the *per se* rule, with elements of a case-specific rule of reason assessment. It thus creates a flexible structure for antitrust analysis that allocates and calibrates the burden and standard of proof in accordance with the case-specific circumstances.[127]

A similar shift towards a sliding-scale approach also became manifest in US merger control. In *Baker Hughes*[128] and *Heinz,*[129] the Court of Appeals for the District of Columbia departed from the original version of the *Philadelphia National Bank* presumption. The showing that a merger leads to high levels of concentration could no longer be considered sufficient to justify a strong, substantive inference about its inherent tendency to harm competition.[130] While not entirely jettisoning the presumption of harm associated with an increase in concentration, the Court of Appeals reinterpreted the *Philadelphia National Bank*

[125] Bork (n 2) 125–129, 294-295. Easterbrook (n 12), 11–13, 19-23. Director and Levi (n 35), 295.
[126] See for a detailed discussion Hovenkamp (n 20), 101–128. See also for the decision-theoretical basis oft he sliding scale approach C. F. Beckner, III and S. C. Salop, 'Decision Theory and Antitrust Rules' (1999) 67 Antitrust L.J. 41 55-61, 67-70; A. I. Gavil, 'Chapter 5 - Burden of Proof in U.S. Antitrust Law' in Collins, Wayne D Collins and J. A. Angland (eds), *Issues in Competition Law and Policy* (American Bar Association. Section of Antitrust Law 2008) 129–131. Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 2-3, 9-11, 22-29.
[127] *California Dental Assn. v. FTC* (n 12) 780. *California Dental Assn. v. FTC* (n 12) Justice Breyer, dissenting 793-794; *Federal Trade Commission v Actavis et al.* (n 122) Majority, 21.
[128] *United States v Baker Hughes, Inc* (n 87).
[129] *FTC v H.J. Heinz Co.* (n 88).
[130] *United States v. Philadelphia National Bank* 374 U.S. 321 (1963) 363.

presumption as a primarily procedural,[131] burden-shifting device that structures a rule of reason analysis of mergers.[132] Within this new burden-shifting framework, the finding that the merger leads to a substantial increase in concentration does no more in itself create a strong presumption of anticompetitive harm and illegality of the merger. It merely shifts the burden of producing evidence rebutting the Government's *prima facie* challenge of the merger on the merging parties. Such a rebuttal, in turn, shifts the burden of production back to the Government, which has to demonstrate that the merger is likely to harm competition and consumer welfare.[133] The Circuit Court in *Baker Hughes* underlined that, despite this burden-shifting framework, the ultimate burden of proof in merger control always remained with the Government.[134] Moreover, *Baker Hughes* clearly linked this burden-shifting framework with a sliding-scale approach. The Circuit Court pointed out that '[t]he more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully.'[135] Accordingly, the assignment of the evidentiary burden between the parties and its respective weight depend on the quality and strength of evidence of the *prima facie* challenge of the merger brought by the Government.[136]

This weakening of the weight of structural presumption has been compounded by the lowering of the evidential burden for the parties to rebut the structural presumption. Instead of being compelled to make a 'clear showing'[137] that the merger, albeit leading to a substantial increase in concentration, will not entail anticompetitive harm, *Baker Hughes* suggested that the parties would simply have to 'show' that the structural presumption does not accurately predict the competitive effects of the merger.[138] With the erosion of the weight of structural presumptions, US competition authorities and courts recognised - even for mergers that bring about concentration levels in excess of the thresholds creating a legal presumption - the need to assess additional factors to determine whether they will facilitate tacit collusion or unilateral price increases.[139]

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[131] For the argument that the structural presumption has been transformed from a substantive interference of anticompetitive harm to a procedural tool of administrative convenience Sullivan (n 83), 406, 423.
[132] *United States v Baker Hughes, Inc* (n 87) 983, 991-992. *FTC v H.J. Heinz Co.* (n 88) 715. Salop (n 83), 271–276. Sullivan (n 83), 415.
[133] *FTC v H.J. Heinz Co.* (n 88) 715.
[134] *United States v Baker Hughes, Inc* (n 87) 982.
[135] *United States v Baker Hughes, Inc* (n 87) 991; Salop (n 83), 275.
[136] Cf. *United States v Baker Hughes, Inc* (n 87) 992.
[137] *United States v. Philadelphia National Bank* (n 130) 363.
[138] *United States v Baker Hughes, Inc* (n 87) 984, 991; Salop (n 83), 275; Shapiro and Hovenkamp (n 83), 2010–2011.
[139] *United States v Baker Hughes, Inc* (n 87) 983, 992. *FTC v. CCC Holdings Inc.* 605 F. Supp. 2d 26 (D.C. Cir. 2009) 67–72.

2.2.2 The Rise of the Sliding-Scale Approach and the Alleviating of the Weight of Presumptions of Illegality in EU Competition Law

A similar decrease in the weight of presumptions of illegality is currently underway in Europe. Like in the US, this dwindling weight of presumptions results from a shift towards a sliding-scale approach under Art. 101, Art. 102 TFEU and EU Merger Control.[140]

This shift towards a sliding-scale approach has, in recent years, transformed the interpretation of Art. 101 (1) TFEU as it has brought about the blurring of the two analytical categories of by-object and by-effect restrictions of competition. In *Cartes Bancaires*, the Court called into doubt what was hitherto perceived as a 'fundamental difference'[141] between the concepts of by-object and by-effect restrictions of competition. Until *Cartes Bancaires*, the Court usually applied a three-pronged test to determine whether an agreement falls within the by-object category, looking at the

(i) content of the provisions;

(ii) objectives the agreement seeks to attain; and

(iii)economic and legal context of which it forms part.[142]

The novelty of *Cartes Bancaires* was that the Court further expanded the third prong of this test, holding that '[w]hen determining that [economic and legal context] context, it is also *necessary* to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.[143] In *Expedia* and *Allianz Hungária*, the Court had already pointed out that 'it is also appropriate' to take into account these additional factors when deciding whether an agreement constitutes a by-object infringement.[144] This wording suggested that competition authorities and courts may, if appropriate, engage in a more in-depth analysis when assessing the economic and legal context under the by-object analysis. By replacing the term 'appropriate' by the word 'necessary',[145]

[140] The EU Courts have adopted a sliding-scale approach towards market shares and concentration in merger control Case T-282/06 *Sun Chemical Group* (n 105) para. 148.
[141] *Opinion of Advocate General Kokott in* Case C-226/11 *Expedia* ECLI:EU:C:2012:544 para. 54.
[142] Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610 para. 58; Case C-403/08 *Football Association Premier League and Others* ECLI:EU:C:2011:631 para. 136.
[143] Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) para. 53 (emphasis added).
[144] Case C-226/11 *Expedia* ECLI:EU:C:2012:795 para. 21; Case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160 para. 36.
[145] In the French language version, which is the working language of the Court, this shift from an optional to an obligatory analysis of additional economic factors is less obvious. Yet, a difference in the formulation is, nonetheless, discernable. In *Allianz* the passage reads , Dans le cadre de l'appréciation dudit contexte, il y a ***également*** lieu de prendre en considération […]' (emphasis added). By contrast, in Cartes Bancaires the wording

the Court in *Cartes Bancaires* made it plain that the analysis of these additional economic criteria are not only optional factors a factfinder may take into account but are actually a necessary precondition for the finding of a by-object infringement. [146]

By suggesting that a competition authority or court would have to consider factors which had previously fallen within the domain of the by-effects analysis to establish a by-object category, the Court in *Cartes Bancaires* recognised that there is a certain degree of continuity between the by-object and by-effect analysis. The Court, however, clearly circumscribed the extent to which this contextual analysis can support the creation of a presumption of illegality under the by-object category. In contrast to its prior case law,[147] the Court clarified that this broader contextual analysis could not be used to broaden the by-object category artificially. On the contrary, the Court in *Cartes Bancaires* endorsed the view advanced by Advocate General Wahl, who suggested that the analysis of the economic and legal context could only reinforce the finding of an anticompetitive object. By no means can it, however, be used to remedy the failure of identifying an anticompetitive objective based on an initial examination of the clauses of the agreement.[148]

By requiring a more granular and detailed analysis of the economic and legal context the Court introduced an additional filter or 'reality check'[149] as a precondition for the finding of a by-object restriction. This 'reality check' requires the fact finder to assess the factual foundation and accuracy of the presumption of illegality attached to a certain form of agreement. This step must be passed to establish the presumption of anticompetitive harm underpinning the finding of an anticompetitive object. *Cartes Bancaires* thus clarified that the analysis of the economic and legal context could only be used to confirm or neutralise to the benefit of the defendant the initial finding of an anticompetitive object on the basis of an

is slightly reversed 'Dans le cadre de l'appréciation dudit contexte, il y a lieu ***également*** de prendre en considération […]' (emphasis added)

[146] This expansive reading of the level of scrutiny necessary to find a by-object restriction has also been adopted in subsequent cases. Case T-472/13 *Lundbeck v Commission* ECLI:EU:T:2016:449 para. 343; Case T-469/13 *Generics (UK) v Commission* ECLI:EU:T:2016:454 para. 137; Case T-691/14 *Servier and Others v Commission* ECLI:EU:T:2018:922 para. 221; Case T-762/14 *Philips and Philips France v Commission* ECLI:EU:T:2016:738 para. 58; Case C-98/17 P *Philips and Philips France v Commission* ECLI:EU:C:2018:774 para. 35; Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2015:184 para. 117; Case C-172/14 *ING Pensii* ECLI:EU:C:2015:484 para. 133; Case C-179/16 *F. Hoffmann-La Roche and Others* ECLI:EU:C:2018:25 para. 79-80. See, however, for the continuous use of the narrower formulation of the test in line with *GlaxoSmithKline*. *C-373/14 P Toshiba Corporation v Commission* ECLI:EU:C:2016:26 para. 27. Case C-469/15 P *FSL and Others v Commission* (n 13) para. 105.

[147] Case C-32/11 *Allianz Hungária Biztosító and Others* (n 144) paras. 36-51.

[148] Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* (n 15) paras. 43-44.

[149] Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) paras. 43,45.

assessment of the clauses of the agreement. Yet, this analysis cannot be used to the detriment of the defendant in order to bring within the purview of the by-object category an agreement whose terms do not indicate an apparent anticompetitive object in the first place.[150]

This clarification has three important implications for the finding of a by-object restriction that triggers the underpinning presumption of illegality. First of all, *Cartes Bancaires* clearly raised the threshold for establishing such a presumption. Even though the Court's interpretation of the by-object category had always presupposed some consideration of the economic context of the agreement at issue,[151] the Court in *Cartes Bancaires* substantially raised the level of scrutiny of case-specific evidence a competition authority or court would have to carry out before it could rely on the presumption of illegality associated with the finding of a by-object restriction. Under the new test, the fact finder has to engage in a more extensive economic analysis in order to establish a presumption of illegality under the by-object restriction than it was the case under the previous case law. In subsequent cases, the Court tempered the implications of this increase in the level of scrutiny by recognising the possibility of a 'quick look' approach with respect to agreements whose adverse effect on competition is pretty obvious. It held that in cases involving hard-core restrictions of competition, such as price-fixing and market sharing agreements, this analysis of the economic and legal context could be limited 'to what is strictly necessary'.[152]

Yet, by adding additional conditions to be taken into account as a 'reality check' before the factfinder could conclude that an agreement has as its object the restriction of competition, the general thrust of *Cartes Bancaires* was to raise the bar for applying a presumption of illegality against an agreement. This crystallised in the recent *Budapest Bank* judgment. Here, the Court went as far as to assert that an agreement between several parties of card payment systems to fix interchange fees must lead to an upward pricing pressure for it to qualify as a by-object restriction.[153] The Court thus, at least in part, departed from previous case law which suggests that there is no need for an agreement to give rise to actual anticompetitive effects to qualify as a by-object restriction.[154] Such a requirement to demonstrate the actual adverse effects of an agreement on the level of prices or non-price parameters of competition

[150] Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* (n 15) paras. 44-45, 124-125, 147; Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) para. 81.
[151] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* ECLI:EU:C:1966:38 p. 250.
[152] Case C-469/15 P *FSL and Others v Commission* (n 13) para. 107; *C-373/14 P Toshiba Corporation v Commission* (n 146) para. 29; Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) para. 47.
[153] Case C-228/18 *Budapest Bank and Others* ECLI:EU:C:2020:265 paras. 81-83.
[154] Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:343 paras. 29-32.

substantially raises the evidentiary burden for competition authorities and courts to establish a by-object restriction.

Second, in taking the view that this 'reality check' under the assessment of the economic and legal context can only be used to confirm or neutralise a finding of a by-object restriction and the underlying presumption of illegality, the Court clarified that this additional scrutiny could only reassign the burden of proof in favour of the defendant. Such would be the case if the contextual analysis undermines the factual foundation of the presumption of illegality. The Court, thus, introduced a new channel through which defendants can rebut the presumption of illegality established by an initial finding of a by-object restriction based on the form, clauses and objective of the agreement. Prior to *Cartes Bancaires*, the case law was interpreted as precluding any rebuttal of the finding of a by-object restriction through the showing that the presumption of anticompetitive effects is factually unfounded because, in the case at hand, it is not giving rise to anticompetitive effects.[155] The only way how defendants could rebut a presumption of illegality under the by-object category was by putting forward 'offsetting'[156] evidence showing that the agreement complied with Art. 101 (3) TFEU and produced countervailing benefits, which outweighed its anticompetitive harm. To do so, they, however, had to discharge a high evidential burden. For they had to demonstrate that their agreement complied with the four cumulative conditions under Art. 101 (3) TFEU.[157]

By recognising that the 'realtiy check' of assessing the economic and legal context may neutralise the finding of a by-object restriction, the Court in *Cartes Bancaires* implicitly introduced a new way for defendants to rebut a presumption of illegality under the by-object category. Apart from proffering 'offsetting' evidence under Art. 101 (3) TFEU, defendants now have also the possibility to rebut the presumption by putting forward 'undermining' evidence, for instance the absence of actual adverse price effects,[158] that demonstrates that the presumption of anticompetitive effects is factually unfounded or inaccurate in the present case.[159] Most recently, the Court of Justice further expanded this channel for parties to rebut the finding of a by-object restriction under Art. 101 (1) TFEU to 'offsetting' evidence taking the

[155] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:110 para. 45. Case C-189/02 P *Dansk Rørindustri and Others v Commission* ECLI:EU:C:2005:408 paras. 144-146.
[156] Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 10.
[157] Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* (n 142) paras. 82-83.
[158] Case C-228/18 *Budapest Bank and Others* (n 153) paras. 82-84.
[159] For this distinction between 'offsetting' and 'undermining' evidence as two alternative channels to rebut a presumption, see Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 10.

form of pro-competitive efficiencies. In *Generics* the Court held that that parties could rely within the framework of Art. 101 (1) TFEU on 'relevant'[160] and 'sufficiently significant'[161] pro-competitive efficiencies that are 'specifically related'[162] to their agreement to rebut its initial characterisation as a by-object restriction.[163] The judgment thus opened a new channel for parties to plead putative efficiencies as 'offsetting evidence' to rebut the finding of a by-object restriction outside the traditional boundaries of the ancillary restraint doctrine[164] or Art. 101 (3) TFEU.[165] In devising these new channels for defendants to rebut an initial categorisation of an agreement as a by-object restriction by proffering 'undermining' or 'offsetting' evidence, the Court also alleviated the height of the defendant's evidential burden for defeating the presumption of illegality. In order to undermine or neutralise the presumption of illegality and the finding of a by-object restriction, they no longer have to demonstrate that their agreement complies with the exacting standards of Art. 101 (3) TFEU.[166]

This post-*Cartes Bancaires* expansion of the rebuttability of the by-object presumption under Art. 101 (1) TFEU, combined with the alleviating of the offsetting evidential burden, has a third important implication for the interpretation of the concept of restriction of competition by-object. In a similar vein as the Supreme Court's § 1 case law, the Court of Justice's interpretation of Art. 101 (1) TFEU has increasingly blurred the lines between the by-object/by-effect distinction and converted both categories into a sliding-scale approach. The Court in *Cartes Bancaires* has redesigned the by-object category as one amongst a number of analytical filters and steps within the framework of a burden-shifting rule of reason analysis. Instead of operating based on a binary logic of form-based presumption under Art. 101 (1) TFEU and rebuttal under Art. 101 (3) TFEU, after *Cartes Bancaires* the concept of by-object restrictions leaves room for different stages of rebuttal under Art. 101 (1) TFEU. Under this sliding-scale

[160] Case C-307/18 *Generics (UK) and Others* ECLI:EU:C:2020:52 para. 105.
[161]
[162] ibid.
[163] Case C-307/18 *Generics (UK) and Others* (n 160) paras. 103-108; Opinion of Advocate General Kokott in Case C-307/18 *Generics (UK) and Others* ECLI:EU:C:2020:28 paras. 147-180.
[164] Case 42/84 *Remia v Commission* ECLI:EU:C:1985:327 paras. 19-20; Case C-309/99 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98 para. 97; *C-136/12 Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato* ECLI:EU:C:2013:489 para. 53; Opinion of Advocate General Kokott in Case C-307/18 *Generics (UK) and Others* (n 163) paras. 153-156.
[165] Case C-307/18 *Generics (UK) and Others* (n 160) para. 104.
[166] The Court has not yet set a clear evidentiary threshold that 'undermining' evidence would have to meet to rebut the finding of a by-object restriction. In *Budapest Ban*k, it refered in the same paragraph to 'strong indications' and 'at very least, contradictory or ambivalent evidence' of the absence of anticompetitive effects in the form of upward price pressure Case C-228/18 *Budapest Bank and Others* (n 153) paras. 82-83. The evidentiary burden for rebutting a by-object characterisation by means of 'offsetting' evidence also falls short of the demanding evidentiary burden under Art. 101 (3) TFEU. 'Case C-307/18 *Generics (UK) and Others* (n 160) paras. 105-107.

approach, the height of the evidential burden to rebut a finding of a restriction of competition by-object, and, hence, the weight of the presumption of illegality itself depend increasingly on the facts of the case. The strength of the presumption is indeed increasingly contingent on the degree to which additional fact-specific evidence supports its factual accuracy. As a consequence, the degree of scrutiny of fact-specific evidence necessary to support a presumption of illegality under the by-object category varies increasingly in accordance with the type of agreement at hand. In the case of hard-core agreements, the analysis for establishing a presumption of illegality can be truncated.[167] By contrast, for agreements containing less obvious restrictions of competition, the by-object analysis might involve several stages of burden-shifting and eventually collapse into a by-effects analysis.

Cartes Bancaires, thus, has considerably reduced the weight of form-based legal presumptions under the by-object category. Since *Cartes Bancaires* the base-line analysis necessary to establish a presumption of illegality under the by-object category clearly involves a higher level of scrutiny because it requires, along with a form-based analysis of the agreement, a more or less cursory analysis of the economic and legal context.[168] Only in cases of hard-core restrictions this analysis of the economic and legal context can be largely dispensed with.[169] At the same time, *Cartes Bancaires* has considerably alleviated the evidentiary burden for defendants to rebut the presumption. As a result, the legal presumption of illegality underpinning the by-object restriction increasingly operates as a procedural burden-shifting tool whose weight moves along a spectrum and is adjusted to the case-specific likelihood of anticompetitive effects.

Along similar lines, the Court of Justice's recent ruling in *Intel* constitutes a considerable step towards a sliding-scale approach with respect to loyalty rebates and a clear sign of the declining weight of legal presumptions under Art. 102 TFEU. While the Court resisted numerous calls[170] for abandoning the form-based *Hofmann-La Roche* presumption against

[167] Case C-469/15 P *FSL and Others v Commission* (n 13) para. 107; *C-373/14 P Toshiba Corporation v Commission* (n 146) para. 29; Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) para. 47.
[168] Accordingly, a recent opinion has suggested that the finding of the by-object category involves a two-step test Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) paras. 41-45.
[169] Case C-469/15 P *FSL and Others v Commission* (n 13) para. 107; *C-373/14 P Toshiba Corporation v Commission* (n 146) para. 29; Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) para. 47.
[170] J. S. Venit, 'Case T-286/09 Intel v Commission —The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10(2) European Competition Journal 202; P. Rey and J. S. Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38(1) World Competition 3; D. Geradin, 'Loyalty Rebates after Intel: Time for the European Court of Justice to overrule Hoffman-La Roche' (2015) 11(3) Journal of Competition Law & Economics 579; N. Petit, 'Intel, Leveraging Rebates and the Goals of

loyalty rebates,[171] the ruling in *Intel* importantly curtailed its implications and allayed its weight. The Court, in *Intel*, clarified for the first time that the presumption of illegality against loyalty rebates could be rebutted if the defendant puts forward evidence casting doubt on their foreclosure effects. When the defendant proffers evidence suggesting that its 'conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects',[172] the Commission must, in turn, rebut this evidence to find an abuse.[173] To this end, the Commission would have to assess, amongst other factors, the foreclosure rate of the rebates, the conditions, duration and amount of the rebates, as well as whether the rebate scheme seeks to exclude competitors who are at least as efficient as the dominant undertaking from the market.[174]

While not fully jettisoning the *Hoffmann-La Roche* presumption of illegality, *Intel* has, in a similar vein as *Cartes Bancaires*, importantly reduced the weight it carries by expanding the possibilities for defendants to rebut it. Prior to *Intel*, the only way for a defendant to rebut the presumption of illegality of loyalty rebates was by proffering 'offsetting' evidence in the form of an objective justification or efficiency defence. The dominant firm, thus, had to show that the presumed anticompetitive effects of loyalty rebates are offset by the pursuit of a legitimate objective or countervailing efficiencies. The weight of this evidential burden was considerable, if not insurmountable.[175] The defendant had to show that the rebates are objectively necessary and the least restrictive measures to achieve the claimed legitimate objective or efficiencies, which outweighed potential consumer harm.[176]

Like in *Cartes Bancaires*, the novelty of *Intel* is that the Court recognised a new channel for defendants to rebut the presumption of illegality of loyalty rebates. Apart from providing 'offsetting' evidence, parties can henceforth also put forward 'undermining' evidence that

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Article 102 TFEU' [2015] SSRN Journal; P. Nihoul, 'The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law' (2014) 5(8) Journal of European Competition Law & Practice 1. For some more welcoming discussion R. Whish, 'Intel v Commission: Keep Calm and Carry On' (2015) 6(1) Journal of European Competition Law & Practice 1; W. P.J. Wils, 'The Judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance' (2014) 37(4) World Competition 405; Opinion of Advocate General Wahl in Case C-413/14 P *Intel v Commission* ECLI:EU:C:2016:788 paras. 80-85, see also paras. 60-78.

[171] Case C-413/14 P *Intel v Commission* (n 68) para. 137.

[172] ibid para. 138.

[173] ibid para. 139.

[174] ibid.

[175] There is not a single Art. 102 case in which the defendant dominant firms pleaded a successful efficiency defence R. Whish and D. Bailey, *Competition law* (Oxford University Press 2018) 218.

[176] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 28-31; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 70) paras. 40-42.

disproves the factual foundation and accuracy of the *Hoffmann-La Roche* presumption.[177] After *Intel*, the possibility for dominant firms to rebut the presumption of illegality for loyalty rebates is no longer limited to advancing an objective justification or efficiency defence. They can henceforth also proffer evidence showing that the *Hoffmann-La Roche* presumption of foreclosure effects is factually unfounded or inaccurate and, therefore, does not hold true in the case at hand. The Court, thus, not only expanded the ways for defendants to rebut the *Hoffmann-La Roche* presumption. Most importantly, it also considerably alleviated the evidential burden the presumption imposes on the plaintiffs. To successfully rebut the presumptions, defendants do no longer have to meet the strict, cumulative conditions, which the objective justification or efficiency defence are subject to.

In reducing the evidential burden for defendants to rebut the *Hoffmann-La Roche* presumption, the Court further limited the possibility for competition authorities to simply infer the foreclosure effects and illegality of rebates from the conditionality and/or loyalty-enhancing effect of the rebate scheme. Just as the Court aligned the by-object restriction in *Cartes Bancaires* with a sliding-scale rule of reason approach, so too in *Intel*, the Court transformed the *Hofmann-La Roche* presumption of illegality of loyalty rebates into a burden-shifting device for a structured rule of reason analysis of rebates. The presumption of *prima facie* illegality of loyalty rebates hence constitutes only one amongst a number of analytical filters to determine their anticompetitive effects. Other filters, such as the foreclosure rate, the duration of the rebate scheme and the incremental price-cost test ('as-efficient competitor test') may become relevant in supporting or undermining an inference of their likely anticompetitive effects from their economic form.[178] *Intel*, thus, aligns the analysis of rebates with a sliding-scale approach under which the weight of the offsetting burden of proof for the plaintiff depends on the strength of the *prima facie* evidence of anticompetitive foreclosure put forth by the Commission. The weight of the *Hoffmann-La Roche* presumption and the height of the offsetting burden of proof for the defendant are increasingly contingent on the strength or, in other words, the factual accuracy of the presumption and the quality of additional fact-specific evidence the Commission puts forward in its support. Commentators, therefore, rightly suggest that, as a consequence of this procedural clarification in *Intel,* it becomes increasingly likely that competition authorities will rely from the outset on an effects-based analysis, including an

[177] For this distinction between 'offsetting' and 'undermining' evidence Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 10.
[178] N. Petit, 'The Judgment of the EU Court of Justice in Intel and the Rule of Reason in Abuse of Dominance Cases' (2018) 8.10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086402> accessed 25 July 2019.

incremental price-cost test, to assess loyalty rebates in order to anticipate any challenge of the *prima facie* presumption of illegality.[179] After *Intel*, the *Hoffmann-La Roche* presumption does no more encapsulate the assumption that loyalty rebates are by their 'very nature capable of foreclosing competitors'[180] and are, therefore, incompatible with competition on the merits.[181] Instead, the *Hoffmann-La Roche* presumption has been transformed into a procedural tool to assign and adjust the weight of the evidential burden within the framework of a sliding-scale rule of reason analysis.

With the rise of the consumer welfare standard, the weight of presumptions of illegality in all three fields of US and EU competition law has thus dwindled. To alleviate the burden and constraints the remaining presumptions of legality impose on the negative entrepreneurial liberty of businesses, US and EU antitrust law have endorsed a sliding-scale approach to coordinated conduct, unilateral conduct and mergers. Instead of relying on a rigid application of form-based presumptions of illegality, the sliding-scale approach adjusts their weight in accordance with the likelihood of certain conduct to give rise to consumer harm.

This sliding-scale rule of reason analysis allows for the testing of the factual accuracy of legal presumptions. Instead of establishing rigid, one-shot inferences about the substantive effect and legality of certain types of conduct, presumptions of illegality have become mainly a procedural burden-shifting device. They structure the rule of reason analysis by assigning the evidentiary burden and by calibrating its height in accordance with the likelihood of anticompetitive effects of a specific conduct. This shift towards a sliding-scale approach has reduced the weight of legal presumptions in two respects. First, as a result of the shift towards a sliding-scale approach, the strength of legal presumptions varies on a case-by-case basis in accordance with the strength of additional, fact-specific evidence. Second, the shift towards a sliding-scale approach has also expanded the possibility of the antitrust defendants to rebut any presumption of illegality.

The shift towards a *laissez-faire* approach thus has alleviated the constraints that the remaining legal presumptions impose on the entrepreneurial liberty of businesses, as it seeks to avoid antitrust interference with the negative liberty of businesses due to erroneous inferences. By reducing the rigidity and weight of presumptions of illegality, the *laissez-faire* approach

[179] Whish and Bailey (n 175) 750; Case No AT.40220 — Qualcomm (Exclusivity Payments)) (Summary decision). OJ [2018] C 269/25 paras. 14-21.
[180] Case T-286/09 *Intel v Commission* ECLI:EU:T:2014:547 paras. 85, 87-88.
[181] Case C-413/14 P *Intel v Commission* (n 68) para. 142.

has, however, also detracted from their rule-like character. Unlike under the republican approach, presumptions of illegality do no longer address the potential domination resulting from certain categories of business conduct by making them inaccessible to market participants. Rather, the extent to which certain conduct is presumed illegal depends on the fact-specific evidence indicating their likelihood to interfere with the negative liberty of other market participants in a welfare-decreasing way. As a consequence, the reduction in the weight of presumptions of illegality has become more contingent and less resilient than under the republican approach.

2.3 New Presumptions of Legality

The shift from a republican to a *laissez-faire* approach not only prompted the narrowing of the scope and the weakening of the weight of presumptions of illegality. Even more importantly, the rise of *laissez-faire* antitrust manifested itself in the proliferation of presumptions of legality under US and EU competition law. Under the auspices of the Chicago and post-Chicago paradigms, US and EU competition law have adopted a presumption of legality towards most types of vertical agreements[182] and mergers[183] in the absence of market power on the part of the parties. The most prominent example of the growing reliance of *laissez-faire* antitrust on presumptions of legality is, however, the application of antitrust rules to unilateral pricing conduct by powerful firms.

In *Brooke Group*, the US Supreme Court adopted the incremental price-cost test as the relevant benchmark to distinguish legitimate aggressive price competition from illegitimate predatory pricing. Accordingly, a dominant firm only violates antitrust rules if it sets prices

[182] *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 89, 900; Bork (n 2) 264–266; Easterbrook (n 12), 9; *Ohio v. American Express Co.* (n 9) 10 fn 7. See for criticism *Ohio v. American Express Co.* (n 9) Justice Breyer dissenting 13-14. Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. OJ [1999] L336/21, recital 7 and 8; Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ [2010] L 102/1, recitals 7 and 8; Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (n 182) Art. 3 (1); R. Whish, 'Regulation 2790/99: The Commission's ``new style'' Block Exemption for Vertical Agreements' (2000) 37(4) Common Market Law Review 887 908; Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (n 182) Art. 3; Guidelines on Vertical Restraints. OJ [2010] C 130/01 paras.102, see also para. 6. The European approach is however stricter than US courts with respect to agreements containing hardcore restrictions, such as resale price maintenance and certain territorial restraints Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (n 182) Art. 4.

[183] 1982 Merger Guidelines (n 113) 14–19; Commission Guidelines on the assessment of horizontal mergers (n 97) paras. 18-21.

below its incremental costs.[184] The *Brooke Group* test, thus, created a presumption of legality for above-cost pricing, even though economic scholarship showed that above-cost pricing by powerful firms is capable of foreclosing equally efficient competitors and harm consumer welfare.[185] This under-inclusive approach towards exclusionary pricing did not happen by accident. On the contrary, the Supreme Court overtly recognised that above-cost pricing might under certain circumstances lead to the foreclosure of as efficient competitors and harm consumer welfare. Yet, the Supreme Court ardently asserted that it is simply impossible to determine whether such harm is the consequence of anticompetitive conduct or the higher efficiency of the alleged predator. Although the incremental rice cost test might fail to deter certain forms of above-cost predation, the Court concluded that any inquiry into the anticompetitive effects of above-cost price-cutting by a dominant firm would render the antitrust analysis unadministrable. Most importantly, it would bear a high risk of creating false convictions (type I errors), which might chill price competition [186] and deprive consumers of the benefits of low prices.[187] The Court, therefore, took the view that the goal of ensuring a clear zone within which businesses could exercise unlimited negative entrepreneurial liberty in setting their prices clearly outweighed concerns about their potential adverse impact on competitors.

This goal of ringfencing negative entrepreneurial liberty to the largest extent possible from antitrust scrutiny has become a primary concern of the application of US antitrust rules to exclusionary pricing conduct by dominant firms. The incremental price cost test has become firmly entrenched as the relevant legal test for the assessment of unilateral pricing conduct

[184] *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 222.
[185] F. M. Scherer, 'Predatory Pricing and the Sherman Act: A Comment' (1975-1976) 79 Harvard Law Review 869 871–880; F. M. Scherer and D. Ross, *Industrial market structure and economic performance* (Houghton Mifflin 1990) 472–478; R. Schmalensee, 'On the use of economic models in antitrust: The realemon case' (1978-1979) 127(4) University of Pennsylvania Law Review 99 1061. Baumol (n 59), 2–3. Yamey (n 58), 134–135. Williamson (n 59), 285–286. Brodley and Hay (n 59), 744–746. P. Milgrom and J. Roberts, 'Predation, Reputation and Entry Deterrence' (1982) 27(2) Journal of Economic Theory 280 281-284, 302.303. P. Milgrom and J. Roberts, 'New Theories of Predatory Pricing' in G. Bonanno and D. Brandolini (eds), *Industrial Structure in the New Industrial Economics* (Oxford University Press 1990) 123–133. Bolton, Brodley and Riordan (n 58), 2247-2250, 2295-2321. Posner (n 3), 939–940; A. S. Edlin, 'Stopping Above Cost Predatory Pricing' (2002) 111(4) Yale Law Journal 941 955-978; J. B. Baker, 'Recent Developments in Economics that Challenge Chicago School Views' (1989) 58(2) Antitrust Law Journal 645 649. See however J. S. McGee, 'Predatory Pricing Revisited' (1980) 23(2) Journal of Law and Economics 289; F. H. Easterbrook, 'Predatory strategies and counterstrategies' (1981) 48(2) University of Chicago Law Review; E. Elhauge, 'Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory- and the Implications for Defining Costs and Market Power' (2003) 112 Yale Law Journal 681.
[186] *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 223. Areeda and Turner (n 57), 704-706, 710-711.
[187] *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 224.

under § 2 of the Sherman Act.[188] While noting the under-inclusiveness of the incremental price-cost test, the Supreme Court and lower courts clarified that the concern about preserving the negative liberty of powerful firms should guide the application of antitrust rules to all forms of allegedly exclusionary pricing conduct. On this account, the US Supreme Court and the lower courts have repeatedly reaffirmed the presumption of legality coined in *Brooke Group*, which shields above-cost pricing by dominant firms from the scope of antitrust rules.[189] *Brooke Group* and progeny have thus firmly established the price-cost test as

> *a specific application of the "rule of reason" to exclusionary pricing conduct which encodes an 'implicit balancing of the procompetitive justifications of above-cost pricing against its anti-competitive effects (as well as the anticompetitive effects of allowing judicial inquiry into above-cost pricing) and a conclusion that the balance always tips in favour of allowing above-cost pricing to stand.*[190]

On the other side of the Atlantic, too, the Commission and, more recently, the Court started to rely on the incremental price-cost test to discern exclusionary from aggressive price cutting. They, thereby, carved out an implied presumption of legality for above-cost price-cutting by dominant firms. After initial hesitation, the Commission endorsed the calls by proponents of a More Economic Approach to render Article 102 TFEU inapplicable to above-cost selective price cuts by dominant firms.[191] Whereas the Commission's Discussion Paper had still suggested that above-cost price cuts might under certain circumstances give rise to an abuse of dominance,[192] the Guidance Paper omitted any such reference to the application of Art. 102 TFEU against above-cost pricing conduct by dominant firms.[193] Rather, the Guidance enthroned an updated version[194] of the *AKZO* price cost-test as the default framework for the

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[188] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* 549 U.S. 312 (2007) 325, 318-324.
[189] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* (n 188) 325; *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 39) 414; *Pacific Bell Telephone Co. dba AT&T California, et al. v. linkLine Communications, Inc. et al.* (n 39) 11.
[190] *ZF Meritor, LLC v. Eaton Corp.* (n 51) 273.
[191] D. Ridyard, 'Exclusionary pricing and price discrimination abuses under Article 82 - an economic analysis' (2002) 23(2) European Competition Law Review 286 292–293; J. Temple Lang and R. O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82' (2002) 26 Fordham Int'l L.J. 83 140; O'Donoghue and Padilla (n 69) 250–251; Kon and Turnbull (n 79), 75; Economic Advisory Group on Competition Policy (EAGCP) (n 69) 21-22, 53; De la Mano, Miguel and Durand (n 79) 2.
[192] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses 2005, Discussion Paper paras. 128-129 (selective price cuts). For a critical discussion O'Donoghue and Padilla (n 69) 282–283.
[193] The Guidance Paper only refers to *below*-cost selective price cuts Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) para. 72.
[194] To address the under-inclusiveness of the cost benchmarks of AVC and ATC in the context of multi- market or multi-product, the Guidance adopted the more versatile cost measures of Average Avoidable Costs (AAC) and Long-run Average Incremental Costs (LRAIC) as surrogates for AVC and ATC. ibid para. 26. See in this respect also Case No COMP/35.141 Deutsche Post AG OJ [2001] L 125/27 paras. 2-3, 5-10, 12-17, 35-36; J.

assessment of whether the pricing conduct by a dominant firm will foreclose an equally efficient competitor.[195] In a similar vein as the US courts, the Commission, thus, elevated the price-cost test to the central methodological tool to determine whether pricing conduct by dominant firms is likely to harm consumers because it forecloses an equally efficient competitor. By removing above-cost pricing by dominant firms from the scope of Art. 102 TFEU, the Commission endorsed the view that in the case of above-cost price cuts, any foreclosure effect can be attributed to the lack of efficiency of competitors, rather than the level of the effective price charged by the dominant firm.

In the aftermath of the publication of the Commission's Guidance Paper, the Court of Justice also increasingly espoused the incremental price-cost or so-called 'as-efficient competitor' test as an essential filter for an effects-based rule of reason analysis of pricing conduct by dominant firms.[196] In *Post Danmark I,* the Court firmly established the principle that Art. 102 TFEU only prohibits exclusionary pricing conduct that forecloses competitors who are as efficient as the dominant firm.[197] On this basis, the Court dealt a final blow to the application of Art. 102 TFEU to above-cost selective price cuts by dominant firms. It held that the distinction between legitimate and anticompetitive price-cutting requires the analysis of all circumstances of the case[198] and crucially hinges on whether pricing conduct leads to the foreclosure of an equally efficient competitor.[199] Without mentioning *Compagnie Maritime Belge* where it had found that above cost price-cutting may fall afoul of Art. 102 TFEU,[200] the Court then concluded that selective price cuts, which allow the dominant firm to cover 'the great bulk' of its cost (ATC) are not capable of foreclosing an equally efficient competitor and are, therefore, lawful under Art. 102.[201] *Post Danmark I,* thus, endorsed the approach taken in the Commission's Guidance Paper and created a clear carve-out for above-cost pricing cutting by dominant firms.[202] By enthroning the incremental price-cost test as the ultimate test to

Temple Lang, 'European Community Antitrust Law: Innovation Markets and High Technology Industries' [1996] Fordham Corporate Law Institute, 124 fn 89; Temple Lang (n 194); O'Donoghue and Padilla (n 69) 260–272; Ridyard (n 191), 301–302.

[195] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 23-27, 43-44 64-65, 67.

[196] Case C-280/08 P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603 pparas. 83-85, 177, 202-203. Case C-52/09 *TeliaSonera Sverige* (n 70). Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 70) paras. 22, 24-27, 28.

[197] ibid para. 25.

[198] ibid para. 26.

[199] ibid para. 25.

[200] Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:2000:132 paras. 112-120. See also the discussion in Chapter 5

[201] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 70) para. 38.

[202] ibid para.38.

determine the legality of pricing conduct by dominant firms, the Commission and the Court departed from their form-based approach in *Akzo* or *Compagnie Maritime*, which had considered the non-linear form of price cuts as indicia for the dominant firm's subjective intent to foreclose competitors.[203]

This goal of insulating to the largest extent possible the negative liberty of dominant firms to set their prices from state intervention also explains the increasing tendency of antitrust enforcers and courts on both sides of the Atlantic to expand the concept of pricing abuses together with the presumption of legality for above-cost pricing to any type of unilateral dominant firm conduct involving low, non-linear pricing. Indeed, on both sides of the Atlantic, the incremental price-cost test is increasingly viewed as the appropriate tool to assess the legality of unilateral behaviour by dominant businesses, such as bundled and loyalty rebates, which traditionally have not been considered as pricing conduct.

This expansion of the use of the incremental price-cost test to rebates contrasts with economic insight that bundled[204] and loyalty rebates[205] allow dominant firms to foreclose equally efficient competitors without necessarily engaging in below-cost pricing. The exclusionary effect of bundled and loyalty rebates, economists suggest, often does not derive from the actual level of the discounted price. Rather, it results from the fact that dominant firms can leverage their ability to grant the rebate across a larger range of product lines (bundled rebates) or volume of sales (loyalty rebates) than their competitors. In other words, the exclusionary effect of rebates often results from the size-advantage of the dominant firm and the structure of the pricing policy underpinning the rebate scheme rather than the level of the

[203] ibid paras. 30, 37. Cf. Case C-62/86 *AKZO v Commission* ECLI:EU:C:1991:286 paras. 155-156; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 79) para. 121.

[204] See, for instance, Judge Kaplan in *Ortho Diagnostic Systems v. Abbott Laboratories* 920 F. Supp. 455 (S.D.N.Y. 1996) 467; P. Areeda and H. Hovenkamp, *Antitrust Law: 2nd edition* (Aspen 2001) Supp 2006, § 749a at 318-319; Nalebuff (n 44), 321; Posner (n 43) 236; *LePage's Inc. v. 3M* (n 50) 150; T. A. Lambert, 'Evaluating Bundled Discounts' (2005) 89(6) Minnesota Law Review 1688 1728; *Cascade Health Solutions v. PeaceHealth* 502 F.3d 895 (9th Cir. 2007) 915.

[205] W. K. Tom, D. A. Balto and N. W. Averitt, 'Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing' (2000) 67(3) Antitrust Law Journal 615 615, 623-624, 627–629. D. Spector, 'Loyalty Rebates: An Assessment of Competition Concerns and a Proposed Structured Rule of Reason' (2005) 1(2) Competition Policy International 89 94–97. J. A. Ordover and G. Shaffer, 'Exclusionary discounts' (2013) 31(5) International Journal of Industrial Organization 569 569–571. E. Elhauge, 'Defining Better Monopolization Standards' (2003) 56(2) Stanford Law Journal 253 284–292. E. Elhauge and A. L. Wickelgren, 'Anticompetitive Market Division through Loyalty Discounts without Buyer Commitment' [2012] Harvard Discussion Paper 1, 1–4. E. Elhauge and A. L. Wickelgren, 'Robust Exclusion and Market Division through Loyalty Discounts' (2015) 43 International Journal of Industrial Organization 111 112–113. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Discussion Paper (n 192) paras. 165; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) para. 37.

discounted prices.[206] This leverage theory, at least implicitly, shaped the republican case law of US and EU courts, which approached bundled rebates and, in particular, loyalty rebates as non-price exclusionary conduct comparable to tying restraints[207] or *de facto* exclusive dealing agreements.[208]

Yet, this treatment of various forms of rebates as non-price conduct has been largely abandoned over the last two decades. A majority of US Circuit Courts and a growing number of antitrust scholars on both sides of the Atlantic have started to consider bundled and loyalty rebates as just another specimen of exclusionary pricing conduct akin to predatory pricing.[209] Antitrust enforcers and courts have become reluctant to infer the exclusionary effects of these rebates from the dominant position of the firm and their loyalty-enhancing form.[210] Instead, courts, competition authorities and commentators on both sides of the Atlantic increasingly assume that the legality of those rebates should be assessed on the basis of a modified incremental price-cost test. This test does not assess whether the discounted average price charged by the dominant firm exceeds its incremental cost. Rather, it focuses on the effective price[211] that a competitor would have to offers customers to meet the dominant firm's discounted price and compensate customers for the loss of discounts they incur when switching

[206] Tom, Balto and Averitt (n 205), 629; Carlton (n 44), 663–665.
[207] *SmithKline Corp. v. Eli Lilly & Co.* 575 F.2d 1056 (3d Cir. 1978); *LePage's Inc. v. 3M* (n 50).
[208] *United Shoe Mach. Co. v. United States* 258 U.S. 451 (1922) 457; *Standard Fashion Company v. Magrane-Houston Company* (346 U.S. 258 (1921)); *United States v. United Shoe Machinery Corp.* 110 F. Supp. 295 (D. Mass. 1953); Jacobson (n 45), 338; Tom, Balto and Averitt (n 205), 629; Carlton (n 44), 663–665; Case 40/73 *Suiker Unie and Others v Commission* ECLI:EU:C:1975:174 paras. 502-505, 513; Case 85/76 *Hoffmann-La Roche v Commission* (n 75) paras. 89-90.
[209] For bundled rebates see *Cascade Health Solutions v. PeaceHealth* (n 204) 909; Nalebuff (n 44), 365. *Cascade Health Solutions v. PeaceHealth* (n 380) 909. Nalebuff (n 449), 365; Areeda and Hovenkamp (n 448) Areeda and Hovenkamp (n 204) Supp. 2006 § 749 at 332; D. L. Rubinfeld, '3M's Bundled Rebates: An Economic Perspective' (2005) 72 The University of Chicago Law Review 243 252–256; D. Crane, 'Multiproduct Discounting: A Myth of Nonprice Predation' (2005) 72(27) The University of Chicago Law Review 29; Antitrust Modernization Commission, 'Report and Recommendations' (2007) 94–100 <https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf> accessed 16 July 2019. For loyalty discounts *Barry Wright Corp. v. ITT Grinnell Corp.* (n 358) 231. *Concord Boat Corp. v. Brunswick Corp.* (n 51); *United States v. Microsoft Corporation* (n 30); H. Hovenkamp, 'Discounts and Exclusions' [2006] Utah Law Review 841, 844; D. A. Crane, 'Bargaining over Loyalty' (2013) 92 Texas Law Review 253. See however for arguments against the extension of the price-cost test to rebates S. C. Salop, 'The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test' (2017) 81(2) Antitrust Law Journal 371. S. C. Hemphill and P. J. Weiser, 'Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing' (2018) 127 Harvard Law Review 2048 2074–2076. In *Microsoft* the Court of Appeals went even further and suggested that discounts are only in breach of § 2 of the Sherman Act if both prongs - the price-cost and recoupment *United States v. Microsoft Corporation* (n 30) 68.
[210] *SmithKline Corp. v. Eli Lilly & Co.* (n 207). *LePage's Inc. v. 3M* (n 50) 154; Case 85/76 *Hoffmann-La Roche v Commission* (n 75) paras. 89-90. See for the position that recoupment is not necessary, because rebates do not entail any profit sacrifice *Cascade Health Solutions v. PeaceHealth* (n 204) 921.
[211] ibid 919. For the calculation of the effective price by means of discount allocation Crane (n 209), 28 fn 8.Crane (n 459), 28 fn 8. For the discussion of alternative tests *Cascade Health Solutions v. PeaceHealth* (n 204) 914..

part of their demand to them. As long as the loyalty or bundled rebates do not cause the effective price to fall below the dominant firm's incremental or average (total) cost, even rebate schemes with a considerable discount rate cannot be considered exclusionary. Conversely, there is a growing consensus on both sides of the Atlantic that above-cost discounts should benefit from a strong presumption of legality. [212]

While the Court of Justice of the EU has never wholeheartedly endorsed the incremental price-cost test as the sole methodology to identify the anticompetitive effects of rebates,[213] it has nevertheless noted that the as-efficient competitor test may, in principle, be used to assess the exclusionary effect of rebates.[214] In *Intel*, the Court further highlighted the importance of the incremental price-cost test as part of the foreclosure analysis of loyalty rebates. To be sure, the Court did not explicitly state that the application of an as-efficient competitor test is necessary to determine the legality of fidelity rebates. The Court, however, insisted that only rebates that foreclose an as-efficient competitor would run afoul of Art. 102 TFEU.[215] It also underscored that a dominant firm is only required to proffer an objective justification if the capacity of rebates to lead to an anticompetitive foreclosure of equally efficient competitors has been demonstrated.[216] The Court, thus, recognised the possibility for a dominant firm to rebut

[212] *Barry Wright Corp. v. ITT Grinnell Corp.* (n 51) 235; *Concord Boat Corp. v. Brunswick Corp.* (n 51) 35. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 23–27, 43-44. Temple Lang and O'Donoghue (n 191), 108–109; Ridyard (n 191), 293; Kallaugher and Sher (n 77), 280–281; Economic Advisory Group on Competition Policy (EAGCP) (n 69) 37–38; G. Federico, 'When are rebates exclusionary?' (2005) 26(9) European Competition Law Review 477 478–480. This basic proposition that the negative liberty of firms to engage in above-cost rebates should be insulated from antitrust intervention has also been endorsed by the Court of Appeals for the Third Circuit, which had as sole US Appeals Court rejected the incremental price-cost test as the exclusive methodology to determine the legality of rebates. *ZF Meritor, LLC v. Eaton Corp.* (n 51) 277; *Eisai, Inc. v. Sanofi Aventis U.S. LLC* 821 F.3d 394 (3d Cir. 2015) 409. The Third Circuit, however, limited the instances in which the incremental price-cost test does not apply to loyalty rebate schemes to the situation where customers risk penalties or supply shortages in the case of non-compliance with the contractual exclusivity requirements (i.e. discounts with customer commitment). *Eisai, Inc. v. Sanofi Aventis U.S. LLC* (n 212) 406. Like in the case of selective above-cost price cuts, the Commission departed from its initial position that Art. 102 TFEU may be applied to rebates which do not drive (effective) prices below the costs of the dominant firm. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Discussion Paper (n 192) para. 165. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 23-27, 41-45.

[213] Case C-549/10 *P Tomra and Others v Commission* ECLI:EU:C:2012:221 para. 73. Case C-23/14 *Post Danmark II* ECLI:EU:C:2015:651 para. 57. Case T-286/09 *Intel v Commission* (n 180) paras. 125-137, 148-157, 172-175.

[214] Case C-23/14 *Post Danmark II* (n 213) paras. 58, 61.

[215] Case C-413/14 P *Intel v Commission* (n 68) paras. 133-134, 139-140.

[216] ibid para. 140.

the presumption of illegality against loyalty rebates by producing its own incremental price-cost test showing that its rebate scheme did not push the effective price below its costs.[217]

The *Intel* ruling thus suggests that rebates are no more considered in the same way as exclusive dealing agreements as non-price abuses, but they are rather viewed as pricing abuses[218] akin to predatory pricing. As a consequence, the legality of loyalty rebates under Art. 102 TFEU is subject to the same principle as that of other pricing conduct: they are only prohibited if they are capable of foreclosing an equally efficient competitor.[219] It implicitly follows that above-cost rebates, even when conditioned upon exclusivity, benefit from a presumption of legality. *Intel* thus removed above-cost rebates, which are not capable of foreclosing an as-efficient competition, from the scope of Art. 102 TFEU. This introduction of a presumption of legality for above-cost rebates further shields businesses' negative liberty to engage in non-linear price-cutting from antitrust scrutiny.

The incremental price-cost test and the implied presumption of legality for above-cost pricing have become the predominant tools to assess unilateral pricing conduct by dominant firms. It has become the predilect device to put the consumer welfare standard and the underpinning concern about negative liberty into practice. The price-cost test, indeed, allows competition authorities and courts to isolate with quasi-mathematical precision the rare instances when dominant firm conduct amounts to welfare-decreasing, and hence undue interference with the negative liberty of other market participants. This is only unambiguously the case if the dominant firm sets prices below its incremental costs. At the same time, by generously carving out above-cost pricing from the scope of antitrust law, the price-cost test ensures legal certainty for dominant firms and protects their negative economic liberty to the largest extent possible from antitrust intervention. It thus maintains the incentives of dominant firms to compete aggressively and derive benefits from their lower cost structure.[220]

[217] J. S. Venit, 'The judgment of the European Court of Justice in Intel v Commission: a procedural answer to a substantive question?' (2017) 13(2-3) European Competition Journal 172 187–190; P. I. Colomo, 'The Future of Article 102 TFEU after Intel' (2018) 9(5) Journal for European Competition Law & Practice 293 302; Petit (n 178) 10, 21; Case No AT.40220 — Qualcomm (Exclusivity Payments)) (Summary decision) (n 179) para. 19.
[218] Case C-413/14 P *Intel v Commission* (n 68) para. 136.
[219] ibid para. 134.
[220] *Cascade Health Solutions v. PeaceHealth* (n 204) 915.

2.4 The Decline of Presumptions of Illegality and its Impact on Republican Liberty

All the developments canvassed in the previous sub-sections – the shrinking of the scope of presumptions of illegality and reinterpretation of their underpinning rationale, the dwindling weight of remaining presumptions and the growing reliance of antitrust law on presumptions of legality – epitomise the growing displacement of the concern about liberty as non-domination by the value of negative liberty as the underlying concern of US and EU competition law. This transformation of the role of presumptions in US and EU antitrust was a driving force behind the move from a republican towards a *laissez-faire* approach.

The declining scope of the presumptions of illegality is primarily the consequence of the endorsement of a rule of reason like effects-based analysis as the default method to assess anticompetitive conduct under US and EU competition law. The rule of reason analysis, indeed, became the predilect mode for operationalising the consumer welfare standard.[221] To proponents of the Chicago School and the More Economic Approach, too broad an application of legal presumptions and rules created an obstacle for the application of the consumer welfare standard as a tool to limit antitrust intervention to those instances in which agreements unduly interfere with the negative liberty of other market participants.[222] They, therefore, called for the substitution of rigid legal presumptions and rules by the more flexible rule of reason standard. The reduction in the scope of presumptions of illegality was, hence, motivated by the objective to preserve the legitimate, welfare-enhancing exercise of negative freedom of contract and property rights of businesses against competition law intervention.

To align the application of US and EU antitrust with the consumer welfare standard as the predominant framework to implement the thinned-out concept of negative economic liberty, US and EU enforcers and courts have also reinterpreted the underpinning rationale of the remaining presumptions of illegality. These presumptions of illegality were no longer exclusively grounded in the concern about domination. They ceased to constitute a generalisation of the magnitude of potential harm specific types of coordinated and unilateral business conduct and mergers may generate by undermining a competitive market structure. Rather, they are perceived as generalisations of the adverse effect of certain types of conduct on consumer welfare and, hence, their likelihood to lead to welfare-decreasing interference with

[221] Crane (n 4), 54–65; Christiansen and Kerber (n 4), 216–219.
[222] See for instance Economic Advisory Group on Competition Policy (EAGCP) (n 69) 3, 6-7.

the economic liberty of other market players. Legal presumptions have thus moved away from liberty as non-domination as its underlying rationale. They no longer establish a *per se* or *prima facie* rule against certain types of conduct or levels of power concentration based on the mere reason that they put private parties in a situation where they can arbitrarily interfere with the sphere of autonomy of other market participants. On the contrary, the new understanding of presumptions of illegality has been fully adjusted with the consumer welfare standard. With the rise of *laissez-faire* antitrust, their scope has been limited to circumstances where there is an actual or concrete threat of likely welfare-decreasing interference with the negative liberty of other market participants.

This alignment of presumptions of illegality with the consumer welfare standard and the value of negative liberty also drives the increasing trend towards a blending of presumptions of illegality with effects-based analysis into a sliding-scale rule of reason-type analysis. Under this sliding-scale approach, modern antitrust analysis operates along a continuum which assigns the burden of proof and weighs the strength of presumptions in accordance with the specific facts of the case. Presumptions nowadays operate primarily as procedural, burden-shifting devices that assign and fine-tune the weight of the evidentiary burden and the requisite level of scrutiny. The remaining presumptions of illegality hence do no longer constitute rigid substantive inferences about the harm of specific conduct. Their weight, instead, depends on the likelihood of anticompetitive effects of a given type of conduct and the quality of fact-specific evidence supporting such an inference. Instead of creating rigid rules against certain types of agreements, unilateral conduct or mergers, presumptions of illegality nowadays operate rather as multipliers that adjust the weight of the *prima facie* case with the discounted likelihood of anticompetitive effects and thus tip the scales either in favour of the plaintiff or the defendant. Depending on the specific facts of the case, these presumptions underlying the *prima facie* case can be more or less easily rebutted by defendants. Ultimately, this shift towards a sliding-scale approach seeks to maintain the advantages in terms of administrability and procedural economy that legal presumptions offer without, however, subjecting the negative liberty of firms to the straightjacket of legal rules. The sliding-scale approach maximises the negative liberty of firms by optimising the precision of presumptions of illegality as administrative filters.[223] It does so

[223] *California Dental Assn. v. FTC* (n 12) Justice Breyer, dissenting 794. *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 898; *Federal Trade Commission v Actavis et al.* (n 122) Majority, 21.

by calibrating their weight to the degree of likelihood with which certain conduct interferes with competitors in a way that reduces consumer welfare.[224]

The radical shift from republican to *laissez-faire* becomes most apparent in the growing role of presumptions of *per se* legality. These presumptions entirely remove certain types of agreements, unilateral conduct and mergers from the scope of US or EU competition law. This proliferation of presumptions of legality starkly contrasts with the broad use of presumptions of illegality under republican antitrust. To protect the liberty of non-domination of market participants, republican antitrust relied on presumptions of illegality to make certain conduct, carrying a high potential of domination, inaccessible to firms. *Laissez-faire* antitrust pursues exactly the opposite strategy. It makes antitrust actions against certain types of conduct inaccessible in order to shield negative entrepreneurial liberty from state intervention. This narrowing and weakening of legal presumptions and the simultaneous expansion of presumptions of legality importantly curtailed the scope of economic liberty protected by antitrust and undermined its resilience.

This simultaneous shrinking and thinning out of economic liberty is exemplified by the increasing endorsement of the incremental price-cost test as the determinative benchmark to decide when unilateral pricing conduct by dominant firms violates US and EU antitrust rules. The proliferation of the price-cost test considerably eroded the role of form-based legal presumptions in assessing unilateral conduct by powerful firms. With their endorsement of the price-cost test, the US and EU courts and enforcers disavowed the republican approach that deemed certain forms of non-linear pricing strategies by large companies as tainted with the inherent tendency to entail domination.[225] Under the *laissez-faire* approach, the mere tendency of specific non-linear pricing practices by dominant firms, such as rebates, to lead to arbitrary interference and domination is no longer sufficient to be categorically presumed as falling outside the realm of legitimate competition on the merits. Conversely, the economic liberty of market participants is no longer categorically guarded against the domination that may flow from aggressive pricing conduct or loyalty rebates.

The adoption of the as-efficient competitor test, thus, considerably shrunk the scope of economic liberty protected by antitrust rules governing the unilateral conduct by dominant

[224] Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4).
[225] *Utah Pie Co. v. Continental Baking Co.* (n 36). Bork (n 2) 387; Case C-62/86 *AKZO v Commission* (n 203) paras. 155-156; *Opinion of Advocate General Fennelly in* Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (n 79) para. 121.

firms. It, indeed, considerably reduced the instances where dominant firm conduct is considered to undermine liberty. Under the as-efficient competitor test, it is no longer the increase in the power of the dominant firm as the consequence of the weakening of the competitive structure in the market, which constitutes the source of unfreedom. Rather, the consumer welfare approach and its operationalisation through the as-efficient competitor test seek to only avert conduct by a dominant firm that interferes with the negative liberty of equally efficient competitors and thus harms consumer welfare. This approach is hence only concerned about a narrowly defined concept of negative liberty as non-interference. At the same time, it remains sanguine about the impact of the dominant firm's conduct on the equality of opportunity of other competitors and the role even less efficient competitors may play in imposing checks on the power of dominant firms. In narrowing the protective scope of antitrust rules to equally efficient competitors, the price-cost test fully disavows the republican ideal of preserving a competitive market structure as a system of antipower. The idea that even less or 'perhaps as efficient'[226] competitors might exert important constraints on the dominant firm and the republican concern about preserving residual competition as a safeguard against domination by dominant firms has been largely abandoned.[227]

In addition to curtailing its scope, the rise of the price-cost test has also reduced the resilience of this shrunk concept of economic liberty. This is, in particular, the case in Europe where the rise of the incremental price-cost test goes hand in hand with an erosion of the presumption of illegality associated with the loyalty-enhancing effect of certain types of rebates. In the classical case law, this presumption of illegality of loyalty rebates, due to its rule-like character, enhanced the robustness and intensity of economic liberty as non-domination enjoyed by other market participants. Indeed, the presumption made loyalty rebates simply inaccessible for dominant firms and thus reduced the resources of domination that powerful firms could mobilise. As a consequence, the enjoyment of market participants' economic liberty was not contingent on the specific design of the loyalty rebate scheme.

This intensity of the protection of economic liberty has dwindled away with the rise of the incremental price-cost test that broadly excludes above-cost pricing from the scope of antitrust laws. This carve-out has considerably curtailed the intensity of protection of economic liberty by US and EU antitrust rules. Several experts have, indeed, criticised the price-cost test

[226] Case C-62/86 *AKZO v Commission* (n 203) para. 72.
[227] For the proposition that less-efficient competitors may impose important constraints on the market power of monopolistic firms and thus benefit consumers Salop (n 209), 414–415.

for not addressing all instances in which predatory pricing[228] and rebates[229] might lead to the foreclosure of equally efficient competitors.

First, the price-cost test has injected a considerable amount of complexity into the analysis of rebates.[230] For example, when applied to rebates, the incremental price-cost test is grounded in the assumption that any market power effect, flowing from the ability of dominant firms to leverage their control over the non-contestable demand of customers, can be internalised and quantified through the exact calculation of the effective price of the rebate scheme. As a consequence, the finding of anticompetitive effects and, hence, the protection of the liberty of consumers and competitors have become highly contingent upon the accuracy of the relevant data and variables used for measuring the effective price and the costs of the dominant firm.

Second, the rise of the incremental price-cost test also exposes the withering of concerns about, or even complete denial of, any asymmetry in power and bidding advantages between the dominant firm and the non-dominant competitor. The price-cost test leaves aside the concern, underpinning the republican case law towards predatory pricing, that large firms might be able to finance a predatory pricing strategy by virtue of their higher financial resources or thanks to their presence in and ability to cross-subsidise their activities across various product or geographic markets. The price-cost test, instead, analyses predatory pricing as if it took place in perfectly competitive markets. It thus incorporates the Chicagoan position, which had disputed the 'deep pocket'[231] and cross-subsidization[232] explanations for predatory pricing on the assumption of perfect capital markets and the single monopoly profit theorem. Similarly, the price-cost test also analyses rebates offered by dominant firms as if they were granted in a perfectly competitive market and ignores that dominant firms are bidding to maintain their position of market power.[233]

The incremental price-cost test hence tallies well with the Chicagoan assumption that most of the time the effects of dominant firms' business conduct do not differ from those of

[228] Yamey (n 58); Scherer (n 185); Edlin (n 185).
[229] Salop (n 209); Hemphill and Weiser (n 209).
[230] Salop (n 209), 406–407; Hemphill and Weiser (n 209), 2076.
[231] Bork (n 2) 146-148, 153. While sharing the scepticism about the 'imperfections-in-the-capital-market' argument, other Chicago Scholars acknowledged the possibility that imperfections of capital markets may facilitate the success of predatory pricing. See for instance G. J. Stigler, 'Imperfections in the Capital Market: Reprinted from Journal of Political Economy, Vol. LXXV, No. 3, June 1967' in G. J. Stigler (ed), *The Organization of Industry* (1968) 114–121; Telser (n 57); Posner (n 43) 210–211; Bork (n 2) 147–148.
[232] Bork (n 2) 144–145.
[233] Salop (n 209), 408–410.

non-dominant firms. It assumes that customers could anytime walk away if competing firms offer them a lower price or higher discount.[234] Conversely, equally efficient competitors can be expected to match the discounts offered by a dominant firm, as long as those discounts do not push the effective price below the cost of the dominant firm. This denial of differences in market power underpins the assumption that different degrees of efficiency are the sole explanatory variable for differences in the ability of dominant and non-dominant firms to offer discounts or cut prices. This approach radically departs from the republican concern about the sway a dominant firm may hold over its customers by mere virtue of its status as a supplier of a must-stock item. In fact, the price-cost test is only capturing the switching cost caused by the potential loss of the rebates on customers' contestable and non-contestable portion of demand. Yet, any form of non-price pressure through which a dominant firm can increase the dependence of customers on the dominant firm, for instance, in terms of contractual constraints (i.e. rebates with buyer commitment) cannot be fully internalised by the price-cost test.

By treating the incapacity of a competitor to match the dominant firm's above-cost prices as an indication of its inferior efficiency, the incremental price-cost test turns a blind eye to situations where dominant firms benefit from incumbency advantages, which cannot be replicated by new entrants or smaller competitors. Aaron Edlin, for instance, observed that the price-cost test obfuscates any cost and/or non-cost advantages an incumbent predator might have over new entrants, which would allow the incumbent to exclude otherwise equally efficient entrants without charging prices below its costs.[235] In *Post Danmark II*, the Court of Justice of the EU also observed that in the presence of a long-standing incumbent whose market position is shielded by substantial entry barriers the application of the as-efficient competitor test may be of 'no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitors practically impossible.'[236] The Court even pointed out that in such a situation 'the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant firm'.[237]

Third, the as-efficient competitor test also disregards that above-cost price cuts and rebates may raise rivals' cost and stifle competition, even without leading to the total exclusion

[234] Bork (n 2) 326.
[235] Edlin (n 185), 944, 956-960.
[236] Case C-23/14 *Post Danmark II* (n 213) para. 59.
[237] ibid para. 60.

of competitors.[238] Although being dubbed 'as-efficient competitor' test, the price-cost test only determines whether the conduct of a dominant firm made it impossible for an equally efficient competitor to access the market. Yet, it does not ascertain whether it just renders entry more difficult. It, thus, ignores situations where competition might be harmed even if the price cuts or exclusivity rebates fall short of causing total foreclosure.[239]

The ascent of the price-cost test as the essential filter of a rule of reason analysis of unilateral pricing conduct and the concomitant erosion of form-based presumptions of illegality thus embody the decline of the role of republican liberty for the application of competition rules to dominant firms. This reduction in the protective scope and in the resilience of economic liberty is, by far, not limited to the application of US and EU antitrust law to unilateral conduct. US and EU antitrust have set a similar course when it comes to a large proportion of vertical agreements and mergers. Under *laissez-faire* antitrust, the scope of presumptions of illegality and, hence, the protective scope of economic liberty, are increasingly reduced. The weight and, hence, the intensity of economic liberty protected under the remaining presumptions has also become less robust. This increase in contingency has been exacerbated by the fact that market participants are exposed to a growing range of coordinated conduct, unilateral conduct and mergers that have the potential of adversely affecting them, but are often beyond the reach of antitrust laws because they benefit from a presumption of legality. The expansion of under-inclusive tests has curtailed the scope of economic liberty of market participants and made it more contingent. The sole contingency that *laissez-faire* antitrust seeks to eliminate is the risk of undue state interference with the negative entrepreneurial liberty of businesses.

3 A Probabilistic Standard of Proof

Alongside with the erosion of structural presumptions of illegality, the tightening of the standard of proof governing the application of US and EU competition rules to coordinated and unilateral conduct, as well as mergers constituted the second vector that drove the shift from republican antitrust towards a *laissez-faire* approach grounded in the concern about negative liberty. Republican antitrust in the US and in the EU merely required the showing of potential anticompetitive effects to sustain the finding of a violation of competition law rules. This standard of proof dovetailed with the concept of republican liberty, which considers not only

[238] Salop (n 209), 410–411.
[239] Case T-286/09 *Intel v Commission* (n 180) paras. 149-150.

actual or likely interference but also the mere capacity of individuals to interfere arbitrarily with others as a source of unfreedom.

With the rise of the consumer welfare standard, this 'capability standard'[240] has given way to a standard of proof that tallies with the probabilistic logic of negative liberty. From the perspective of negative liberty, only conduct which is actually or likely interfering with the sphere of autonomy of another individual is deemed a source of unfreedom. This probabilistic standard of proof requires the showing of actual or likely interference and anticompetitive effects for antitrust intervention to be warranted. Nowadays, this tightened, probabilistic standard of proof constitutes the threshold for the application of competition rules against anticompetitive agreements (3.1.), the antitrust regulation of monopoly power (3.2), and merger policy (3.3) and had further accentuated the decline of republican liberty as central policy objective of competition law (3.4).

3.1 The Probabilistic Standard of Proof and Coordinated Conduct

From the late 1970s onwards, the US Supreme Court made it plain that the application the *per se* rule under § 1 of the Sherman Act had to be made subject to a 'demanding standard'.[241] Under this demanding standard, the threshold test for applying the *per se* rules is that courts must be able to 'predict with confidence' that the agreement at hand would be found in 'all or almost all instances' to breach Section 1 under a rule of reason analysis.[242] On a balance of probabilities, the impugned conduct must be more likely than not anticompetitive, while being 'very likely without "redeeming virtue"'.[243] The *per se* rule and the underpinning presumption of illegality was henceforth perceived as nothing more than a shortcut for a rule of reason inquiry into the actual or likely effects of specific types of agreements.[244] This probabilistic interpretation of the *per se* rule assumes that the underpinning presumption of

[240] P. I. Colomo and Lamadrid de Pablo, A. 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' in D. Gerard, M. Merola and B. Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017) 361–363.
[241] *Cont'l T.V. v. GTE Sylvania,* (n 9) 50, 57; *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 895.
[242] *Ariz. v. Maricopa County Medical Soc.* (n 16) 344; *White Motor Co. v. United States* (n 12) Justice Brennan, dissenting 265-266. *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 386. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (n 12) 9. *National Soc. of Professional Engineers v. United States* (n 15) 692.
[243] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (n 12) 9.. *National Soc. of Professional Engineers v. United States* (n 15) 692; *Ariz. v. Maricopa County Medical Soc.* (n 16) 351.
[244] *National Soc. of Professional Engineers v. United States* (n 15) 692. *Cont'l T.V. v. GTE Sylvania,* (n 9) 50. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (n 12) 8, 9; *Ariz. v. Maricopa County Medical Soc.* (n 16) 344.

illegality encodes a generalisation about the 'social utility' of a specific agreement on the one hand, and the 'probability of anticompetitive consequences' and their 'severity' on the other.[245]

A similar shift towards a probabilistic standard of proof as the threshold requirement for finding a violation of Art. 101 (1) TFEU is also underway in EU competition law. This development is also primarily the result of the change in the understanding of the presumption of illegality attached to the finding of restrictions of competition by-object. As part of the modernisation of Art. 101 TFEU, the Commission stated that, under the modernised approach, Art. 101 (1) TFEU would only outlaw agreements that were likely to restrict competition and harm consumers.[246] This probabilistic reading of the standard of proof under Art. 101 (1) TFEU was not confined to the by-effects category. The Commission, instead, also sought to align the presumption of illegality underpinning the by-object category with the probabilistic logic of negative liberty. It suggested that the presumption of illegality underpinning the by-object restriction is informed by the (i) degree of seriousness of harm of particular agreements and (ii) the high likelihood that this harm will materialise.[247] Only if those two conditions are present, the assessment of the actual effects of coordinated conduct becomes redundant.[248]

The Commission's adoption of a probabilistic standard of proof sat, however, uneasy with the case law of the Court of Justice. Until recently, the Court had consistently held that for an agreement to fall within the category of by-object restrictions under Art. 101 TFEU it is sufficient that it is capable of causing anticompetitive effects.[249] Yet, the Court's interpretation of the requisite standard of proof for the finding of a by-object restriction has importantly changed with *Cartes Bancaires*. The Court clarified in this case that the by-object category covers only collusive behaviour that may be 'considered so *likely* to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered

[245] *Cont'l T.V. v. GTE Sylvania*, (n 9) 50, fn 16. See also the Court referring to 'high probability' and 'great likelihood' *National Collegiate Athletic Ass'n v. Board of Regents* (n 12) 100, 103.
[246] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ [2001] C3/2 para. 18. Guidelines on the application of Article 81(3) of the Treaty (n 17) paras. 17-18, 22-24. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. OJ [2011] C 11/01 par. 26.
[247] Guidelines on the application of Article 81(3) of the Treaty (n 17) para. 21; Commission Staff Working Paper - Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice. SWD(2014) 198 final p. 3. Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* (n 15) para. 58, 142.
[248] Guidelines on the application of Article 81(3) of the Treaty (n 17) para. 21.
[249] Case C-8/08 *T-Mobile Netherlands BV and Others* (n 154) para. 31; Opinion of Advocate General Kokott in Case C-293/13 P *Fresh Del Monte Produce* ECLI:EU:C:2014:2439 para. 210; Opinion of Advocate General Kokott in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* ECLI:EU:C:2014:2437 para. 109; Case T-587/08 *Fresh Del Monte Produce v Commission* ECLI:EU:T:2013:129 para. 306; *Opinion of Advocate General Kokott in* Case C-226/11 *Expedia* (n 141) para. 49; Case C-32/11 *Allianz Hungária Biztosító and Others* (n 144) para. 38.

redundant […] to prove that they have actual effects on the market'.[250] The Court, thus, endorsed a probabilistic reading of the standard of proof for the finding of by-object restrictions. Although the Court observed in continuity with its previous case law that the 'essential legal criterion' of a by-object infringement is the 'finding that such coordination reveals in itself a sufficient degree of harm to competition',[251] it implicitly introduced an additional requirement of probability or likelihood of anticompetitive effects as threshold criterion for finding a by-object restriction. [252] It thus made it clear that the presumption of illegality attached to the by-object category is only reserved to agreements which are likely and not only capable of having a sufficiently deleterious effect on competition. In other words, the Court narrowed the presumption of illegality under the by-object category to those types of agreements that are not only capable of entailing a large magnitude of harm, but for which experience also suggests that the expected harm is also likely to materialise in all or almost all cases.[253]

By injecting this probabilistic understanding into the concept of the by-object restriction, the Court aligned the standard of proof governing the concept of by-object restrictions with that of by-effect restrictions. The Court had, indeed, repeatedly referred to the 'likely effects' of an agreement or concerted practice on competition as the requisite standard of proof for the finding that an agreement has as its effect the restriction of competition.[254] *Cartes Bancaires* suggests that there is no distinction between the by-object and by-effect category other than that the former category establishes a presumption about the likelihood of anticompetitive effects, whereas the latter requires some separate proof of such actual or likely

[250] Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) para. 51. (emphasis added)
[251] ibid para. 57. See for the pedigree of this standard Case C-32/11 *Allianz Hungária Biztosító and Others* (n 144) para. 34. Case C-209/07 *Beef Industry Development and Barry Brothers (BIDS)* ECLI:EU:C:2008:643 para. 15; Case 56/65 *Société Technique Minière v Maschinenbau Ulm* (n 151) p. 249; B. Amory, van de Walle, Geoffroy and N. A. Smuha, 'The Object-Effect Dichotomy and the Requirement of Harm to Competition: On the Road to Clarity after Cartes Bancaires' in D. Gerard, M. Merola and B. Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017) 69.
[252] The EU Courts also referred in subsequent cases consistently to the 'sufficient degree of harm' as legal criterion of finding a by-object restriction. Case C-345/14 *Maxima Latvija* (n 13) para. 18; Case T-472/13 *Lundbeck v Commission* (n 146) para. 339; Case T-469/13 *Generics (UK) v Commission* (n 146) para. 133; Case T-691/14 *Servier and Others v Commission* (n 146) paras. 219-220; Case T-762/14 *Philips and Philips France v Commission* (n 146) para. 54; Case C-98/17 P *Philips and Philips France v Commission* (n 146) para. 34; Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* (n 146) para. 113; Case C-172/14 *ING Pensii* (n 146) para. 31; Case C-179/16 *F. Hoffmann-La Roche and Others* (n 146) para. 78.
[253] It is this introduction of the requirement of likelihood of anticompetitive effects rather than the shift from a standard of 'capability' to 'sufficient degree' of harm observed by Amory et al. which raised the bar for the finding of a by-object infringement. Amory, van de Walle, Geoffroy and Smuha (n 251) 68–71.
[254] Joined Cases 142 and 156/84- *BAT and Reynolds v Commission* ECLI:EU:C:1987:490 para. 38, 44; Case C-7/95 P *Deere v Commission* ECLI:EU:C:1998:256 paras. 80, 88; Case T-35/92 *Deere v Commission* ECLI:EU:T:1994:259 para. 60. Guidelines on the application of Article 81(3) of the Treaty (n 17) para. 24.See in support of this interpretation also Colomo and Lamadrid de Pablo, A. (n 240) 363. Colomo and Lamadrid also observe that the Court held in *Maxima Latvija* that the capability of anticompetitive effects is not sufficient for a finding of an anticompetitive effect Case C-345/14 *Maxima Latvija* (n 13) para. 22.

effects.[255] The transposition of this probabilistic approach from the by-effects to by-object restrictions brought the application of Art. 101 (1) TFEU in its entirety in line with a probabilistic standard of proof that tallies with the probabilistic logic of negative liberty.

The nature of the presumption of illegality attached to the concept of by-object restrictions has, thus, changed. The by-object restriction is no longer exclusively grounded in assumptions about the gravity or scale of potential harm and domination resulting from specific forms of agreements. Rather, the finding of a by-object restriction must, in addition, be based on the experience that certain types of agreements carry a high likelihood of generating that harm.[256] Thus, despite the potential magnitude of the harm it may generate, an agreement does not fall within the by-object category if it does not appear more likely than not that this harm will occur. This reading whereby the underlying presumption of illegality attached to by-object restrictions is no longer correlated with the gravity of harm caused by certain types of agreements but primarily pertains to their likelihood to give rise to anticompetitive effects has been recently confirmed by Advocate General Bobek. It is easily conceivable, Bobek observed, that by-object restrictions give rise to less serious anticompetitive harm than particularly injurious by-effect restrictions.[257] Accordingly, the presumption of illegality attached to the category of by-object restrictions does no longer necessarily encapsulate a presumption about the gravity of certain harm to competition. But it rather constitutes a generalisation about the likelihood of particular forms of agreement to give rise to adverse welfare effects.

3.2 The Probabilistic Standard of Proof and the Regulation of Monopoly Power

A similar alignment with a probabilistic standard of proof is also observable in the application of antitrust law towards unilateral conduct by dominant firms. The US Supreme Court clarified that antitrust law only interferes with dominant firms' unilateral conduct if it entails actual or likely foreclosure and welfare effects.[258] Under this probabilistic standard of proof, unilateral conduct is only 'unlawful if it threatens actual monopolization'.[259] The mere

[255] See for the view that 'by-object' and 'by-effects' analysis are just two complementary analytical categories of an effects-based analysis Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* (n 15) paras. 26-31, 45 fn. 26; Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) paras. 24, 27, 32, 50.
[256] Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) para. 33.
[257] ibid.
[258] See for instance *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (n 46) 16. For the requirement of likely consumer harm in form of recoupment *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 223, 225-226.
[259] *Copperweld Corp. et al. v Independence Tube Corp.* (n 21) 767; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (n 54) 594; *Cargill, Inc. v. Monfort of Colorado, Inc.* 479 U.S. 104 (1986) 122 fn. 17; *Brooke Group v.*

possibility of potential harm, which informed the republican hostility against monopoly and specific single-firm conduct, has become clearly insufficient to trigger antitrust intervention. The US courts thus aligned their approach towards unilateral conduct with the view taken by Chicago and post-Chicago scholarship that antitrust law should only prohibit unilateral firm conduct if there is clear evidence for actual or likely foreclosure of competitors, which is in turn actually or likely harming consumers.[260]

Along similar lines, the EU Commission[261] and the Court of Justice increasingly endorse a similar shift towards a probabilistic standard of proof for the application of Art. 102 TFEU to dominant firm conduct. Until recently, the EU Courts continued to apply a capability standard of proof, which requires only the showing of potential harm.[262] More recently, the Court, however, seemingly responded to the ardent criticisms of this 'minimalist standard'.[263] The Court departed from this capability standard of its classical case law for the first time in *Post Danmark I*. In this case, the Court held that the analysis of the legality of pricing conduct by dominant firms under Art. 102 TFEU requires an assessment of whether the conduct 'produces an *actual or likely* exclusionary effect, to the detriment of competition and, thereby, of consumers' interests.'[264] Along similar lines, in *Post Danmark II,* Advocate General Kokott suggested that in order to be prohibited under Article 102 TFEU the anticompetitive effects of a single-firm conduct must be more likely than not.[265] Within the very same judgment, the Court moved along the entire scale of possible thresholds for the standard of proof. It suggested that the requisite standard of proof would require the showing that the conduct has the potential,[266]

Brown & Williamson Tobacco Corp. (n 15) 225; *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 39) 414.

[260] Bork (n 2) 122, 144, 156-157. Posner (n 43) 195, 214, 252-253. Krattenmaker and Salop (n 44), 212-213, 223, 254.

[261] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Guidance Paper (n 70) paras. 19 and 20.

[262] Case 85/76 *Hoffmann-La Roche v Commission* (n 75) para. 126. Case C-62/86 *AKZO v Commission* (n 203) para. 72; Opinion of Advocate General Kokott in Case C-95/04 P *British Airways* ECLI:EU:C:2006:133 paras. 41 and 46. Case C-95/04 P *British Airways plc v Commission of the European Communities* ECLI:EU:C:2007:166 paras. 67-68, 77, 100, 144. Note that unlike the General Court and the Advocate General, the Court of Justice avoided any reference to the 'likelihood' of anticompetitive effects. Both the General Court and the Advocate General seemed to use ‚capable' and ‚likely' as synonyms. Case T-219/99 *British Airways plc v Commission* ECLI:EU:T:2003:343 para. 293. Opinion of Advocate General Kokott in Case C-95/04 P *British Airways* (n 262) para.71. Case C-52/09 *TeliaSonera Sverige* (n 70) paras. 28, 71-73, 77. Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 70) para. 26. Case C-549/10 *P Tomra and Others v Commission* (n 213) paras. 68, 72. Case T-201/04 *Microsoft Corp v Commission* (n 76) para. 867. Case T-286/09 *Intel v Commission* (n 180) paras. 148.157, 172-175.

[263] Kallaugher and Sher (n 77), 263. Referring to an ‚extremely low standard' Temple Lang and O'Donoghue (n 191), 110.

[264] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 70) para. 44. (emphasis added) See also for a reference to likely foreclosure effects Case C-52/09 *TeliaSonera Sverige* (n 70) para. 67.

[265] *Opinion of Advocate General Kokott in* Case C-23/14 *Post Danmark II* ECLI:EU:C:2015:343 para. 82.

[266] Case C-23/14 *Post Danmark II* (n 213) para. 66.

capacity[267] tendency[268] of exclusionary effects or is 'liable'[269] to foreclose competitors, before concluding that the exclusionary effects must not be 'purely hypothetical',[270] but must be, if not actual, at least 'likely'[271] or 'probable'.[272]

This probabilistic interpretation of the requisite standard of proof has, however, not been reaffirmed in subsequent case law. Rather, in *Intel* the Court reverted again to a standard which merely relied on the 'capacity of rebates to foreclose competitors'.[273] *Post Danmark I* and *Post Danmark II* nonetheless indicate that the republican capability standard of proof, which merely requires the showing of potential anticompetitive effects, is anything but uncontroversial within the Court. On the contrary, there are growing signs that the Court incrementally moves towards an interpretation of Art. 102 TFEU based on a standard of proof in line with the probabilistic logic of negative liberty.

Despite this general trend toward a more probabilistic understanding of the standard of proof under Art. 102 TFEU, the question remains unsettled. In *Google Shopping* and *Google Android*, the Commission, for instance, reverted to the 'capability standard'. It reasserted that it is not required to demonstrate actual anticompetitive effects to sustain a finding of an abuse of dominance under Article 102 TFEU. It, instead, suffices that the conduct 'tends to' or is 'capable' of producing such effects.[274] These recent cases suggest that the shift towards a more probabilistic understanding of the standard of proof in line with a negative understanding of liberty under Art. 102 TFEU is less pronounced than it is the case for the US approach towards single-firm conduct. This persisting ambiguity may also indicate that the Commission is again diverting from a purely probabilistic understanding of the standard of proof endorsed in the Guidance Paper and in more recent judgments. As the appeals lodged with the General Court in both cases are currently pending,[275] it remains to be seen whether the EU judiciary will move further in the direction of a probabilistic standard of proof consistent with negative liberty or

[267] ibid paras. 35, 38, 50, 68.
[268] ibid paras. 27, 29, 42.
[269] ibid paras. 27, 64, 74.
[270] ibid para. 65.
[271] ibid para. 67, 69.
[272] ibid para. 74 and operative. This oscillation between various standards of proof does not necessarily the claim made by Colomo and Lamadrid that *Post Danmark II* stands for a clear endorsement of a standard of likelihood of harm Colomo and Lamadrid de Pablo, A. (n 240) 363.
[273] Case C-413/14 P *Intel v Commission* (n 68) paras. 138, 140. See also Case T-851/14 *Slovak Telekom v Commission* ECLI:EU:T:2018:929 para. 111; Colomo (n 217), 298–300.
[274] Case No COMP/AT.39740 Google Search (Shopping). C(2017) 4444 final paras. 336, 339; Case No COMP/AT.40099 Google Android (n 76) para. 733.
[275] Case T-612/17 *Google and Alphabet v Commission;* Case T-604/18 *Google and Alphabet v Commission Google and Alphabet v Commission* pending.

rather reaffirm the capability standard[276] that is more in line with the republican understanding of liberty.

3.3 The Probabilistic Standard of Proof in Merger Control

US and EU merger policy, too, have largely converged towards a probabilistic standard of proof of actual or likely anticompetitive effects initially advocated by the Chicago School.[277] Instead of merely relying on the potential harm flowing from an increase in industry concentration, the Department of Justice and FTC are committed to inquiring into the likelihood of anticompetitive effects to decide whether or not to block a merger.[278] US antitrust law has moved a far cry from the sweeping application of the incipiency doctrine during the Warren Court era under which it was sufficient to show some form of potential harm for a merger to be considered in breach of § 7 of the Clayton Act. Critical observers, therefore, claim that this endorsement of a probabilistic standard of proof goes as far as requiring the Government to prove anticompetitive effects 'to a near certainty' in order to be allowed to block a merger under § 7 of the Clayton Act.[279]

Over the last two decades, a similar endorsement of a probabilistic standard of proof in merger control occurred in Europe. This probabilistic standard was first coined by the EU judicature. In *Tetra Laval*, the then Court of First Instance interpreted the adoption of a stricter standard to collective dominance in *Airtours* as requiring the showing of likely,[280] as compared to 'possible' or 'probable' anticompetitive effects.[281] The Court of First Instance took the view that the prohibition of a merger must be grounded in a prospective analysis of its effects that show that 'a dominant position would, in *all likelihood*, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded.'[282] The Court of First Instance, thus, adopted a standard of proof, which requires the showing that on a balance of probabilities the merger is more likely than not to lead to

[276] Most recently, the Court of Justice appeared to reaffirm the capability standard which requires that the 'conduct was capable of restricting competition and, in particular, producing the alleged exclusionary effects' Case C-307/18 *Generics (UK) and Others* (n 160) para. 154.
[277] Bork (n 2) 206. Posner (n 43) 125; Posner (n 113), 1601–1602.
[278] 1982 Merger Guidelines (n 113) 12–13; Antitrust Division of the US Department of Justice/Federal Trade Commission - Merger Guidelines 2010 (n 113) 2.
[279] See for this criticism Consolidation Prevention and Competition Promotion Act of 2017 14 September 2017. S. 1812 (115th Congress 1st Session), 4.
[280] Case T-5/02 *Tetra Laval v Commission* ECLI:EU:T:2002:264 para. 155.
[281] ibid paras. 159-162.
[282] ibid para. 153. (emphasis added)

anticompetitive effects.[283] Whereas the exact degree of likelihood necessary for a finding of a Significant Impediment of Effective Competition (SIEC) remains subject to considerable debate,[284] the Court of Justice confirmed the Court of First Instance's endorsement of a probabilistic standard of proof subsequently on appeal in *Tetra/Laval* and in *Bertelsmann.* [285]

In the most recent *CK Telecoms* judgment, the General Court further heightened the evidentiary burden for the Commission to sustain the finding of a SIEC in – at least certain – horizontal mergers. It took the view that the requisite standard for proving the existence of a SIEC in horizontal merger cases, in which the Commission relies on multiple theories of harm, is stricter than the 'balance of probabilities standard'. Even though the General Court stopped short of requiring the proof of anticompetitive effects being 'beyond all reasonable doubt'[286] (i.e. quasi-certainty or 100%), it affirmed that it is not sufficient for the Commission to show that anticompetitive effects are on balance more likely than not (i.e. above the level 51%). This tightening of the standard of proof substantially raises the bar for the Commission to block future horizontal mergers, in particular in cases where the alleged harm is of potentially great magnitude but rather distant and, hence, less certain.[287] In such cases, the Commission will have to demonstrate that the merger will harm competition with a likelihood somewhere between 52 and 99%. The *CK Telecoms* thus further amplified the trend towards a purely probabilistic standard of proof under EU merger control, pushing the degree of probability with which the Commission has to establish anticompetitive harm to a new level.

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[283] Opinion of Advocate General Kokott in Case C-413/06 P *Bertelsmann und Sony Corporation of America/ Impala* ECLI:EU:C:2007:790 paras. 209-211. Bailey (n 5), 860; B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1(1) European Competition Journal 3 19–20; T. Reeves and D. Ninette, 'Standards of Proof and Standards of Judicial Review in European Commission Merger Law: Fordham Law School Centennial Issue' (2006) 29 Fordham International Law Journal 1034 1040.

[284] Advocate General Tizzano for instance suggested that even though the Commission cannot be required to show with 'absolute certainty' (i.e. beyond reasonable doubt) that the merger gives rise to anticompetitive effects, the Commission must demonstrate that such anticompetitive effects are 'very probable' Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval* ECLI:EU:C:2004:318 para. 74. For the discussion of the appropriate degree of likelihood in the academic literature see Bailey (n 5), 864–888. Vesterdorf (n 283), 20–31 and literature referenced in fn 19; Reeves and Ninette (n 283), 1042–1055. See however for an insightful criticism of the application of the common law concept of standard of proof to EU competition law E. Gippini-Fournier, 'The Elusive Standard of Proof in EU Competition Cases' (2010) 33(2) World Competition 187 189-.190.

[285] See in this respect also Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* (n 92) paras. 52, 129.

[286] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 109) para. 118.

[287] This is, for instance, the case for the newly crafted 'innovation theories of harm'. Case No COMP/M.7932 Dow/DuPont. C(2017) 1946 final paras. 342, 2032-2034. The ruling also casts doubt upon the Commission's future ability to address concerns about so-called killer acquisitions. C. Cunningham, F. Ederer and S. Ma, 'Killer Acquisitions' (2019) <https://ssrn.com/abstract=3241707> accessed 28 September 2019. See to this effect also Case T-399/16 *CK Telecoms UK Investments v Commission* (n 109) paras. 331-332, 368-369, 379, 390, 408.

3.4 The Probabilistic Standard of Proof, the Decline of Republican Liberty and the Rise of Negative Liberty

On both sides of the Atlantic, the standard of proof governing the application of all three pillars of competition law has thus undergone a radical change. Unlike under republican antitrust, the application of competition rules against coordinated and unilateral conduct, as well as mergers, is no more grounded in the concern about the potential harm and domination associated with certain situations of concentrated economic power and specific forms of business conduct. The standard of proof does no longer follow the logic of republican liberty that views in the mere potential of arbitrary interference an abrogation of liberty. On the contrary, US and EU antitrust have converged towards a probabilistic standard of proof that requires an antitrust plaintiff to show that, on a balance of probabilities, a certain agreement, unilateral conduct or merger is more likely than not to give rise to anticompetitive effects.[288] This shift from the capability to the probabilistic standard aligned US and EU competition law with the Chicagoan position that antitrust law should only prohibit those types of conduct whose adverse effects on price or output could be predicted with 'some certainty'[289] or 'sufficient likelihood'.[290]

This tightening of the standard of proof has a number of important implications for the enforcement of antitrust rules. First, the adoption of a probabilistic standard of proof has certainly made it more difficult for antitrust plaintiffs and authorities to challenge anticompetitive conduct or mergers. As the tightening of the standard of proof was accompanied by a decline in the role and weight of presumptions of illegality, competition authorities and courts on both sides of the Atlantic are required to adopt a higher level of scrutiny when assessing the legality of a certain business conduct or merger than it was the case under the republican approach. In general terms, the shift from a capability to a probabilistic standard of proof has thus made antitrust enforcement more complex and costly.[291]

Second, by raising the bar for sustaining a successful antitrust case, this tightening of the standard of proof has made it more difficult for market participants to invoke antitrust law

[288] For such a probabilistic formulation of the standard of proof under US and EU competition law Beckner, III and Salop (n 126), 61; Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 6; Salop (n 83), 283; D. Bailey, 'Presumptions in EU Competition Law' (2010) 31(9) European Competition Law Review 362 363; C. Ritter, 'Presumptions in EU competition law' (2018) 6(2) Journal of Antitrust Enforcement 189 211.
[289] Director and Levi (n 35), 294.
[290] ibid 295.
[291] Khan and Vaheesan (n 3), 280.

as the famed 'Magna Charta of free enterprise'[292] in order to protect their sphere of economic liberty against domination and arbitrary interference by powerful firms. In fact, the adoption of a probabilistic standard of proof has moved competition law away from the original idea of empowering market participants against the domination of large corporate Behemoths. Antitrust law has, in part, lost its empowering promise of addressing and decreasing the power imbalances between big businesses and small businessmen and consumers. As a consequence, competition law works to a lesser extent as a system of antipower, which steps in to hold powerful businesses accountable when polycentric competition itself is weakened to such an extent that is no more able to do so.

Third, the adoption of a probabilistic standard of proof has not only disempowered market participants against domination by powerful businesses by making it more difficult for them to invoke their rights. The shift towards a probabilistic standard of proof has also fundamentally reduced the resilience or robustness of economic liberty protected by competition laws. The jettisoning of a capability standard has, indeed, made economic liberty more precarious and less contingent. This decrease in the resilience of economic liberty has been triggered by the streamlining of the presumptions of illegality with the probabilistic logic of negative liberty. Under republican antitrust, these presumptions were grounded in a balance of harm approach, which *prima facie* or categorically outlawed certain conduct or mergers because of the magnitude or scale of harm and domination they might produce. Nowadays, presumptions of illegality have been fully aligned with a balance of probabilities approach, which only outlaws conduct if it appears more likely than not to harm competition and market participants. As a result, antitrust law ceases to protect republican liberty and reduce the prevailing level of domination in the market by making certain conduct inaccessible to market participants because of its capacity or tendency to give rise to domination. On the contrary, the protection of economic liberty becomes increasingly contingent upon whether the conduct appears to be likely in the case at hand to give rise to interference with other market participants. By relying on a standard of proof that was directed against potential harm, republican antitrust had ensured a 'probabilistically unweighted form of protection'[293] of economic liberty as non-domination. It had thus guaranteed market participants a 'resilient enjoyment of non-

[292] *United States v. Topco Assocs. Inc.* (n 111) 610.
[293] P. Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997) 137.

interference'[294] across a range of possible settings or 'worlds'.[295] In contrast, *laissez-faire* antitrust, by adopting, a probabilistic standard of proof only guarantees a probabilistically weighted, negative form of economic liberty that shields market participants from actual or likely interference. Economic liberty protected by *laissez-faire* antitrust thus becomes increasingly a probabilistic function of expected welfare-decreasing interference associated with a particular type of business conduct.[296]

Lastly, the adoption of a probabilistic standard of proof, together with the erosion of presumptions of illegality, has finetuned antitrust enforcement in a way that protects to the largest possible extent the negative liberty of businesses against antitrust intervention. The tightening of the standard of proof, together with the shift towards a sliding-scale approach, constitutes the heroic attempt to optimise the precision of antitrust analysis. The sliding-scale approach seeks to enable courts and competition authorities to distinguish with almost the mathematical precision of Bayesian probability theory[297] conduct, which actually or likely interferes with the negative liberty of other market participants, from conduct, which constitutes a legitimate exercise of negative entrepreneurial liberty. The shift towards a probabilistic standard of proof thus seeks to strictly limit state interference with negative entrepreneurial liberty to those rare instances when the exercise of negative entrepreneurial liberty entails an actual or likely welfare-decreasing interference with the negative liberty of other market participants. Conceptually speaking, the shift towards a probabilistic standard of proof has shrunk the range of situations or conduct that can be legitimately considered as a preventing condition or obstruction of liberty. Conduct or situations, which only have the potential or capacity of entailing arbitrary interference, are considered too remote to count as an abrogation of liberty that would justify state intervention.

By enhancing the accuracy of antitrust intervention and narrowing the reasons that might justify such intervention, the alignment of the standard of proof with the probabilistic logic of negative liberty skewed antitrust enforcement in favour of the negative liberty of businesses. What is more, the balance of probabilities approach also grounded antitrust

[294] P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576 589.
[295] P. Pettit, *On The People's Terms : A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 67.
[296] For such a probabilistic understanding of presumptions in competition law Beckner, III and Salop (n 126), 61–66. Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 2; Ritter (n 288), 204; Bailey (n 288), 367.
[297] See for the Bayesian origins of the decision-theoretical approach, Beckner, III and Salop (n 126), 41; Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 11.

enforcement in a default presumption that is biased in favour of entrepreneurial liberty. As antitrust plaintiffs have to show that the alleged anticompetitive effects of business conduct are more likely than not (i.e. with a probability of more than 50%), the shift towards a probabilistic approach has introduced the default assumption that business conduct of the antitrust defendant is 'marginally pro-competitive', say with a likelihood of 1%.[298] Under the balance of probabilities standard, this margin of doubt of 1% operates as a tie-breaker that in the rare cases of inconclusive evidence (*non liquet)* tips the scales in favour of the defendant and, hence, of entrepreneurial liberty.[299] The adoption of an even more demanding standard than the 'balance of probabilities' standard, as it has been recently introduced by the General Court for certain horizontal mergers in *CK Telecoms*, further inflates this marginal default presumption in favour of entrepreneurial liberty by a magnitude of potentially 2 to 49% likelihood that the merger is pro-competitive or neutral. The General Court thus introduced a full-blown general presumption that certain forms of business conduct, such as horizontal mergers, are always generating efficiencies[300] and should, therefore, be generally deemed pro-competitive. Instead of being anchored in economic or empirical evidence,[301] this default presumption is the latest expression of a clear policy choice to shield negative entrepreneurial liberty from antitrust intervention.

4 A *laissez-faire* Understanding of the Costs and Benefits of Antitrust Intervention

This pro-entrepreneurial liberty bias of *laissez-faire* antitrust is further amplified by the convergence of US and EU competition law with Chicagoan understanding of the costs and benefits of competition law intervention. No factor indicates clearer the shift from republican to *laissez-faire* antitrust than the fundamental transformation of the error-cost framework that underpins contemporary antitrust. The Chicago School, indeed, radically reshaped the error-

[298] Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 4) 7.
[299] Opinion of Advocate General Kokott in Case C-413/06 P *Bertelsmann und Sony Corporation of America/ Impala* (n 283) para. 223.
[300] See in this sense Case T-399/16 *CK Telecoms UK Investments v Commission* (n 109) para. 278.
[301] Röller et al. observe that 'there seems to be no support for a general presumption that mergers create efficiency gains' L.-H. Röller, J. Stennek and F. Verboven, 'Efficiency Gains from Mergers: (DiscussionPapers/ Wissenschaftszentrum Berlin für Sozialforschung, Forschungsschwerpunkt Marktprozeß und Unternehmensentwicklung, Abteilung Wettbewerbsfähigkeit und industrieller Wandel, 00-09).' (2000) 9. See also, Hovenkamp and Shaprio pointing out that 'while in theory sufficient merger-specific synergies could make up for the loss of competition resulting […], we are aware of no economic evidence indicating that such efficiencies are common.' Shapiro and Hovenkamp (n 83), 2008 fn 49.

cost framework which governs our understanding of the costs and benefits of competition law enforcement (4.1). On both sides of the Atlantic, the prohibition of anticompetitive agreements (4.2), the regulation of monopoly power (4.3) and merger policy (4.4) have been increasingly brought into line with this Chicagoan version of the error-cost framework. The Chicagoan error-cost framework has indeed become the source-code of contemporary antitrust. Together with the transformation of the policy parameters of presumptions of illegality and the standard of proof canvassed in the previous sections, the ascent of the Chicagoan error-cost framework constituted a significant driver of and is the ultimate explanation for the displacement of republican by *laissez-faire* antitrust (4.5).

4.1 The Chicagoan Error-Cost Framework

The Chicago School has revolutionised our understanding of the costs and benefits of antitrust law as a specific form of state regulation and state intervention. Chicago Scholars fundamentally departed from the creed that antitrust policy 'is worth its costs'[302], which had underpinned the Supreme Court's republican case law and was shared by the Harvard School as the prevailing antitrust paradigm of the time.

The Chicago School not only recognised that state regulation or antitrust enforcement has its cost[303] but also put major emphasis on the welfare costs of erroneous over-enforcement (type I errors) as compared to the under-enforcement (type II errors) of antitrust law.[304] Based on the assumption that businesses are normally efficiency-enhancing profit-seekers, the Chicago School warned that antitrust intervention bears a high risk of preventing or dissuading firms from engaging in efficient, welfare-enhancing conduct. An erroneous condemnation of business conduct by antitrust rules (type I error) thus creates considerable welfare costs, because it chills the incentives of businesses to compete aggressively.[305] The welfare costs of false positives, the Chicago School claimed, are in general high because even small gains in productive efficiencies are sufficient to outweigh substantial price increases.[306] Assuming that entry barriers are low, the Chicago scholars also postulated that markets would easily self-correct anticompetitive, output-reducing behaviour. On this basis, the Chicago School

[302] C. Kaysen and D. F. Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press 1959) 5.
[303] Easterbrook (n 12), 4.
[304] ibid 3, 15-16.
[305] ibid 15.
[306] ibid 16.

suggested that the costs of undetected or erroneously acquitted anticompetitive business conduct (type II errors) are low because they will be in the long run corrected by new entry.[307]

Comparing the costs of type I and type II errors, the Chicago School, further, posited that markets would more easily correct monopolistic conduct than judicial or administrative errors. Undetected anticompetitive conduct only leads to a restriction of output or price increases on the units sold by the firms indulging in the distortive behaviour. By contrast, mistaken condemnation of a pro-competitive business practice may prohibit or deter all firms from applying an efficient production technique to all their units. While market entry will correct undetected monopolistic prices, the potential efficiencies foregone by reason of mistaken inferences about the anticompetitive nature of a specific conduct will be for ever lost.[308] On this basis, the Chicago School argued that type I errors are most costly than type II errors. It, thus, challenged the precept of republican antitrust that the costs of erroneous over-enforcement resulting from broadly construed legal presumptions are always compensated or even outweighed by the gains resulting from lower enforcement costs and fewer type II errors.[309] Rather, Chicago scholars insisted that the costs of over-enforcement resulting from an overly broad application of legal presumptions are much more serious than the costs of under-enforcement.

The Chicago School, thus, entrenched the notion that the real problem of antitrust enforcement does not lie in the risk that some form of anticompetitive conduct goes undetected, but that efficient and aggressive competitive conduct is erroneously classified as anticompetitive.[310] In case of doubt, antitrust law should, therefore, err in favour of type II errors and the negative liberty of powerful firms.[311] Bork argued that this one-sidedness of the error-cost framework was justified by the fact that 'private restriction of output may be less harmful to consumers than mistaken rules of law that inhibit efficiency'. [312]

The adherents of Chicago School, therefore, shared a clear aversion against state intervention as source of type-I errors and clear preference in favour of type-II errors. This preference for under-enforcement was deeply grounded in a firm belief in the self-correcting

[307] Bork (n 2) 143–144; Easterbrook (n 12), 15; Devlin and Jacobs (n 6), 84–85.
[308] Easterbrook (n 12), 15–16.
[309] For the criticism that the Chicagoan take on the error-cost framework does not account for accuracy benefits of a certain rule or procedure to calculate its net error costs or accuracy benefits, see First and Weber Waller (n 6), 2570–2572.
[310] Bork (n 2) 157.
[311] Easterbrook (n 12), 16.
[312] Bork (n 2) 133. For a critical assessment of the underpinning assumptions Baker (n 6), 8–23.

forces of markets.[313] The origin of this belief can only be fully appreciated within the broader intellectual framework that shaped how Chicagoans thought about the appropriate role of the state and the market. The attitude of the Chicago School towards the relative virtues of markets and state intervention in resolving the problem of the allocation of scarce resources was fundamentally shaped by the work of Ronald Coase. In two seminal articles published in 1959[314] and 1960,[315] Coase postulated that, in the absence of transaction costs, voluntary contractual bargaining and market transactions coordinated by the price mechanism, will always lead to an efficient allocation and optimum utilization of property rights, irrespective of the original distribution of those property rights.[316] This claim, which is nowadays broadly referred to as the 'Coase theorem', thus, suggested that the transaction and allocation of property rights and resources should be left to the largest extent to the market or private enterprise system.[317] At the same time, it provided a strong case against state intervention and for a limited government whose role is confined to ensuring a system of property rights, which determines their initial allocation and arbitrates disputes.[318] In a world free of transaction costs, there is little need for state regulation, say in the form of antitrust law, because, as Stigler somewhat incredulously observed, even 'monopolies would be compensated to act like competitors'.[319]

A central implication of the Coase theorem is, hence, that Government intervention in the market is only justified in situations where the assumption of zero transaction costs does not hold and market transactions create externalities that cannot be resolved through private bargains. Yet, even in those situations where transaction costs prevent efficient market bargains, Coase cautioned against the potential shortcomings of state intervention. Not only may political or regulatory capture prevent regulation from leading to efficient outcomes, but regulators most often also lack the relevant information to achieve an efficient allocation of resources by intervening in the market.[320] State intervention, moreover, itself may be very costly because it involves a considerable amount of administrative resources and often imposes costs on

[313] Larouche and Schinkel (n 6) 13.
[314] Coase, R. H. 'The Federal Communications Commission' (1959) 2 Journal of Law and Economics 1.
[315] Coase (n 1).
[316] Coase, R. H. (n 314), 14, 17-18, 25-30; Coase (n 1), 2-35,10, 15.
[317] Coase, R. H. (n 314), 14.
[318] ibid 14, 18.
[319] G. J. Stigler, 'The Law and Economics of Public Policy: A Plea to the Scholars' (1972) 1(1) Journal of Legal Studies 12. See R. J. Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2000) 237 fn. 12.
[320] Coase, R. H. (n 314), 18.

businesses leading to losses in production.[321] Coase, therefore, argued that any form of state intervention should be based on an assessment of the cost-benefit analysis of the alternative institutional choices of market-based or regulatory solutions. State interference with the economic activity of private businesses and market transactions is only justified if the benefits, in the form of increased allocative efficiency, exceed the costs of state regulation.[322]

While such a cost-benefit analysis may in some cases justify state interference, it may often also simply support to 'do nothing', because 'it will no doubt be commonly the case that the gain which would come from regulating the actions which give rise to the harmful effects will be less than the costs involved in Government regulation'.[323] While pointing out that more empirical work by economists is necessary to analyse the relative costs and benefits of regulation and market bargains, Coase expressed the ‚belief' that 'that economists and policy-makers generally, have tended to over-estimate the advantages which come from governmental regulation' and that government regulation should therefore be ‚curtailed'.[324] On this account, Coase claimed that it might often be preferable ‚before turning to special regulations', to 'tolerate a worse functioning market than would otherwise be the case.'[325]

The Coase theorem, thus, provided what many Chicagoans considered as 'scientific' justification for their belief in the self-correcting forces of markets and their preference for false negatives. The assumption derived from the Coase theorem that state intervention tends in most of the cases to be more expensive than 'doing nothing' and that type II errors are, therefore, preferable to type I errors, provided the Chicago School with a powerful economic argument in support of shielding the negative entrepreneurial liberty against antitrust intervention. The Chicagoan error-cost framework, in fact, encoded the assumption that erroneous state interference with negative liberty of businesses is inherently costly because it deters wealth-maximising and, hence, legitimate exercises of contractual liberty. It suggested that in case of doubt, antitrust authorities and courts should opt for non-intervention. The Chicago School error-cost framework thus put some economic gloss on the assumption that in most cases the loss in liberty of powerful businesses as a consequence of antitrust intervention, is not outweighed by any gains in the liberty and welfare of other market participants, in particular consumers, that would justify such state interference in the first place.[326] By adopting the

[321] Coase (n 1), 18; Coase (n 1), 17.
[322] Coase, R. H. (n 314), 29; Coase (n 1), 17–18.
[323] Coase (n 1), 18.
[324] ibid.
[325] Coase, R. H. (n 314), 29.
[326] Bork (n 2) 134-135, 143-144, 157, 196.

Chicagoan error-cost framework, US and EU competition law thus endorsed a balance of rights, which was clearly oriented towards preserving negative liberty of businesses against state intervention.

4.2 The Chicagoan Error Cost Framework and the Rise of laissez-faire *Antitrust towards Coordinated Conduct*

The Chicagoan understanding of the costs and benefits of antitrust intervention has increasingly become the source code that governs the application of all three pillars of antitrust law in the US and in Europe.

With regards to coordinated conduct, the ascent of the Chicagoan error-cost framework was the essential driver of the shrinking of legal presumptions of illegality and the increasing blending of the *per se* /rule of reason analysis under § 1 of the Sherman Act and the by-object/by-effect categories under Art. 101 (1) TFEU. Departing from its republican approach, the US Supreme Court increasingly expressed its preference for the flexibility of the common-law rule of reason standard over a broad interpretation of *per se* rules.[327] It took the view that advantages of *per se* rules, in terms of procedural economy and legal certainty, are no longer sufficient to justify in themselves their application. On the contrary, the Court cautioned that too broad an application of *per se* rules would put entrepreneurial liberty in the straitjacket of overly rigid rules.[328]It is ultimately this concern about the cost of over-enforcement (type I errors) and state interference with the negative entrepreneurial liberty, which explains the shrinking of the scope of presumptions of illegality under § 1 and the increasing erosion of the *per se* rule/rule of reason divide.[329]

The narrowing of the by-object category and the blending of by-object and by-effect analysis in *Cartes Bancaires* also reflect the growing influence of the Chicagoan error-cost framework on the interpretation of Art. 101 (1) TFEU.[330] By expanding the range of factors a competition authority or court must account for, before it could conclusively categorise an agreement as a by-object restriction, the Court introduced a number of administrative filters to increase the accuracy of legal presumptions and to reduce the risk and cost of false positives.[331]

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[327] *Cont'l T.V. v. GTE Sylvania,* (n 9) 54; *National Soc. of Professional Engineers v. United States* (n 15) 688; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (n 12) 8.
[328] *Cont'l T.V. v. GTE Sylvania,* (n 9) 50 fn. 16. *Leegin Creative Leather Prods. v. PSKS, Inc.* (n 9) 895.
[329] *California Dental Assn. v. FTC* (n 12) 780.
[330] Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) paras. 78-79.
[331] Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* (n 15) paras. 36, 54.

These filters serve as an additional safety valve that allows the fact-finder to double-check and, if necessary, correct the accuracy of the characterisation of an agreement as by-object restriction. [332] In heightening the level of scrutiny for finding a by-object restriction, the Court thus sought to reduce the risk of erroneous inferences resulting from an overly broad construction of legal presumptions. The Court thus reshaped the by-object category in a way that errs in case of doubt in favour of the defendant and hence leans in the case of doubt towards under-enforcement (type II errors).[333] The increasing blending of the by-object and by-effect analysis under Art. 101 (1) TFEU thus pursues the ultimate goal of shielding the exercise of negative entrepreneurial liberty from undue antitrust intervention. *Cartes Bancaires*, indeed, displayed a clear concern about limiting the scope of *prima facie* presumptions of illegality under Art. 101 (1) TFEU, lest competition law unduly interferes with the contractual integration competing firms use to internalise transaction costs and tackle free riding.[334]

4.3 The Chicagoan Error-Cost Framework and the Rise of laissez-faire *Antitrust towards Powerful Firms*

The Chicagoan error-cost framework and the underlying assumption that false positives are more costly than false negatives have also deeply reshaped the application of US and EU antitrust towards unilateral firm conduct.

The one-sided Chicagoan error-cost framework was soon endorsed by other leading antitrust scholars[335] and fundamentally shaped the Supreme Court's approach towards unilateral pricing conduct by powerful firms.[336] By carving out a safe-harbour for above-cost pricing,[337] it establishes a clear bright line presumption of legality, which broadly shields the

[332] In this sense, Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank and Others* (n 13) paras. 43,45.
[333] This is so, even though as Advocate General Wahl observed, the competition authority could still address anticompetitive effects of an agreement under the by-effects analysis. see Opinion of Advocate General Wahl in Case C-67/13 P *Groupement Cartes Bancaires v Commission* (n 15) para. 62.
[334] Case C-67/13 P *Groupement des cartes bancaires v Commission* (n 10) paras. 70, 75. See for discussion R. Nazzini and A. Nikpay, 'Object Restrictions and Two-sided Markets in EU Competition Law after Cartes Bancaires' (2014) 10(2) Competition Law International 157.
[335] Areeda and Turner (n 57), 699.
[336] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (n 54) 594; *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 15) 223, 226; Bork (n 2) 157; Posner (n 43) 214.*Copperweld Corp. et al. v Independence Tube Corp.* (n 21) 768. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* (n 188) 325. *Pacific Bell Telephone Co. dba AT&T California, et al. v. linkLine Communications, Inc. et al.* (n 39) 11. *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 39) 414. *Cascade Health Solutions v. PeaceHealth* (n 204) 910, 915. *United States v. Microsoft Corporation* (n 30) 68.*ZF Meritor, LLC v. Eaton Corp.* (n 51) 273, 275. *Eisai, Inc. v. Sanofi Aventis U.S. LLC* (n 212) 408.
[337] *ZF Meritor, LLC v. Eaton Corp.* (n 51) 273, 275; *Eisai, Inc. v. Sanofi Aventis U.S. LLC* (n 212) 408; *Cascade Health Solutions v. PeaceHealth* (n 204) 910.

economic liberty of dominant firms from antitrust intervention.[338] This concern about the cost of false positives remained not only confined to pricing conduct. On the contrary, the Supreme Court made it clear that the Chicagoan error-cost framework militated for a cautious application of antitrust towards all form unilateral conduct, holding that '[t]he cost of false positives counsels against an undue expansion of § 2 liability'.[339]

The application of antitrust law to unilateral conduct by dominant firms has, thus, moved a far cry away from the republican concern about the domination emanating from the mere existence of concentrated economic power. On the contrary, the major concern underpinning the application of antitrust rules to single-firm conduct by powerful firms has become that antitrust law might unduly interfere with the negative liberty of powerful firms and, thereby, chill their incentives to compete and innovate. This position had found even more support in the more recent judicial endorsement of a neo-Schumpeterian understanding of dynamic competition. Nowhere emerges this more clearly than in *Trinko* which reads like a hymn of praise to 'king monopoly':

> *The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.*[340]

The Chicago School error-cost framework had recently also made inroads in the application of Article 102 TFEU to unilateral firm conduct. The Commission and, to a growing extent, the Court of Justice showed themselves increasingly receptive to the criticism that the form-based approach led to too many type I errors.[341] One example of the increasing bearing of

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[338] *Barry Wright Corp. v. ITT Grinnell Corp.* (n 51) 235. *Cascade Health Solutions v. PeaceHealth* (n 204) 910; *United States v. Microsoft Corporation* (n 30) 68; *Concord Boat Corp. v. Brunswick Corp.* (n 51) 36. The precept that the error-cost framework should err in the case of above-cost pricing on the side of non-intervention was also shared by the Court of Appeals for the Third Circuit which has declined to examine all forms of bundled and loyalty rebates under the price-cost test. *ZF Meritor, LLC v. Eaton Corp*. (n 51) 273, 275; *Eisai, Inc. v. Sanofi Aventis U.S. LLC* (n 212) 409.

[339] *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 39) 414.

[340] ibid 407.

[341] Economic Advisory Group on Competition Policy (EAGCP) (n 69) 2, 4, 7, 14-15.A. J. Padilla and C. Ahlborn, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) 25 ff. See with respect to predatory pricing and above-cost price cuts Economic Advisory Group on Competition Policy (EAGCP) (n 69) 7, 53. De la Mano, Miguel and Durand (n 79) 2; Ahlborn and Allan (n 79), 246. Ridyard (n 191), 297-298, 300-302; Temple Lang and O'Donoghue (n 191), 131; Mastromanolis (n 79), 210, 222-224; De la Mano, Miguel and Durand (n 79) 17; Kon

the Chicagoan error-cost framework on the application of Article 102 TFEU is the growing importance of the price-cost test and introduction of a clear safe-harbour for above-cost pricing under Art. 102. Despite economic theory suggesting that above-cost price-cutting may lead to anticompetitive foreclosure and losses in consumer welfare,[342] the Commission and the EU courts increasingly rely on a deliberately underinclusive incremental price-cost test to decide when single-firm conduct leads to an abuse of dominance.[343] The adoption of the price-cost test is geared towards reducing type I errors to a minimum. It thus insulates the negative commercial liberty of dominant firms from antitrust scrutiny and provides dominant firms with clear legal certainty as to the lawfulness of their conduct.[344] In the same way as the US courts, the Commission and, albeit to a lesser extent, EU Courts, appear to assume that the benefits in scrutinising above-cost price cuts by dominant firms are outweighed by the costs of potential type I errors. [345]

This heightened sensibility for the costs of antitrust enforcement has, however, not led to a shrinking of the scope of Art. 102 TFEU of the same order of magnitude as it was the case for § 2 of the Sherman Act. The wholehearted endorsement of the Chicagoan error-cost framework prompted the US Supreme Court to refrain from expanding the § 2 liability to margin squeeze,[346] let alone excessive monopoly pricing which has never been recognised as an offence under the Sherman Act.[347] The Supreme Court also importantly qualified the application of § 2 to unilateral refusals to deal by powerful firms.[348] By contrast, while the Commission and EU Courts have curtailed the application of Art. 102 TFEU against certain pricing conduct, they have continued to expand the scope of Art. 102 TFEU to new forms of price and in particular non-price abuses. The rise of the More Economic Approach notwithstanding, the EU Commission and EU courts have applied Art. 102 TFEU to numerous

and Turnbull (n 79), 76. See with respect to rebates Venit (n 77), 1177–1178. See with respect to tying Ahlborn, Evans and Padilla (n 44), 337–338.

[342] G. A. Hay, 'A Confused Lawyer's Guide to the Predatory Pricing Literature' (1987) 17(2) Journal of Reprints for Antitrust Law and Economics 155 161–164; Brodley and Hay (n 59), 744–746; Edlin (n 185), 955–978.

[343] Case C-280/08 P *Deutsche Telekom v Commission* (n 196) paras. 83-85, 177, 202-203; Case C-52/09 *TeliaSonera Sverige* (n 72) paras. 24-25. Case C-209/10 *Post Danmark A/S v Konkurrencerådet* (n 70) para. 38.

[344] Case C-280/08 P *Deutsche Telekom v Commission* (n 196) para. 202.

[345] Temple Lang and O'Donoghue (n 191), 127, 130.

[346] *Pacific Bell Telephone Co. dba AT&T California, et al. v. linkLine Communications, Inc. et al.* (n 39) 9-12, 17.

[347] *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 39) 407-408, 414; Larouche and Schinkel (n 6) 2–3; S. Weber Waller, 'The Omega Man or The Isolation of U.S. Antitrust Law' [2018], 6–8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295988> accessed 20 January 2020.

[348] *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 39) 409, 407-411; *Pacific Bell Telephone Co. dba AT&T California, et al. v. linkLine Communications, Inc. et al.* (n 39) 8, 10.

novel forms of abuses, such as margin squeeze,[349] self-preferencing,[350] the seeking of injunctive relief against willing licensees of standard essential patents,[351] the abuse of administrative procedures,[352] and contractual strategies by originator drug producers to suppress generic entry.[353] The European Commission's enforcement activity towards single firm conduct also clearly outperforms that of its US counterparts.[354] The most prominent example for this transatlantic divergence are the investigations of the US Federal Trade Commission (FTC) and the EU Commission into Google's strategy to ensure its own comparison shopping services a more prominent positioning in its search engine. Whilst the FTC decided to close the investigation without finding any antitrust concerns,[355] the Commission pushed the boundaries of Art. 102 TFEU[356] in finding that Google's self-preferencing amounted to an abuse of dominance. In recent years, the Commission has also resumed its somewhat sluggish enforcement practice against exploitative pricing,[357] regardless of the misgivings about this theory of harm amongst proponents of the More Economic Approach,[358] as well as European[359] and national judges.[360]

Although the more recent abuse of dominance case law displays a greater concern about type I errors in particular with respect to exclusionary pricing conduct, neither the EU Commission nor the Courts have endorsed the *laissez-faire* error cost framework to the same extent as their US homologues did. Nonetheless, concerns about the over-enforcement of Art.

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[349] Case C-280/08 P *Deutsche Telekom v Commission* (n 196) paras. 157-184. Case C-52/09 *TeliaSonera Sverige* (n 70) paras. 31-33, 72-73, 87-98. Case T-336/07 *Telefónica and Telefónica de España v Commission* ECLI:EU:T:2012:172 paras. 182-184, 187; Case No COMP/AT.39523 Slovak Telekom. C(2014) 7465 final; Case T-851/14 *Slovak Telekom v Commission* (n 273) see in particular paras. 162-168. Weber Waller (n 347), 14–15.

[350] Case No COMP/AT.39740 Google Search (Shopping) (n 274) see in particular paras. 334-340, 644-652.

[351] Case No COMP/AT.39985 Motorola; Case No COMP/AT.39939 Samsung; Case C-170/13 *Huawei Technologies* ECLI:EU:C:2015:477.

[352] *Case C-457/10P AstraZeneca AB and AstraZeneca plc v European Commission* ECLI:EU:C:2012:770 paras. 98-99.

[353] Case C-307/18 *Generics (UK) and Others* (n 160) paras. 140-171.

[354] G. Gutiérrez and T. Philippon, 'How Amercia lost its competitive edge' (2018) 14–15 <https://pdfs.semanticscholar.org/b004/082757b119adcbac267494789d631ac13838.pdf> accessed 14 March 2020.

[355] Statement of Federal Trade Commission Concerning Google/DoubleClick. FTC File No. 071-0170.

[356] Case No COMP/AT.39740 Google Search (Shopping) (n 274) paras. 334, 651.

[357] European Commission, 'Antitrust: Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines' (15 May 2017) <http://europa.eu/rapid/press-release_IP-17-1323_en.htm> accessed 11 November 2017.

[358] Economic Advisory Group on Competition Policy (EAGCP) (n 69) 10–11.

[359] Opinion of Advocate General Wahl in Case C-177/16 *Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome (AKKA)* ECLI:EU:C:2017:286 para. 117.

[360] *Judgment in Case 1275/1/12/17 Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd v Competition and Markets Authority and Case 1276/1/12/17 Pfizer Inc. and Pfizer Limited v Competition and Markets Authority* [2018] CAT 11; *Competition and Markets Authority v Flynn Pharma Limited, Flynn Pharma Holdings Limited, Pfizer Inc. Pfizer Limited* [2020] EWCA Civ 617.

102 TFEU against single-firm conduct have been on the rise with the shift towards a More Economic Approach. Some recent pronouncements by the EU judicature, also suggest that the tide might further turn towards a more *laissez-faire* approach under Art. 102 TFEU.[361] The growing sway of the *laissez-faire* error-cost framework on the interpretation of Art. 102 TFEU has perhaps been most clearly articulated by Advocate General Wahl, recently appointed Judge at the Court of Justice of the European Union. In a recent opinion, the Advocate General uncritically endorsed the Supreme Court's orbiter in *Verizon v Trinko* that the possession of monopoly power constitutes an 'important element of the free market system' and added that high prices 'fulfil an important function in the competitive process'.[362]

4.4 The Chicagoan Error-Cost Framework and the Rise of laissez-faire *Antitrust towards Mergers*

The Chicagoan error-cost framework also tightened its grip over merger control on both sides of the Atlantic. In rejecting the interventionist republican approach of the Warren Court, the Chicago School suggested that the merger rules should encode a value judgment that was clearly geared towards protecting the negative contractual liberty of merging parties against interference by the antitrust laws. Indeed, their proposed a reform of the merger policies was grounded in an error-cost framework that expressed a clear preference in favour of false negatives. Bork, for instance, argued that in any situation other than a merger to monopoly, the decision between internal growth and external growth should be left to the discretion of the merging parties.[363] This *laissez-faire* approach is warranted since the firms would not opt for a merger unless it constitutes the less costly way to reach more efficient size. As long as the merger does not lead to monopoly, the decision of the merging parties to decrease or increase output, investment or product variety (consumer choice) will be purely dependent on the demand conditions. In such a situation, the interests of merging parties will be largely aligned

[361] *Case C-177/16 Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome* ECLI:EU:C:2017:689 para. 56. *Case C-525/16 Meo - Serviços de Comunicações e Multimédia* ECLI:EU:C:2018:270 paras. 26-28,31. Case C-413/14 P *Intel v Commission* (n 68) paras. 133-141; *Opinion of Advocate General Wahl in Case C-525/16 MEO — Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* ECLI:EU:C:2017:1020 paras. 4, 61-69, 91. See also in support of the view that recent case law suggests a partial endorsement of the *laissez-faire* error cost framework 'Of course, it may be suggested that by raising the Commission's costs of bringing such [i.e. rebate] cases one errs the other way, towards under-enforcement. Yet, this is the policy choice the Court made.' G. Monti, 'Abuse of a Dominant Position: A Post-Intel Calm?' [2019] CPI Antitrust Chronicle 1, 3.

[362] Opinion of Advocate General Wahl in Case C-177/16 *Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome (AKKA)* (n 359) para. 117.

[363] Bork (n 2) 207–208.

with the interests of consumers and self-correcting market forces will, in any event, penalise inefficient mergers. [364]

Bork, therefore, argued that mergers, which do not lead to a creation or strengthening of a monopoly, give rise to a very low likelihood of type II errors. In a vast majority of cases, the decision to merge should hence be left to the firms alone.[365] Any erroneous prohibition of a merger would prevent society from the gains that the merging parties could derive from swifter and less costly growth necessary to achieve scale economies and other efficiencies. These efficiency gains might be forever lost if the merger is blocked, because internal growth is not necessarily an alternative way of achieving optimal firm size. On the contrary, the prohibition of a merger may prompt firms to refrain from investing in growth altogether, when the increase in costs as the result of the blocking of the external growth route discourages or prevents them from investing in growth altogether.[366] On the basis of this error-cost framework, the Chicago School set out a blueprint for a reformed merger policy that would err in case of doubt in favour of the negative liberty of the merging parties. The Chicago School cast mergers as only one amongst a number of alternative strategies to achieve efficiencies and growth. Mergers thus constituted just another dimension of competition antitrust law should normally not interfere with.

This error-cost framework was the key driver of the decline in scope and weight of legal presumptions and their alignment with a rule of reason-like sliding-scale inquiry of mergers and a probabilistic standard of proof.[367] US Courts and competition authorities have largely adjusted their inquiry with the aversion against type I errors and their allegedly adverse effect on negative entrepreneurial liberty, which is characteristic of the prevailing *laissez-faire* error cost framework. This is reflected by the most recent Merger Guidelines, which seek to limit the intervention with mergers to those few transactions that clearly give rise to anticompetitive effects, 'while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral.'[368]l

The Chicagoan error-cost framework has also gained considerable influence over EU merger policy. Even though the Court of Justice declined to endorse the view that the EU

[364] ibid.
[365] ibid.
[366] ibid 207, 222.
[367] *United States v Baker Hughes, Inc* (n 87) 984, 991-992.
[368] Antitrust Division of the US Department of Justice/Federal Trade Commission - Merger Guidelines 2010 (n 113) 2.

Merger Regulation creates a presumption of legality for mergers,[369] the Court and the European Commission have largely aligned EU merger control with an error-cost framework that, in the case of doubt, errs on the side of clearing the merger. The shift towards a More Economic Approach and the tightening of the standard of proof in *Tetra Laval* and *Bertelsmann* was indeed clearly driven by a concern that too robust a merger enforcement and the erroneous blocking of mergers would lead to irreparable welfare losses.[370] At the same time, it was argued that type II errors could be easily corrected by market forces and ex-post antitrust intervention under Art. 102 TFEU. A large majority of commentators have therefore welcomed the decreasing weight of structural presumptions and the adoption of a probabilistic standard of proof for reconciling EU merger policy with an error cost framework which in case of doubt errs tips the balance in favour of type II errors. Not only does such a one-sided error cost framework reduce welfare losses resulting from the erroneous prohibition of mergers, but it was also perceived as a necessary step to ensure that EU merger policy preserves the negative commercial liberty and property rights of the merging parties. [371]

Merger policy is perhaps the field of antitrust law in which the Chicagoan error-cost framework and the underpinning concern of shielding to the largest extent possible the negative entrepreneurial liberty of the merging parties from state interference have most strongly entrenched a *laissez-faire* attitude on the part of competition authorities and courts. During the last decades, US and EU competition authorities have, indeed, grown reluctant to block mergers even if they clearly led to actual or likely to anticompetitive effects that were not outweighed by efficiencies. In fact, most of these mergers were cleared after the parties offered commitments as remedies.

Take, for instance, the recent wave of mobile telecommunication mergers, which led to an important surge in industry concentration in US and national European mobile telecommunication markets. In a majority of cases, the Department of Justice and the Commission found that the telecom mergers were likely to lead to anticompetitive harm, which exceeded any potential efficiencies. Yet, they nonetheless refrained from blocking the mergers

[369] See for arguments in favour of such a presumption Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval* (n 284) paras. 77-80. For a similar view Reeves and Ninette (n 283), 1040–1045; Bailey (n 5), 875–878; Vesterdorf (n 283), 29; Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* (n 92) paras. 40, 46–47, 51, 53.
[370] Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval* (n 284) para. 81. Vesterdorf (n 283), 28–29. Reeves and Ninette (n 283), 1046–1047. For the opposite view A. Pera and V. Auricchio, 'Consumer Welfare, Standard of Proof and the Objectives of Competition Policy' (2005) 1(1) European Competition Journal 153 162-163, 168. For a discussion of both views Bailey (n 5), 871–873.
[371] Bailey (n 5), 875–876; Vesterdorf (n 283), 28; Reeves and Ninette (n 283), 1040–1046.

when the parties were able to put forth remedies that addressed the identified competition concerns. Out of 25 mergers in which both competition authorities identified anticompetitive effects that were not outweighed by efficiencies, only one merger was blocked because the parties failed to proffer effective remedies.[372] Two other mergers were withdrawn by the parties before the Commission[373] and the Department of Justice[374] would have enjoined the merger due to the lack of effective remedies. In all other cases, the US and EU authorities cleared the transactions unconditionally or subject to behavioural and structural remedies.[375] The ultimate goal of these remedy packages was to recreate and build-up a new mobile network operator with a view of restoring the competitive market structure and pressure that existed prior to the merger.[376]

This extensive use of remedies in mobile telecom mergers shows that merger control on both sides of the Atlantic has become increasingly surgical.[377] Competition authorities have grown reluctant to use the sledge-hammer of prohibiting the merger and preventing the parties from exercising their negative economic liberty. Rather, they prefer light-touch intervention

[372] Case No COMP/M.7612 Hutchison 3G UK/ Telefónica UK. C(2016) 2796 final paras. 3149-3152.
[373] European Commission, 'Statement/15/5627-Statement by Commissioner Vestager on announcement by Telenor and TeliaSonera to withdraw from proposed merger' (11 September 2015) <http://europa.eu/rapid/press-release_STATEMENT-15-5627_fr.htm> accessed 19 November 2015.
[374] E. Wyatt and J. Wortham, 'AT&T Merger With T-Mobile Faces Setbacks' (24 November 2011) <https://www.nytimes.com/2011/11/25/technology/att-deal-with-t-mobile-takes-a-step-back.html> accessed 25 January 2015.
[375] See for the US cases Competitive Impact Statement in SBC/Ameritec. Civil No.: 99-0715 (TPJ), 2, 12-15. Competitive Impact Statement in U.S. v. AT&T Corp. and Tele-Communications, Inc. 1998. No. 1: 98CV03170, 10. Competitive Impact Statement in SBC/BellSouth Corporation, 2, 9, 21. Competitive Impact Statement in AT&T Wireless Services, Inc./Cingular Wireless Corporation 2004. 1:04CV01850, 2, 13, 19. Competitive Impact Statement in Alltel Corp./Western Wireless Corp. 2005. 1:05CV01345, 2, 12-13. Competitive Impact Statement in Alltel Corporation/Midwest Wireless Holdings L.L.C. 2006, 2, 13-14. Competitive Impact Statement in Verizon Communications Inc./Alltel Corp. Civil No. 1:08-cv-01878, 2, 12-17. Competitive Impact Statement in AT&T Inc./Dobson Communications Corp. 2007. Civil No. 1:07-CV-01952, 2, 14. Competitive Impact Statement in AT&T Inc./Centennial Communications Corp. 2009. Civil No. 1:09-cv-01932-JDB, 2, 10, 11. Competitive Impact Statement in T-Mobile/Sprint. Case 1:19-cv-02232-TJK, 2,4,7,11-13; Proposed Final Judgment in T-Mobile/Sprint. Case 1:19-cv-02232 4–5. For the EU cases see Case No COMP/M.3916 T-Mobile Austria/Tele.Ring. C(2006) 1695 paras. 120-182. Case No COMP/M. 6497 Hutchison 3 G Austria/ Orange Austria. C(2012) 9198 final paras. 520-526, 539-543. Case No COMP/M.6992 Hutchison 3G UK/ Telefónica Ireland 28 May 2014. C(2014) 3561 final paras. 976-977, 982-985, 999-1003, 1359-1363. Case No COMP/M.7018 Telefonica Deutschland/ Eplus 2 July 2014. C(2014) 4443 final paras. 1368, 1384-1397. Case No COMP/M.7758 Hutchison 3G Italy/ WIND/ JV 2016. C(2016) 5487 final para. 1782, 1652-1808. Case No COMP/M.7637 Liberty Global/ BASE Belgium 2016. C(2016) 531 final paras. 456-576. K. Tyagi, 'Four-to-Three Telecoms Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector' (2018) 49(2) International Review of Intellectual Property and Competition Law 185 200-202, 205-208, 209-212. S. Vande Walle and J. Wambach, 'No magic number to dial - The Commission's review of mobile telecoms mergers' (2014) 1 Competition Merger Brief 10 15. L. Manigrassi, E. Ocello and V. Staykova, 'Recent developments in telecoms mergers' (2016). Competition Merger Brief 3/2016 5–6. M. Stoyanova-Sieber, 'The Orange–H3G Merger and the New Regulatory Paradigm for a Single Telecoms Market' (2013) 9(2) European Competition Journal 431 452.
[376] S. Schubert, 'Mobile Fixation? A Review of Recent EC Decisions in the Telecoms Sector' 2016 Competition Policy International 2–4.
[377] Tyagi (n 375), 212.

through carefully designed remedies. The paramount role of remedies as ultimate tie-breaker in merger control resonates well with the basic assumptions of the Chicagoan error-cost framework. The strong preference of competition authorities for remedies over the blocking of the merger is grounded in the implicit assumption that the costs of erroneously blocking the merger and the interference with the merging parties' entrepreneurial liberty clearly outweigh the costs of mergers that are erroneously cleared or in which the remedies fail to prevent anticompetitive effects. This is not least the case because markets can, at least in the long-run, be expected to self-correct-correct potential anticompetitive effects of the falsely cleared mergers or ill-designed remedies.

The central role of remedies in the recent telecom merger decisions by the US and EU competition watchdogs suggests that both authorities assume that the market power and efficiency effects of mergers can be relatively easily isolated and separated by the use of effective remedies.[378] The design of remedies in the telecom mergers also shows that competition authorities have become more confident in their own ability to redesign markets and in the capacity of markets to recreate the competitive forces eliminated by the merger. Competition authorities seem to believe that merger remedies can be used like a scalpel, which cuts out with almost clinical precision those parts of the merging businesses whose integration appears to be most likely to lead to anticompetitive effects. By designing ever more complex remedies, competition authorities try to square the circle. On the one hand, they seek to preserve to the largest extent possible the negative contractual liberty of the merging parties by allowing them to move forward with the merger. On the other hand, they nonetheless seek to mute the adverse effects those mergers have on consumers and to restore the market structure that had existed prior to the merger.

In recent years, the effectiveness of these remedies has, however, come under increasing scrutiny. Some recent *ex-post* studies have examined the effectiveness of the remedy packages in several telecom mergers cleared by the European Commission. These *ex-post* studies, as well as the Commission's own decisions, show that a number of remedies subject to which the Commission cleared the mergers have either not been implemented at all, or have only been implemented in an incomplete manner.[379] When it comes to the effectiveness of the

[378] T. Duso, K. Gugler and F. Szücs, 'An Emprirical Assessment of the 2004 EU Merger Policy Reform' (2013) 123 The Economic Journal 596 613.

[379]See for the discussion of the limited effectiveness of the remedies in T-Mobile Austria/Tele.ring Case No COMP/M. 6497 Hutchison 3 G Austria/ Orange Austria (n 375) para. 551.See for instance for the conclusion that the remedies in Hutchison 3G/Orange Austria, Hutchison 3G/Telefónica Ireland and Telefónica/Eplus were ineffective Body of European Regulators for Electronic Communications, 'BEREC Report on Post-Merger

commitments in preventing adverse effects on consumers and competition, the studies present a rather mixed picture. Two ex-post studies suggest that several 4-to-3 telecom mergers cleared subject to remedies did not have a clear effect on prices and non-price parameters of competition, such as investment.[380] Six studies even find that the cleared 4-to-3 or 5-to-4 mergers have had a positive impact on competition by leading to price decreases and increased investment.[381] Yet, a majority of nine studies suggests that the commitments adopted were insufficient in remedying the anticompetitive effects brought about by the reviewed telecom mergers. These studies suggest that the reduction of the number of Mobile Network Operators (MNOs) from five to four or four to three had adverse effects on prices and other competitive parameters, such as network penetration rates.[382] Although the empirical evidence provided by the *ex-post* studies is not fully conclusive and the studies themselves are subject to a number of methodological difficulties and limitations,[383] they, to say the least, cast serious doubt upon the

Market Developments: Price Effects of Mobile Mergers in Austria, Ireland and Germany' (2018). BoR (18) 119 24, 40–41; European Commission, 'Mergers: Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition' (2019) <https://europa.eu/rapid/press-release_IP-19-1371_en.htm>. See for a critical appraisal of the accepted remedy package in the recent T-Mobile/Sprint merger. Kwoka, John E. Jr. 'Masquerading as Merger Control: The U.S. Department of Justice Settlement with Sprint and T-Mobile' (2019) <https://www.antitrustinstitute.org/work-product/john-kwoka-unpacks-settlement-in-the-merger-of-sprint-and-t-mobile-demonstrates-why-the-remedy-is-ineffective-and-a-worrisome-new-development-in-merger-control/> accessed 29 August 2019.

[380] Frontier Economics, 'Assessing the case for in-country mobile consolidation: A report prepared for the GSMA' (2015); Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste (WIK), 'Competition & investment: An analysis of the drivers of investment and consumer welfare in mobile telecommunications: A study for Ofcom' (2015). The Frontier Economics study was founded by industry members.

[381] P. Affeldt and R. Nitsche, 'A Price Concentration Study on European Mobile Telecom Markets: Limitations and Insights' (2014). ESMT Working Paper No. 14-07; G. V. Houngbonon and F. Jeanjean, 'Is there a level of competition intensity that maximizes investment in the mobile telecommunications industry?' (2014); G. V. Houngbonon, 'The Impact of Entry and Merger on the Price of Mobile Telecommunications Services' (2015); Lear, DIW Berlin, Analysys Mason, 'Economic impact of telecoms markets in the EU on the functioning of Final report competition policy enforcement' (2017) <https://publications.europa.eu/en/publication-detail/-/publication/5a579e1c-969e-11e7-b92d-01aa75ed71a1> accessed 20 May 2019; K. Bahia, P. Castells and X. Pedros, 'Assessing the impact of mobile consolidation on innovation and quality' (2017). Two of those studies, Houngbonon/Jeanjean(2014), Houngbonon (2015) and Bahia et al. (2017) were founded by members of the telecom industry

[382] Y. Li and B. Lyons, 'Market structure, regulation and the Speed of Mobile Network Penetration' (2012) 30(6) International Journal of Industrial Organization 697; C. Geneakos, T. Valletti and F. Verboven, 'Market structure, regulation and the Speed of Mobile Network Penetration' (2015); G. Csorba and Z. Papai, 'Does one more or one less mobile operator affect prices? A comprehensive ex-post evaluation of entries and mergers in European mobile telecommunication market' (2015). MT-DP – 2015/41; L. Aguzzoni and others, 'Ex-post analysis of two mobile telecom mergers:: T-Mobile/tele.ring in Austria and T-Mobile/Orange in the Netherlands' (2015); Rundfunk & Telekom Regulierungs-GmbH (RTR), 'Ex-post analysis of the merger between H3G Austria and Orange Austria' (2016); Bundeswettbewerbsbehörde (BWB), 'The Austrian Market for Mobile Telecommunication Services to Private Customers: An Ex-post Evaluation of the Mergers H3G/Orange and TA/Yesss!' (2016). Sectoral Inquiry BWB/AW-393 Final Report; Office of Communications (Ofcom), 'A cross-country econometric analysis of the effect of disruptive firms on mobile pricing' (2016); Body of European Regulators for Electronic Communications (n 379); N. Sung, 'Market concentration and competition in OECD mobile telecommunications markets' (2015) 46(26) Journal of Applied Economics 3037.

[383] See for an insightful discussion of the methodologies and limitations of ex-post studies. P. Ormosi and others, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' (2015).

effectiveness of the remedies adopted by the European Commission in mobile telecom mergers in ensuring lower prices, better quality or more choice for consumers.

The results of these *ex-post* studies of the remedy packages in recent mobile mergers tally well with recent studies, which look more broadly at the use of commitments and the effectiveness of merger control in Europe and the US. These studies conclude that competition authorities have consistently overestimated the effectiveness of remedies in preventing anticompetitive effects of mergers in the form of supra-competitive prices.[384] In his leading study of US merger control, Kwoka observes that merger control in the US has become 'excessively permissive'.[385] Recent studies of EU merger control come to a similar conclusion. Duso et al. found that since the 2004 modernisation of the EU Merger Regulation, the Commission merger policy is characterised by a clear tendency to err in favour of type II errors (in two-thirds of the cases) as compared to type I errors (in one third of the cases).[386] The study concludes that the Commission 'blocks too few mergers.'[387] This trend is also reflected in the merger statistics provided by the European Commission. While the number of mergers notified and scrutinised by the Commission have more than doubled from 2350 (1990-2003) to 5221 (2004-2019) after the adoption of the revised EU Merger Regulation in 2004, the number of decisions to block a merger in the post-modernisation period (2004-2019) has fallen in comparison with the pre-modernisation period from 18 to 12 cases in absolute terms and from 1,2 to 0,76 cases per year on average.[388]

The tendency of competition authorities to clear telecom mergers on the basis of remedies even though they give rise to anticompetitive effects is thus representative for a general surge in the *laissez-faire* tendency in merger control. The Chicagoan error-cost

[384] Kwoka, John E. Jr. *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (MIT Press 2015) 120-121 and 159-160. See also Kwoka, John E. Jr. 'Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes' (2013) 78(3) Antitrust Law Journal 619 645. For a critical analysis of those findings and a rejoinder see M. Vita and F. D. Osinski, 'John Kwoka's Mergers, Merger Control and Remedies: A Critical Review' (2018) 82(1) Antitrust Law Journal 361; Kwoka, John E. Jr. 'Mergers, Merger Control, and Remedies: A Response to the FTC Critique' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947814> accessed 26 August 2019. For a discussion of the limited effectiveness of structural remedies in recreating a competitive force Kwoka, John E. Jr. 'Merger Remedies: An Incentives/Constraints Framework' (2017) 62(2) Antitrust Bulletin 367 370-371, 375-379. See however a recent FTC ex-post analysis of structural remedies, suggesting that in about 2/3 of all cases (70%), divestitures of assets, in horizontal, non-consummated mergers were successful in recreating competition. Federal Trade Commission, 'The FTC's Merger Remedies 2006-2012 A Report of the Bureaus of Competition and Economics' (2017) 1–2. For the European Commission, see Duso, Gugler and Szücs (n 378), 613-614, 618.See also Ormosi and others (n 383); M. Motta and M. Peitz, 'Challenges for EU Merger Control: Discussion Paper' (2019).

[385] Kwoka, John E. Jr. (n 384) 120-121, see also 117,158. See also Kwoka, John E. Jr. (n 384), 645.

[386] Duso, Gugler and Szücs (n 378), 609; Motta and Peitz (n 384) 2.

[387] Duso, Gugler and Szücs (n 1041), 618.

[388] EU Commission, 'Merger Statistics: 21 September 1990 to 31 November 2019' accessed 7 December 2019.

framework has made the minimization of type I errors through the extensive use of structural and behavioural remedies a top priority of EU and US merger control. It thus has entrenched a clear preference towards under-enforcement with a view to preserving the economic liberty of the merging parties. This *laissez-faire* approach and the underpinning Chicago error-cost framework continue to shape merger policy in the US and in Europe, notwithstanding the fact that the disconnect between this policy and empirical analysis becomes increasingly pronounced. Competition authorities continue to clear mergers in highly concentrated markets, despite the fact that numerous studies suggest that mergers reducing the number of players in an industry to four or three are likely to lead to anticompetitive price effects.[389]

The triumph of the *laissez-faire* approach in merger control, thus, has clear costs. While the reliance on remedies preserves the economic liberty of the merging parties and shields the presumptive efficiency gains of increased firm size, they failed to restore the competitive forces and market structure eliminated by the mergers. The permissive stance of EU and US competition authorities in telecom mergers shows that modern merger policy fails to prevent concentration in exactly those highly concentrated markets in which the likelihood of anticompetitive effects is the highest[390] and for which even Chicago Scholars accepted that antitrust policy should discourage further increases in concentration.[391]

The dubious effectiveness of a *laissez-faire* merger policy grounded in the Chicagoan error-cost framework thus also cast doubt on its underlying assumption of the ability of markets to easily correct type II errors and hence the low costs of under-enforcement of competition law. It suggests that instead of being grounded in any empirical basis, the prevailing error-cost framework is primarily informed by the ideological concern about preserving the negative economic liberty of businesses and freeing them from the 'straightjacket' of strict antitrust rules. By closely following the Chicagoan error-cost framework, the *laissez-faire* approach to merger control has not only importantly contributed to the increase in industry concentration in the US and, to some extent in Europe,[392] but also fails to deliver on its own promises of maximizing consumer welfare. The Chicagoan error-cost framework as source-code of modern antitrust

[389] This is the conclusion drawn from a survey study analysing 49 studies of mergers in 21 industries over a period of 30 years O. Ashenfelter, D. Hosken and M. Weinberg, 'Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers' (2014) 57(3) The Journal of Law and Economics 67 96; Sung (n 1224), 3046.
[390] S. Peltzman, 'Industrial Concentration under the Rule of Reason' (2014) 57(3) The Journal of Law and Economics 101 101–103.
[391] ibid 117–118.
[392] Peltzman's study, focusing on the manufacturing industry, shows that while the pre-1982 merger policy failed to prevent industry concentration, it nonetheless kept concentration at a relatively stable level. After the adoption of the Merger Guidelines in 1982, concentration began to raise. ibid 105-107, 111, 112-117, 117-118.

policy has led to what the Chicago School had guarded against: the 'crash of antitrust merger policy'.[393] From this perspective, merger policy is perhaps the most striking example showing how the Chicagoan antitrust revolution devoured its own children.

4.5 The Error-Cost Framework and the Endorsement of Negative Liberty

To fully grasp the extent to which the Chicagoan error-cost framework has aligned all three pillars of modern antitrust with the logic of negative liberty and has entrenched a *laissez-faire* approach, it is worthwhile to take one step back and contrast it with the understanding of the costs and benefits of competition law intervention prevailing under republican antitrust. The error-cost framework prevailing under republican antitrust was forged by a balance of rights in line with the idea of republican liberty as non-domination. The Chicagoan error cost framework departed from this framework in three respects.

First, unlike the republican approach, which recognises the possibility of non-arbitrary interference,[394] the Chicagoan error cost framework perceives any kind of state interference as a restriction of liberty and source of (welfare) costs. While from a republican vantage point, state intervention does not annihilate liberty as long as its non-arbitrariness is ensured through democratic and constitutional safeguards, the Chicagoan error-cost framework counts any kind of state intervention as interference with and, thus, reduction of liberty.[395] Consequently, state intervention under the Chicagoan cost framework is much costlier than from the perspective of republican liberty.

Second, the gains of intervention are much lower under the Chicago School error cost-framework than from the republican vantage point. From the perspective of republican liberty, antitrust intervention does not only prevent a specific instance of interference, which leads to unfreedom. But it also reduces the overall level of domination, by making access to such interference impossible and hence also preventing future instances of potential arbitrary interference. The gains in terms of liberty generated through state intervention are hence much higher from the perspective of republican than from the vantage point of negative liberty, which

[393] Bork and Bowman, Ward S. Jr. (n 35), 370.
[394] Pettit (n 294), 586-587, 597; Pettit (n 7), 135-136, 145-146; Pettit (n 295) 58–59.
[395] Pettit (n 294), 597–599; Pettit (n 7), 145–146.

sees state intervention only as a remedy for isolated instances of actual or likely interference. [396]

Third, the costs of erroneous non-intervention (false acquittals), in turn, are higher from the perspective of republican liberty as compared to the Chicagoan error-cost framework. From a republican perspective, erroneous non-intervention not only leads to a single instance of a reduction of negative liberty due to an isolated interference. In failing to prevent, say a dominant firm from accumulating further market power, a false acquittal of anticompetitive exclusionary conduct also fails to guard market participants against the future loss of liberty due to an increase in the level of domination the dominant firm will be able to exert as a consequence of the successful exclusion of competitors. A further reason why the cost of erroneous non-intervention are higher from the perspective of republican antitrust than under *laissez-faire* antitrust is that both paradigms rely on different counterfactuals. Whereas the Chicago School assumed that markets are likely to self-correct false negatives, the republican approach was less confident in the ability of market forces to defeat instances of unchallenged domination. On the contrary, proponents of republican antitrust assumed that the failure of the state to challenge domination resulting from the excessive concentration of economic power might, in the long-run, entail an unbearable level of domination and undermine the legitimacy of democratic and economic institutions themselves. From a republican perspective, the real cost of non-intervention is that the unbridled domination of private economic players will eventually prompt popular calls for the state to take back control over the economy, for instance, by means of a more centralised and autocratic way of organising the economy and polity. [397]

By substituting the broad republican notion of economic liberty as non-domination by a thinned out, negative concept of economic liberty as welfare-reducing interference, the Chicago School as reweighted the costs and benefit of legal rules and their enforcement through state intervention. While republican antitrust in line with the republican tradition perceived antitrust rules and their enforcement as a constitutive source of economic liberty, the Chicagoan School has realigned the balance of rights with the Hobbesian and Benthamite idea that any kind of legal rule automatically reduces liberty.[398] This explains why the Chicago School championed an error-cost framework that fundamentally reshaped the calculus of the balance of right that informs the decision of when state intervention is legitimate. State intervention

[396] Pettit (n 7), 145.
[397] Kaysen and Turner (n 302) 5. See for a similar point W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 172.
[398] Pettit (n 294), 597, 598-599.

under this error-cost framework is only permissible as long as its benefits, in terms of securing negative liberty of market participants against interference, say by a dominant firm, outweigh its costs in terms of the reduction of the negative liberty of the dominant firm due to the corrective state interference.[399] This calculus lay at the heart of the Chicagoan error-cost framework that constitutes the source-code for a *laissez-faire* approach to competition law. As a consequence of the thinning out of the concept of economic liberty, the broader societal or political benefits of antitrust intervention and non-welfare costs of non-intervention on the input-legitimacy of a competitive market economy and democratic political institutions do no longer enter the equation on which the Chicagoan error-cost framework is based.[400]

5 Conclusion

This chapter further traces the decline of republican antitrust, grounded in the ideal of republican liberty, and how it was dislocated by *laissez-faire* antitrust that rests on a negative understanding of liberty. It shows that, alongside with the displacement of the structuralist goal of preserving a polycentric market structure by the consumer welfare standard as policy objective of modern antitrust, the shift from republican to *laissez-faire* antitrust took place through three other channels. The ascent of the Chicago and Post-Chicago schools prompted the alignment the presumptions of illegality, the standard of proof and error-cost framework that we have identified as key policy instruments and parameters of republican antitrust with a thinned out understanding of negative liberty. While the extent to which this transformation materialised in the US and EU certainly differs in degree, one can discern an overall trend towards a more *laissez-faire* approach along these three variables in both competition law systems.

The first vector driving the shift from republican to *laissez-faire* antitrust is the decline of legal presumptions and their displacement by a rule of reason-style sliding-scale analysis of the specific impact of agreements, unilateral conduct and mergers on competitors and consumer welfare. Presumptions of illegality under republican antitrust were informed by the notion of republican liberty, which did no only perceive actual or likely interference, but the mere potential of arbitrary interference as a source of unfreedom. Under the republican approach, these presumptions were applied to specific agreements, specific levels of monopoly power and

[399] Pettit (n 7), 145–146.
[400] This point adds another dimension to the observation that the error-cost framework as coined by the Chicago School fails to account for the 'accuracy benefits' of antitrust enforcement First and Weber Waller (n 6), 2571.

forms of unilateral conduct, as well as mergers based on concerns about the potential harm and domination they might generate by undermining a polycentric market structure. The magnitude of harm of a specific form of conduct to polycentric competition was, in turn, considered as a proxy for their capacity to generate domination and undermine republican liberty of other market participants.

This extensive reliance on broadly construed presumptions of illegality has been increasingly disavowed by US and EU courts and antitrust enforcers. The scope of presumptions of illegality under all three pillars of competition law has, therefore, been consistently curtailed to the benefit of a broader application of a rule of reason or effects-based analysis. In line with the concept of negative liberty, the rule of reason analysis only inquires into whether business conduct actually or likely interferes with competitors and consumers in a welfare-decreasing way. The remaining presumptions of illegality have also been aligned with the logic of negative liberty because they are viewed as a generalisation of the likely welfare effects of specific forms of business conduct. These welfare-effects, in turn, constitute a proxy for their propensity to interfere with the negative liberty of other market participants in a welfare-decreasing way.

The rise of the *laissez-faire* approach has also importantly alleviated the weight of legal presumptions. Courts and competition authorities on both sides of the Atlantic have increasingly blended presumptions of illegality and the casuistic effects-based analysis into a sliding-scale approach structured by a number of filters. This increasing reliance on a sliding-scale approach shows how modern antitrust sought to maintain the advantages of legal presumptions, in terms of legal certainty and administrability, without however subjecting the negative entrepreneurial liberty to the tight corset of rigid, over-inclusive presumptions of illegality. The sliding-scale approach, instead, uses legal presumptions as a burden-shifting instrument. It adapts the weight of presumptions of illegality and evidentiary burdens, as well as the level and granularity of scrutiny of the likelihood of anticompetitive effects, in accordance with the quality of proof and the complexity of the facts at hand.

The move from a republican to a *laissez-faire* approach manifests itself most clearly in the proliferation of presumptions of legality towards broad categories of vertical agreements, above-cost pricing by dominant firms and a vast majority of mergers. To unshackle the industrial Behemoths and liberate negative entrepreneurial liberty from the strictures of tight rules imposed by republican antirust, *laissez-faire* antitrust did not only narrow the scope and erode the weight of presumptions of illegality. Rather, it removed large areas of exercise of

negative entrepreneurial liberty completely from the reach of antitrust law and ringfenced them against state intervention.

A second driver of the transformation of republican antitrust into *laissez-faire* antitrust was the change in the overall standard of proof of anticompetitive effects that governs all three pillars of US and EU competition law. On both sides of the Atlantic, the narrowing of presumptions of illegality, their streamlining with a probabilistic logic and their collapsing into a sliding-scale approach has brought about a tightening of the standard of proof. Republican antitrust relied on a capability standard of proof, which justifies the application of antitrust rules to agreements, unilateral conduct, or mergers on the basis of their mere potential harm to competition. This capability standard was in keeping with the idea of republican liberty as non-domination, which perceived not only actual or likely but potential interference as a source of unfreedom. With the rise of the Chicago School, this capability standard of proof has been superseded by a probabilistic standard of proof. This standard of proof is only met if an antitrust plaintiff can show that an agreement, unliteral conduct or merger creates actual or likely harm to consumer welfare. In line with the probabilistic logic of negative liberty, the rise of *laissez-faire* antitrust has limited the scope of application of competition law to forms of business conduct, which actually or likely interfere with the negative liberty of other market participants and thereby deprive them of the possibility to enter into mutually beneficial transactions. Modern antitrust law, thus, no longer relies on a balance of harm approach that focuses mainly on the magnitude or scale of harm and the ensuing domination that might arise from a certain degree of concentration of economic power or a specific form of business conduct. The *laissez-faire* approach has, instead, adopted a balance of probabilities approach. This probabilistic approach lays major emphasis on the likelihood of business conduct to interfere with other market participants in a welfare-decreasing way. As a consequence of the adoption of a probabilistic standard of proof, the raise of *laissez-faire* antitrust has substituted a probabilistically unweighted with a probabilistically weighted protection of economic liberty.

The third, and perhaps most important, vector of this shift from a republican to a *laissez-faire* antitrust is the rise of the Chicagoan understanding of the costs and benefits of antitrust intervention. The decline of the structural approach, the shrinking of legal presumptions and the adoption of a probabilistic standard of proof can ultimately be traced back to an adoption of an error-cost framework that consistently errs on the side of non-intervention. By increasingly endorsing this one-sided error cost framework as the source-code of modern antitrust enforcement, US and EU competition authorities and courts weigh the cost and the benefits of

state intervention in a way that, in the case of doubt, tips the scales of the balance of rights in favour of the unbridled exercise of entrepreneurial liberty. This finetuning of the error-cost framework in favour of 'non-intervention' has definitely moved antitrust away from the prophylactic approach of republican antitrust, which was willing to tolerate welfare losses as the price for guarding market participants' economic liberty against potential domination and harm.

The recalibration of these three policy variables demonstrates how the decline of the concern about republican liberty and with it the idea of a link between competition and democracy is ultimately the result of the fear that too broad an application of antitrust law will unduly undermine the negative entrepreneurial liberty, contractual freedom and property rights of businesses. The jettisoning of a Smithian understanding of competition as polycentric market structure as policy objective, the narrowing of presumptions of illegality, the adoption of a probabilistic standard of proof and the endorsement of the Chicagoan error-cost framework sought in the first place to insulate the exercise of negative contractual liberty from the clutches of antitrust law and state intervention.

This thinning out of the concept of economic liberty and the one-sided concern about the preservation of negative entrepreneurial liberty hence ultimately pursued the goal of unleashing corporate Behemoths with a view to harnessing entrepreneurial liberty as a catalyst for economic growth and welfare. Yet, this shift from republican to *laissez-faire* antitrust came at a certain cost. The decline of presumptions of illegality and the displacement of a rule-based by a standard-based assessment of business conduct provides private firms with greater leeway to exercise private government and to arbitrarily interfere with other market participants. The shift from a republican to *laissez-faire* antitrust has curtailed not only the prohibitive but also the protective scope of antitrust law. The republican, form-based operationalisation of the concern about liberty as non-domination provided a 'probabilistically unweighted'[401] protection of market participants against potential harm that may result from certain forms of business conduct, by making this conduct more costly or unavailable. With the rise of *laissez-faire* antitrust, this thick form of economic liberty of market participants has been thinned out and has become more contingent and less resilient. *Laissez-faire* antitrust does not more make specific business conduct unavailable because of its tendency to serve as resources of domination. Rather, as a consequence of the shift towards a rule of reason-like effects-based analysis, antitrust law only ensures a probabilistically weighted protection of the economic

[401] Pettit (n 7), 137–138.

liberty of market participants. Economic liberty has thus become dependent on the contingencies and accuracy of an increasingly complex analysis in predicting the probabilities of anticompetitive effects of a particular business conduct.

The presumptive gains in welfare brought about by a shift towards a More Economic Approach in line with the concept of negative liberty thus came at the costs of the thinning out of the concept of economic liberty as non-domination and equal and independent status of all market participants. Arguably, it has led to an increase in the level of domination, as market participants have become increasingly dependent on and exposed to the individual or collective exercise of private government by corporate Behemoths. The ascent of the *laissez-faire* approach thus has led to the strengthening of the negative entrepreneurial liberty of powerful businesses, while concerns about the liberty as non-domination and equality of opportunity of smaller competitors have become largely irrelevant. The days in which all three pillars of US and EU antitrust law were geared towards the prevention of domination resulting from instances of concentrated economic power in the hands of a few with a view to ensuring competition as domination-free economic order and counterpart of a republican society and polity of free and equals are definitely gone. And so is the fear about private government by corporate Behemoths.

CONCLUSION

This study started with a short, albeit complex puzzle: How can we explain the idea that competition and competition law promote democracy? And more specifically, what is the relationship between competition and democracy that informs the concept of a competition-democracy nexus in US and EU competition law? For a long time, the idea that the preservation of competition and the control of concentrated economic power through competition law contributes to the protection of democracy has been a recurrent theme, if not even a foundational myth, of the normative discourse of both US and EU antitrust. Yet, our current, predominantly economic understanding of competition and competition law does little to enhance our understanding of this relationship. The mainly economic thrust of contemporary competition law analysis also explains why antitrust scholarship has as yet failed to put forth a coherent theory which elucidates this idea of a competition-democracy nexus.

1 The Story: The Rise and Fall of Republican Liberty as Connecting Piece of the Competition-Democracy Nexus

This study addresses this research gap by providing a clear, short, and coherent answer to the question of what exactly the relationship between competition and democracy consists of. Drawing upon the history of political thought, it argues that the idea of a competition-democracy nexus in US and EU antitrust rests on the republican concept of liberty as non-domination (Chapter I). Unlike the predominant understanding of negative liberty, this republican concept of liberty, which can be traced back to the Ancient Roman Republic, perceives the exposure to domination and subordination rather than interference as an obstruction of liberty. While the concept of negative liberty postulates that an individual enjoys freedom, as long as no other person interferes with its actions or choices, the republican understanding of liberty assumes that an individual remains unfree even if it does not face actual or likely interference. The republican tradition does not associate unfreedom with interference but with a master-slave relationship. It stands for the proposition that an individual cannot be said to be free, as long as it is exposed to asymmetric power relationships that make it dependent on the goodwill of another, more powerful person, which can arbitrarily interfere with its actions and choices whenever it sees fit. Republican liberty can only be attained by emancipating individuals from the dependence on and subordination to the arbitrary will of the more powerful. Liberty, in its republican sense, therefore, does not limit itself to requiring the

absence of interference. Rather, to be said to be free, individuals must not be subjugated to the arbitrary will of someone else. They must enjoy the independent status of free and equal citizens.

This republican concept of liberty allows us to explain two features that underpin the idea of a competition-democracy, which lies at the root of US and EU competition law. The concept of republican liberty helps us understand why early antitrust movements in the United States (US) and Europe were opposed to the existence of concentrated economic power as such and perceived it as a threat to democracy. This proposition that concentrated economic power constitutes in itself an abrogation of liberty is far from obvious. From the predominant perspective of negative liberty, the existence of economic power should only raise concerns if dominant firms abuse their power and interfere with the choices and actions of other market participants. By contrast, republican liberty can explain why concentrated economic power is viewed as a source of unfreedom. Indeed, from the vantage point of republican liberty, it is the mere existence of this concentrated power and the ensuing capacity of potent firms to interfere with other market participants at whim, which constitutes an obstruction of liberty.

In contrast to our primarily negative understanding of liberty as non-interference, the concept of republican liberty as non-domination also explains why this state of unfreedom resulting from the existence of concentrated economic power is considered a problem for democracy. From the vantage point of negative liberty, the link between freedom and democracy is indeed anything but obvious. For the attainment of negative liberty does not necessarily presuppose a democratic form of government. The opposite is, however, the case for republican liberty. Unlike negative liberty, the republican concept of liberty is directly linked with a specific type of government, namely a republican democracy. Republican thinkers have emphasised that a republican democracy can only thrive if it is grounded in a society of free and equals. It hence presupposes the absence of domination, for instance, in the form of concentrated economic power. Republican democracy, thus, does not only require checks and separation of power in the political but also in the social and economic sphere.

This study draws upon the concept of republican liberty as an analytical tool to shed new light on the historical trajectory of the idea of a competition-democracy nexus. It traces this idea back to the early proponents of competitive markets, amongst them most prominently Adam Smith, John Steuart, Montesquieu and the English Levellers movement. Already those early proponents of competition associated polycentric competitive markets in which economic power is diffused amongst many independent players with the ideal of republican liberty. This

relationship between competition and republican liberty clearly emerges from their account of the transition from a feudal economy to a competitive market society. Whereas the feudal economy was characterised by the concentration of economic power, hierarchy and subordination, the competitive market society operates in a heterarchical manner and economic power is dispersed amongst many players. On this basis, these early political economists claimed that the transition from a feudal economy to a competitive market society enhanced republican liberty and would ultimately bring about a republican or democratic form of government. These early proponents of competitive markets thus coined for the first time the idea of a link between competition and republican democracy. At the same time, they shed light on the capacity of polycentric competition to operate as a mechanism of antipower that guards liberty as non-domination against domination and private government and, thus, solves the 'Behemoth problem'.

This perennial idea that competition as a polycentric market structure and institution of antipower promotes republican liberty as non-domination was picked up by the framers of the Sherman Act and figured prominently as a recurrent theme of US antitrust law until far beyond the mid of the 20th century (Chapter II). Likewise, the beginnings of the idea of a link between competition and democracy in Europe coined by the Ordoliberal School in Germany can be traced back to a republican concept of economic liberty as non-domination (Chapter III). The framers of the Sherman Act and the Ordoliberals alike harnessed the idea of republican liberty in the face of the unprecedented challenges that the industrial revolution and the rise of the large-scale, corporate Behemoths posed to the pre-industrialist, Smithian understanding of competitive markets.

At the heart of the idea of a competition-democracy nexus on both sides lay the assumption that competition enhances republican liberty by imposing checks on and dispersing concentrated economic power. By ensuring the domination-free self-coordination of economic agents, competition also plays an essential role in promoting the independent status and equality of opportunity of all market participants. On both sides of the Atlantic, the goal of a competition-democracy nexus was thus associated with the values of economic liberty as non-domination and its egalitarian dimension of equality of status and opportunity. Proponents of the idea of a competition-democracy nexus, such as the Harvard School and the Ordoliberals, also explored various pathways to operationalise the concern about republican liberty. The goal of preserving republican liberty as a paramount value of a republican society and polity also, as

Chapters IV and V show, shaped the way how US and EU competition have been respectively applied until the 1970s and 2000s.

This study does, however, not confine itself to recount the importance of the ideal of republican liberty for US and EU antitrust. But it also illustrates how this concern about liberty as non-domination and with it the concept of a competition-democracy nexus went astray. This decline of republican antitrust and the idea of a competition-democracy nexus has been triggered by the ascent of the Chicago School in the US and the More Economic Approach in Europe. This study unveils that the Chicago School successfully assaulted republican antitrust through two channels (Chapter IV). On the one hand, by calling attention to the theoretical and methodological weaknesses of the underlying assumptions of the Structure-Conduct-Performance paradigm, the Chicago School deprived the republican approach of the economic arguments that supported the hostile approach against concentrated economic power. On the other hand, the Chicago School put forth with the consumer welfare standard a versatile, principled framework that enables antitrust policy to operationalise the concept of negative liberty. The study shows that the ultimate goal of the Chicago School's support of the consumer welfare standard was the preservation of entrepreneurial liberty against state coercion. With the ascent of the Chicago School and the consumer welfare standard, *laissez-faire* antitrust, which is primarily grounded in negative liberty, gradually superseded republican antitrust and its ideal of liberty as non-domination.

Instead of relying on diffuse fears about the presence of domination and concentrated power, which underpins the republican concept of liberty, the consumer welfare standard succeeds in clearly delimiting when economic liberty of other market participants is unduly obstructed. Under the consumer welfare standard, this is only the case if the conduct actually or likely interferes with competitors in a way that reduces consumer welfare. The consumer welfare standard also gives guidance as to when state interference to remedy this obstruction of liberty is warranted. Indeed, the consumer welfare standard sets out a clear, principled framework to balance conflicting and often incommensurable rights and liberties of market participants to decide whether state interference is permissible to remedy such undue interference. Under this framework, antitrust intervention is only justified if the welfare costs resulting from the reduction of the liberty of the perpetrator firm, in form of lost pro-competitive efficiencies as a result of state intervention, is outweighed by the welfare gains resulting from the increase in liberty, in the form of averted anticompetitive harm, of those parties whose obstruction of liberty is either averted or remedied through antitrust intervention.

Chapters VI and VII show how the concept of negative liberty as the underpinning rationale of the consumer welfare standard has fully displaced republican antitrust and revolutionised the interpretation and application of antitrust law in the US and the EU. With the rise of the *laissez-faire* approach and consumer welfare standard, negative liberty as non-interference has superseded the republican ideal of liberty as non-domination as the ultimate normative foundation of US and EU competition law. As a consequence, the link between competition and democracy has gone missing.

2 The Key Findings

This comprehensive study of the role and trajectory of republican liberty in US and EU antitrust enhances our understanding as to how the ideal of republican liberty and the competition-democracy nexus have been operationalised through antitrust policy. At the same time, it sheds new light on the profound transformation that antitrust law on both sides of the Atlantic underwent with the rise of the *laissez-faire* approach championed by the Chicago School and More Economic Approach and the disappearance of the competition-democracy nexus. This transformation was the consequence of the recalibration of several essential parameters of the republican approach to antitrust law: namely, the concept of economic liberty (2.1), the understanding of competition and the policy objective of competition law (2.2), the role of presumptions of illegality (2.3), the standard of proof (2.4) and the attitude towards state intervention (2.5).

2.1 Economic Liberty

The first parameter that the shift from a republican to the *laissez-faire* approach fundamentally reframed is the understanding of economic liberty. Antitrust law on both sides of the Atlantic have gradually abandoned a republican understanding of economic liberty as non-domination and widely endorsed a narrow concept of negative economic liberty as non-interference. This transformation affected both the negative, defensive (2.1.1) and the positive, egalitarian dimension (2.1.2) of liberty.

2.1.1 The Negative Dimension: The Types of Preventing Conditions of Liberty

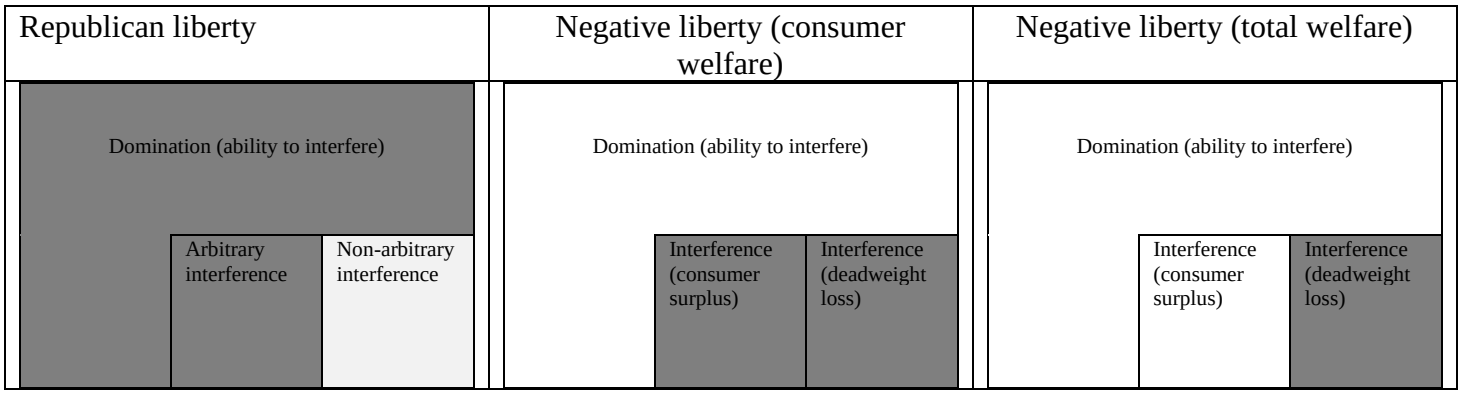
When it comes to the negative, defensive dimension of economic liberty, the shift from republican to negative liberty operated through a transformation of the types of preventing

conditions that are perceived as a source of unfreedom.[1] The republican approach considered the mere existence of concentrated power and hence the mere ability of powerful businesses to arbitrarily interfere with other market participants as obstruction of liberty or preventing condition. Put succinctly, the republican approach antagonised both the existence and exercise of economic power. It was hence not only opposed to specific categories of firm conduct, which lead to arbitrary interference, but also specific situations of concentrated power which create the mere ability for powerful players to interfere with the economic liberty of other market participants in an arbitrary manner. From the republican vantage point, economic liberty, hence, presupposes the absence of excessive concentration of economic power, which vests coalitions of players or mighty players with the ability to exert domination.

By contrast, the *laissez-faire* approach coined by the Chicago and post-Chicago School adhered to a much narrower understanding of the types of situations or actions which actually frustrate economic liberty. Instead of being concerned about the existence of concentrated power as such, *laissez-faire* antitrust only opposes the exercise of power through very specific, namely welfare-reducing, conduct as an undue invasion of liberty. Under the consumer welfare standard, this is only the case if the conduct actually or likely interferes with competitors in a way that reduces welfare. The proponents of a consumer welfare (surplus) approach properly so called, consider firm behaviour that prevents voluntary, mutually beneficial economic transactions (deadweight loss) and the deterioration of the terms of those economic transactions (reduction of consumer surplus) as preventing conditions leading to undue interference. The traditional and neo-Chicagoan proponents of a total welfare approach adopted an even narrower notion of undue interference. They only view the prevention of voluntary, mutually beneficial economic transactions (dead-weight loss) as preventing conditions of economic liberty, while ignoring any adverse effect on the terms of the transaction.

A major implication of the shift from republican to *laissez-faire* antitrust was hence a thinning out or shrinking of the scope of economic liberty protected by antitrust law. This is depicted schematically by the graph below. Each square represents the potential scope of liberty. The shaded area tries to capture the actual scope of the specific concept of republican liberty,[2] negative liberty defined by the consumer welfare and negative liberty defined by the total welfare approach.

[1] G. C. MacCallum, 'Negative and Positive Freedom' (1967) 76(3) The Philosophical Review 312 319–327.
[2] The area of non-arbitrary interference is also shaded, yet to a lesser degree. This accounts for the fact that, although the proponents of republican liberty assumed that non-arbitrary interference does not amount to an



Graph 4 The scope of republican economic liberty and Chicago/post-Chicago economic liberty

2.1.2 The Egalitarian Positive Dimension: Types of Action or Conditions of Performance Guaranteed by the Concept of Liberty

The second difference between the republican and the Chicagoan *laissez-faire* version of economic liberty pertains to the type of actions or conditions of performance under which agents must be able to carry out their economic activities to be considered free. The republican tradition, which conceptualises liberty as non-domination in opposition to dependence and subordination, has a strong positive, egalitarian dimension. From a republican perspective, for markets participants to be considered free, they have to benefit from an equal status of independence. This egalitarian dimension of republican liberty presupposes that market participants must be able to carry out economic transactions without being subject to hierarchies and subordination. Competition advances liberty as non-domination as it contributes to the achievement of the republican ideal of a society of free and equal masterless (wo)men. Early proponents of competitive markets, such as Adam Smith, therefore celebrated the role of competition in levelling socio-economic hierarchies and as a catalyst of a domination-free coordination of economic activities between independent, free and equal market participants. The independent, small and entrepreneur was indeed the hero of the Smithian and Jeffersonian ideal of a republican market society structured by a multitude of small, independent entrepreneurs who benefit from equal opportunities and are emancipated from any relationship of economic subordination.

obstruction of republican liberty, they were highly sceptical that interference by private party can qualify as non-arbitrary. On the contrary, they widely assumed that only constitutional and democratic processes could ensure the non-arbitrary character of interference. Accordingly, only public interference would qualify as non-arbitrary.

This egalitarian dimension of the republican concept of economic liberty as non-domination has important implications. Unlike proponents of negative liberty, the republican tradition perceived relationships of dependence and subordination as obstruction of liberty, even if they are the outcome of contractual liberty. Since the republican tradition apprehended not only interference by but also subjection to concentrated economic power as a source of unfreedom, liberty as non-domination is also opposed to asymmetric power relationships. Republican liberty is hence attached to some form of structural egalitarianism which presupposes the equal distribution of economic power and opportunity. The republican tradition thus understands economic liberty as equal liberty, which is closely intertwined with equality of opportunity.

This egalitarian dimension of republican liberty guided the republican approach towards antitrust. The interpretation of the prohibition of anticompetitive agreements under § 1 of the Sherman Act and Art. 101 TFEU, for quite some time, perceived certain vertical restraints as an undue extension of hierarchical relationships of subordination beyond the perimeters of the firm. The republican approach towards monopoly power and merger policy on both sides of the Atlantic also displayed a considerable concern about the adverse effect of economic concentration on the economic opportunities of small, independent businessmen.

To Chicagoans, however, this Jeffersonian ideal of a market structure composed by a multitude of small, independent players and the proposition that antitrust law should ensure equality of opportunity was an anathema. Chicago Scholars, indeed, perceived this republican ideal as the principal culprit for the woes of antitrust law, as it provided the ideological basis for an interpretation of competition law that protected small competitors, rather than competition. The Chicago School, therefore, derided previous antitrust policy, which took into account non-economic considerations as 'populist' or 'political' antitrust.[3] The primary objection that the Chicagoan scholars marshalled against the egalitarian dimension of republican economic liberty was that it unduly stymies the 'freedom of action of large business firms'.[4] To cleanse antitrust from this political or populist contamination of market egalitarianism, the Chicago School championed consumer welfare as the unique goal of antitrust law. The only type of action and conditions of performance to be guaranteed under the

[3] R. H. Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1966) 75(3) The Yale Law Journal 775 815-829, 832-834; R. H. Bork and Bowman, Ward S. Jr. 'The Crisis of Antitrust' (1965) 65(3) Columbia Law Journal 363 365, 369-371; R. H. Bork, 'The Goals of Antitrust Policy' (1967) 57(2) The American Economic Review 242 249–251.
[4] R. A. Posner, *Antitrust Law* (University of Chicago Press 2001) 26; Bork (n 3), 252–253.

Chicagoan negative version of economic liberty is the ability to enter into voluntary, mutually beneficent transactions and hence efficient economic activity.

Unlike the republican tradition, the *laissez-faire* approach is, therefore, mostly unconcerned about the status of economic agents as independent, free and equal market citizens. Instead of being opposed to hierarchies and dependence created through contractual integration or integration by merger, competition law increasingly embraced them as efficient attempts to internalise transaction costs and protect property rights. Integration by contract and merger was considered to be just another manifestation of competition, which should be insulated from state interference. With respect to monopoly power and mergers, modern *laissez-faire* antitrust has embraced the Chicagoan proposition that the adverse effect of economic concentration, unilateral conduct and mergers on smaller competitors is unproblematic, as long as they do not foreclose equally efficient competitors.

The shift from a republican to a *laissez-faire* approach thus brought about a considerable narrowing of the egalitarian dimension of economic liberty, which is summarised in the table below.

Table 3 Types of actions and conditions of performance guaranteed by the republican and laissez-faire concepts of economic liberty

	Mutually beneficial transactions	Equal opportunity	Independent and equal status
Republican liberty	X	X	X
Negative liberty (consumer welfare)	X		
Negative liberty (total welfare)	X		

This thinning out of the egalitarian dimension of economic liberty due to the shift from a republican to a *laissez-faire* approach also affected considerably the range of agents who benefit from economic liberty. Republican and *laissez-faire* antitrust fundamentally disagree on the extent to which the economic liberty of competitors should be protected by antitrust law.

The Chicago School, in fact, substituted the republican concept of 'equality of status' with 'efficiency' as the relevant criterion of merit on which competitors could base claims to their entitlement to equal status, opportunity and liberty. In the Chicagoan and the post-Chicagoan world, competitors could only claim that another player had jeopardised their economic liberty and opportunity if they are equally or more efficient than the other player. The ascent of the *laissez-faire* version of negative liberty thus actuated a shift from a system of

'equal liberty' to a system of 'liberty of the more efficient'. If one follows, as did the Chicago School, the assumption coined by Schumpeter and Coase that efficiency is positively correlated with firm size,[5] 'liberty of the more efficient' means in turn 'liberty of the bigger guy'. As a consequence of the decline of the egalitarian dimension of republican freedom, the notion of the competitive process under the *laissez-faire* approach has become much less inclusive than that prevailing under republican antitrust.

2.2 The Understanding of Competition and Goal of Competition Law

The shift from a republican to a negative concept of liberty as the underpinning rationale of antitrust law also brought about a fundamental transformation of the understanding of the policy objectives of competition law. The republican approach operationalised the goal of liberty as non-domination through an antitrust policy, which was geared towards the preservation of competition in the Smithian sense as a polycentric market structure. Republican liberty was thus associated with a deconcentrated, polycentric market structure, which operates as an institution of antipower and ensures a domination-free process of economic coordination rather subordination.

This structuralist understanding of competition guided the interpretation of the prohibition of coordinated conduct, the regulation of monopoly power and merger policy in the US and EU. All three pillars of antitrust law were tailored to protect competition, in its Smithian sense, as a polycentric market structure in which a multitude of players act independently and thereby keep each other's market power in check. The elimination of a polycentric functioning of competition and the concentration of economic power through agreements, the existence of or exercise of monopoly power and mergers were perceived as a source of domination.

By seeking to safeguard the Smithian understanding of competition as a deconcentrated market structure, republican antitrust contributed to the achievement of the two dimensions of republican liberty. On the one hand, polycentric competition by diffusing economic power

[5] This is indeed the implied consequence of Coase's claim that the boundaries of the firm will only encompass those transactions which are coordinated more efficiently by vertical hierarchy or entrepreneurial fiat than through horizontal market transactions Coase, R. H. 'The nature of the firm' (1937) 4(16) Economica 386 390. R. J. Peritz, 'A Counter-History of Antitrust Law' (1990) 39(2) Duke Law Journal 263 309. Schumpeter provided an alternative argument for why efficiency is correlated with size or market power. This assumption is encapsulated in his central claim was that 'that market power is necessary to innovation and that innovation is the core of effective competition.' E. S. Mason, 'Schumpeter on Monopoly and the Large Firm' (1951) 33(2) The Review of Economics and Statistics 139 139, 142. J. A. Schumpeter, *Capitalism, Socialism and Democracy [1942]* (Harper & Row 1962) 82–86.

amongst many players reduced the instances of domination resulting from concentrated economic power. It thus ensured a check-and-balancing mechanism where all players impose constraints on each other's ability to exert arbitrary power. On the other hand, by safeguarding a market structure composed of a multitude of small, independent players, polycentric competition also contributed to the achievement of the Jeffersonian ideal of a society guaranteeing equal opportunities and ensured the status of free, independent masterless businessmen.

The Chicago School, by contrast, ardently opposed previous attempts to associate competition with a specific market structure. Instead of likening competition with a domination-free process or a particular market structure, the Chicago School suggested that the well-functioning of competition can only be measured having regard to its outcomes. In refuting the socio-political values and the economic precepts of the S-C-P paradigm underpinning the republican goal of polycentric competition and its hostility against bigness and size, the Chicago School disavowed the idea that concentration of economic power and firm size constitute a problem as such. The output-oriented understanding of competition cherished by Chicago and Post-Chicago antitrust policy thus has become largely agnostic about concentrated economic power and monopoly. Posner, for instance, claims that as 'we value competition because it promotes efficiency – that is as a means, rather than as an end – it would seem that whenever monopoly would increase efficiency it should be tolerated, indeed encouraged.'[6] Modern *laissez-faire* antitrust thus relies on the outcomes of competition in terms of efficiency or welfare and 'not the particular form that the competitive process takes'[7] as an indicator to measure the well-functioning of competitive markets and as an appropriate benchmark to identify the legality of business behaviour under antitrust rules.[8] In so far as it assumes that efficiency is correlated with firm size, the *laissez-faire* approach replaced the Smithian understanding by a Schumpeterian concept of competition, which celebrates size and market power as the crowning success of entrepreneurial acumen and the unrestricted exercise of negative entrepreneurial liberty.

[6] Posner (n 4) 28.
[7] S. Bishop and M. Walker, *The economics of EC competition law: Concepts, application and measurement* (Sweet & Maxwell 2002) 16.
[8] ibid.

2.3 The Role of Presumptions of Illegality

The third vector through which the shift from republican to a *laissez-faire* approach materialised is the changing role and weight attributed to presumptions of illegality. Republican antitrust implemented the concern about liberty as non-domination through the design of broad presumptions of illegality. These presumptions were grounded in the mere potential of specific agreements, single-firm conduct and mergers to give rise to arbitrary interference and harm. This potential harm was inferred from their legal and economic form and their adverse effect on a polycentric market structure. This extensive use of structural presumptions of illegality contributed to the reduction of the overall level of domination in a given market. In effect, the republican approach bolstered the robustness of economic liberty by making certain forms of conduct with a high potential to give rise to domination unavailable or very costly for market participants.

With the shift from a republican towards a *laissez-faire* approach, the interpretation and application of all three pillars of US and, albeit to a lesser degree, EU competition law have experienced a decline in the role of presumptions of illegality to the benefit of an expansion of a rule of reason-like analysis. For antitrust intervention to be justified, this rule of reason approach inquires in line with the probabilistic logic of negative liberty into whether specific conduct led to actual or likely welfare-reducing interference with other market participants. With the rise of the rule of reason analysis, the rationale of the remaining legal presumptions has also undergone a substantial transformation. Presumptions of illegality are no more grounded in a concern about the mere potential harm and domination certain conduct might entail. Rather, presumptions of illegality are limited to types of firm behaviour for which experience suggests that they will, in all likelihood, generate anticompetitive effects so that a fully-fledged rule of reason analysis into their actual or likely impact becomes redundant. Instead of being, in line with the republican concept of liberty, geared towards conduct which has the potential to entail harm or domination, legal presumptions have morphed into procedural short-cuts for a detailed rule of reason analysis into the actual or likely welfare effects of a specific business conduct.

The thinning out of the scope of economic liberty brought about by a shift from republican to *laissez-faire* antitrust was thus translated through a reduction in the protective and prohibitive scope of antitrust rules with respect to anticompetitive agreements, single-firm conduct and mergers. The form-based approach, which was grounded in a broad application of legal presumptions against specific forms of coordinated and unilateral conduct, as well as

mergers, has been gradually disavowed. While the scope of legal presumptions has been substantially curtailed, all three pillars of US and EU competition law were instead increasingly streamlined towards a sliding-scale rule of reason analysis, which calibrates the weight of presumptions with fact-specific evidence of the likelihood of anticompetitive effects. Moreover, *laissez-faire* antitrust increasingly relies on presumptions of legality that shield certain business conduct from the scope of antitrust law. Under the *laissez-faire* approach, the protective scope of antitrust law has been limited to those forms of conduct, which are actually or likely interfering with the economic liberty of other market participants. The withering weight of presumptions of illegality and the generous carve out of presumptions of legality have also rendered economic liberty more contingent and less robust. Through the use of presumptions of illegality, republican antitrust had made certain conduct with a high potential of domination unavailable or very costly for market participants. Under the sliding-scale rule of reason approach, the economic liberty of market participants has become highly contingent upon the facts of the case, the accuracy of the legal analysis and, ultimately, the goodwill of powerful firms.

2.4 The Standard of Proof

A fourth parameter affected by the transition from republican to *laissez-faire* liberalism was the standard of proof. Republican and *laissez-faire* antirust differ as to the degree of plausibility to which the preventing conditions have to materialise so that economic liberty can be considered frustrated and state intervention to remedy this invasion can be justified. From a republican perspective, already the potential of arbitrary interference is sufficient to give rise to domination and to frustrate liberty in a way that would justify remedying state intervention. In line with this understanding of liberty, republican antitrust law relied on a standard of proof, which merely required the showing of potential rather than actual or likely harm for antitrust intervention to be warranted. This loose standard of proof allows for a prophylactic antitrust intervention that addresses conduct, which tends to undermine a polycentric market structure, even if the likelihood of adverse effect on competition, competitors or consumers is rather low. This prophylactic rationale of republican antitrust relied on a balance of harm approach, which attributed considerable weight to the magnitude of potential harm. The fact that the potential harm of a given conduct is high might tip the scales in favour of state intervention, although the likelihood of such injury to occur was low.

The rise of the Chicago School has brought about a tightening of the standard of proof, which has been gradually aligned with the probabilistic logic of negative liberty. While from

the republican perspective the presence of the mere potential or possibility of arbitrary interference is sufficient for liberty to be frustrated, proponents of negative liberty assert that freedom can only be deemed obstructed in the case of actual or likely interference. With the rise of *laissez-faire* antitrust, the standard of proof governing the application of all three pillars of US has been brought in line with this probabilistic logic of negative liberty. This trend towards a more probabilistic standard of proof is also underway in Europe, although some ambiguity remains in particular with respect to Art. 102 TFEU. Under this tightened, probabilistic standard of proof, US antitrust and EU competition law increasingly require the showing of actual or likely anticompetitive interference, rather than potential harm for economic liberty of other participants to be jeopardised and antitrust intervention to be justified. Whereas the standard of proof under the republican approach relied on a balance of harm, the standard of proof under the *laissez-faire* approach hinges on a balance of probabilities, which requires the showing that the anticompetitive effects are more likely than not. The displacement of republican antitrust by *laissez-faire* antitrust thus entailed a shift from a 'probabilistically unweighted' to a probabilistically weighted form of protection of economic liberty.[9]

2.5 The Attitude towards State Intervention

The shift from republican to laissez-faire antitrust was also driven by a fundamental reframing of the attitude of antitrust law towards state intervention. The republican and laissez-faire approaches fundamentally contrast in the balancing of rights, which determines whether a specific obstruction of liberty should be remedied through state intervention or not.

Republican antitrust relied on a specific error-cost framework, which in the case of doubt errs on the side of state intervention. This error-cost framework encoded a balancing of rights, which is shaped by the concept of republican liberty as non-domination. Its bias in favour of state intervention, on the one hand, is due to the fact that for proponents of republican liberty only arbitrary interference constitutes a source of unfreedom. Proponents of republican liberty recognise the possibility of non-arbitrary interference. Such non-arbitrary interference can be ensured if the interfering authority is obliged to trace the interests of the individuals whose choices or actions it interferes with. The republican tradition assumes that, unlike interference by private parties, interference by a public authority taking place in compliance with constitutional safeguards, the rule of law and democratic processes does not automatically reduce individual liberty. To proponents of republican liberty, the costs of state interference, in

[9] P. Pettit, 'Freedom in the Market' (2006) 5(2) politics, philosophy & economics 131 136–137.

terms of reduction of liberty, are therefore much lower than for proponents of negative liberty who liken any state interference with a decrease in individual liberty.

The second explanation for the bias of the republican error-cost framework in favour of state intervention is that from the perspective of republican liberty state intervention is capable of generating more benefits than from the perspective of negative liberty. In the case of negative freedom, the gains of state intervention are limited to instances where state intervention remedies undue interference or prevents individuals from engaging in actual or likely interference. From the republican vantage point, by contrast, state intervention does not only enhance liberty by preventing or remedying a particular instance of actual or likely interference. It also furthers liberty by reducing the overall level of domination prevailing in the economy or society. Proponents of republican antitrust, hence, assumed that the benefits of state intervention (or costs of non-intervention) are not confined to the economic sphere. On the contrary, by reducing the overall level of concentrated power prevailing in a society, state intervention also contributes to the preservation of a republican society or a democratic government. As a consequence, the limited costs and the substantial benefits of state intervention tilt the balance clearly in favour of antitrust intervention.

The Chicagoan *laissez-faire* version of negative economic liberty cultivates a diametrically opposed attitude towards state intervention. Proponents of negative liberty perceive interference, be it private or public, as an abrogation of negative liberty. Any state interference, for instance, in the form of antitrust law, which seeks to prevent a powerful firm from interfering with the economic liberty of competitors or consumers or seeks to remedy such interference, thus, will automatically also reduce the liberty of the perpetrator firm. This assumption importantly changes the weight of the costs and benefits of state intervention and, hence, modifies the underpinning arithmetic of the balancing of rights. The Chicagoan error-cost framework counsels in the case of doubt in favour of non-intervention. The Chicago and post-Chicago School assumed that type I errors are more costly than type II errors. In the case of doubt, state interference is hence less desirable than private interference. The *laissez-faire* approach thus clearly tilts the balance of rights against state intervention and in favour of negative entrepreneurial liberty. This error-cost framework, therefore, has a clear *laissez-faire* bias in favour of preserving the entrepreneurial liberty of the perpetrating firm. Under the growing influence of the Chicago School and the More Economic Approach, this error-cost framework has become firmly entrenched as the source-code of US and EU competition law enforcement. The minimisation of type I errors has emerged as a central preoccupation of

modern US antitrust law. While the EU Commission and Courts have retained a more pro-active and interventionist approach, in particular in the realm of single-firm conduct, the concern about type I errors also figures more prominently in EU competition law. The objective of averting over-enforcement and over-deterrence has been a major driver of the European Commission's modernisation initiative and has also been at least partially endorsed by the EU courts. As a consequence, US and EU competition law increasingly rely on consciously underinclusive tests which consistently seek to reduce type I errors to a level close to zero, while attributing little weight to the costs of type II errors. Paradoxically, the shift from a republican towards a *laissez-faire* approach has not only become inapt to address concerns about industry concentration, but it also struggles to deliver on the promise of protecting consumers from higher prices.

2.6 The Retreat of the Competition-Democracy Nexus

Ultimately, this shift from a republican to a negative understanding of liberty as the underpinning rationale of antitrust or competition law has rendered the idea of a link between competition and democracy obsolete. The republican tradition has consistently underscored the interdependence[10] between the economic, social and political sphere. This interdependence is grounded in the republican belief that the realisation of the ideal of republican liberty requires a specific form of domination-free, republican government and society: in short, a republican democracy. The realisation of the ideal of republican liberty and a republican democracy thus depends not only on the elimination of instances of political and social but also economic domination.

This perceived interdependence between the political, social and economic sphere underpinning the competition-democracy nexus becomes apparent in the hostility of proponents of republican liberty against any form of concentration of power. Republicans, therefore, champion institutional settings that ensure a polycentric dispersion and separation of power not only in the political but also in the social and economic sphere. From a republican vantage point, a competitive market structure, which disperses and diffuses economic power and ensures some form of checks-and-balances between equally-sized market players, constitutes the counterpart of mechanisms of antipower safeguarding the separation of and checks on power in the political sphere. The interdependence between economic and political sphere, which informs the idea of a competition-democracy nexus, also manifests itself in the egalitarian

[10] W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 304–308; R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051 1152.

dimension of republican liberty as non-domination. Competition as a polycentric market structure in which hierarchies are eroded and economic opportunity is equally spread amongst small and independent businesses was perceived as an essential building block of the republican ideal of a society and a virtuous citizenry composed by free and equal, independent masterless men. The republican antitrust tradition was firmly anchored in the assumption that the ideal of republican democracy and republican liberty could only be achieved by ensuring competition as a domination-free economic order. It is this republican opposition against all forms of domination which lies at the core of the idea of a competition-democracy nexus.

This study thus offers an account of the link between competition, competition law, and democracy which importantly differs from the existing literature. Unlike the conventional scholarship, it does not portray the curtailing of the political influence of big business as the ultimate explanation as to how competition law contributes to democracy. Rather, this study locates the competition-democracy nexus in the preservation of a polycentric market structure which operates as a system of antipower and a safeguard of a domination-free economic order. Of course, by curtailing the economic power of big business, republican antitrust also strengthens the integrity of the political institutions as it prevents powerful economic players from exerting political domination and corrupting democratic processes. This limitation of the power of big business to engage in lobbying or rent-seeking is, however, only a positive side-effect of the overall policy goal of preserving polycentric competition as a safeguard of republican liberty as non-domination.

The endorsement of the consumer welfare standard by US and EU competition law gradually obliterated the role of republican liberty as the underpinning link of the competition-democracy nexus. By jettisoning the ideal of republican liberty as non-domination and replacing it with a narrow, negative understanding of liberty as non-interference, the Chicago and Post-Chicago School, as well as the More Economic Approach movements severed this link between competition and democracy. Unlike republican liberty, negative liberty is not tightly linked with a specific form of government. Negative liberty can, under certain circumstances, also thrive under an authoritarian regime. Nor does negative liberty depend on the absence of concentrated power, the elimination of subordination, and the equality of status which the republican tradition perceived as an economic corollary of republican democracy. On the contrary, modern antitrust law grounded in a concept of negative liberty remains agnostic about concentrated economic power, dependence or subordination, as long as it does not involve involuntary, welfare-reducing interference with other market participants. Within

the framework of modern antitrust, economic power is only relevant if it is exercised in the form of market power; that is, if it entails output restrictions or price increases. The dominating effects of the mere existence of concentrated economic power and the adverse effect of economic power beyond the strict perimeters of the market, for instance, on democracy, fall outside the realm of modern antitrust analysis.

In conclusion, the shift from a republican to a *laissez-faire* approach has brought about important changes in what is perceived as obstruction of economic liberty (preventing conditions), the egalitarian dimension of economic liberty (types of actions and conditions of performance guaranteed), the understanding of competition and policy goal of competition law, the use of presumptions of illegality, the requisite standard of proof of anticompetitive effects, the attitude towards state intervention and the link between competition and democracy. This transformation of the main parameters of the republican and *laissez-faire* approach is summarised in the table below.

Table 4 The essential elements of the republican and laissez-faire approach

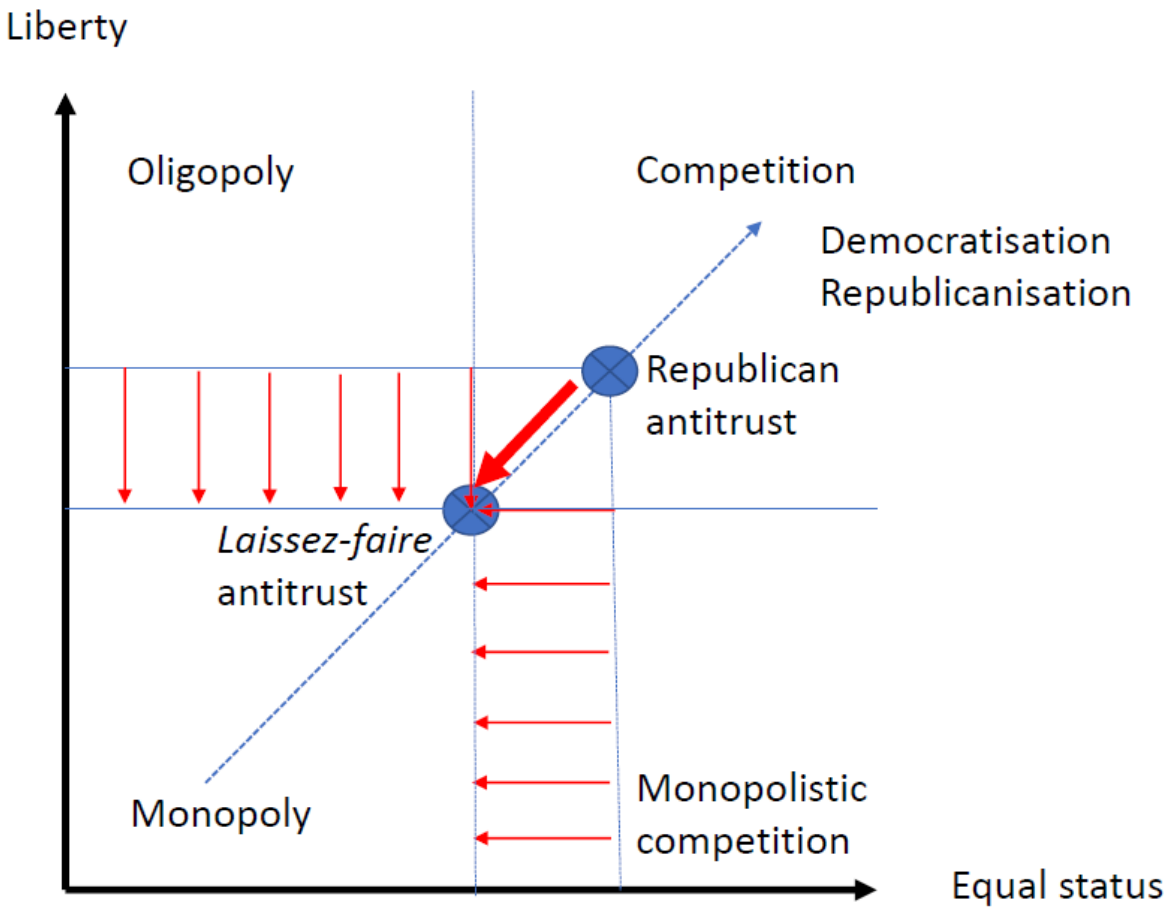
	Republican approach	*Laissez-faire* approach
Preventing conditions of liberty	• Domination • Existence of concentrated economic power • Probabilistically unweighted	• Interference • Exercise of economic power • Probabilistically weighted
Actions and conditions of performance guaranteed by liberty	• Absence of dependence, hierarchies as antonym of liberty as non-domination • Equality of opportunity and status	• Hierarchies and subordination as expression of contractual liberty • Superior efficiency
Legal presumptions	• Broad use of presumptions of illegality • Presumptions based on the magnitude of potential harm	• Shrinking of presumptions of illegality • Expansion of the rule of reason analysis • Presumptions based on the likelihood of potential harm
Standard of proof	• Potential (arbitrary) interference • Balance of harms	• Actual or like interference • Balance of probabilities

Attitude towards state intervention	• Bias in favour of state intervention	• Bias in favour of entrepreneurial liberty
The understanding of competition	• Competition as market structure and process	• Competition as outcome
The competition-democracy nexus	• Interdependence between republican liberty and republican democracy • Relevance of non-economic co goals	• No link between negative liberty and specific form of government • Rejection of non-economic goals

The ‘democratic’ or ‘republican’ model of competition set out in Chapter I, which focuses on liberty and equality of status as parameters to measure the degree of ‘democratisation’ or ‘republicanisation’ of a certain types of market structure has thus allowed us to canvass a comprehensive picture of the transformation of the shift from republican to *laissez-faire* antitrust. This transformation is graphically condensed in the graph below. The shift from republican to *laissez-faire* antitrust (red arrow between the two blue points) testifies to the fact that modern antitrust law has become more agnostic about the type of market structure and degree of industry concentration. Unlike republican antitrust, which seeks to preserve competition as a decentralized, polycentric market structure, *laissez-faire* antitrust is willing to tolerate more concentrated, oligopolistic or even monopolistic market structures.

The graph shows that this shift has led to a narrowing or thinning out of the scope of economic liberty and equality of status guaranteed by competition law (red arrows). This graph thus accounts for the fact that *laissez-faire* antitrust has ceased to guarantee the thick, probabilistically unweighted concept of republican liberty as non-domination. This thick concept of liberty has been superseded by the thinner, less resilient and probabilistically weighted form of negative liberty as non-interference. At the same time, the shift from republican to *laissez-faire* antitrust also brought about a decrease or narrowing in the equality of status guaranteed by competition law. Unlike republican antitrust, *laissez-faire* antitrust no longer aims at ensuring the equality of opportunity and independent status, in particular of small market players. Under *laissez-faire* antitrust, the equality of opportunity protected by

competition law is conditioned upon the efficiency of the market players. The type of competition preserved under antitrust has thus become less inclusive.



Graph 1- The shift from republican to laissez-faire antitrust

The shift towards *laissez-faire* antitrust grounded in the ideal of negative liberty and its operationalisation through the purely output-oriented consumer welfare standard has fundamentally curtailed the role of competition law in ensuring the input-oriented legitimacy of competition.[11] While there remain some differences in the degree to which US and EU competition law followed this shift towards *laissez-faire* antitrust – certainly, the shift is more pronounced in the US than in the EU – this graph nonetheless quite faithfully depicts the overall trend in both jurisdictions. If we apply our model to make a statement about the degree of democratization of the type of competition or market structure modern antitrust law protects, we have to conclude that competition and competition law have become less democratised, republicanised or 'less democratic'.

[11] F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 2.

3 Why Did the Idea of a Nexus between Competition and Democracy Go Astray?

This study shows how the idea of a competition-democracy nexus faded into irrelevance as a consequence of this shift from republican to negative liberty as the guiding principle of modern antitrust. Chicago and post-Chicago antitrust have actively purged antitrust law from the idea of a competition-democracy nexus by rejecting the relevance of non-economic values and considerations and vilifying them as populism. This displacement of non-economic goals of antitrust law by the single consideration of consumer welfare was often portrayed as a necessary reform to make antirust and competition law more coherent, less political, and bring it in line with what has been cast as the scientific truth of modern economics. This is still the prevailing mainstream account of contemporary antitrust scholarship and policymakers in support of the consumer welfare standard.[12]

Certainly, the adoption of the consumer welfare standard had the merits of narrowing down the focus of competition law analysis and has enhanced the administrability of competition law.[13] The consumer welfare standard, indeed, addressed two fundamental shortcomings of the republican approach by disentangling two boundary issues the republican approach has, to some extent, left unanswered. Republican antitrust and its concern about domination often failed to clearly state when business conduct undermined competition to such an extent that it unduly undermined the economic liberty of other market participants. Endorsing the very thick concept of liberty as non-domination, republican antitrust often fell short of clearly explaining where liberty ends, and the state of unfreedom or domination starts. For instance, republican antitrust did not provide any clear guidance as to how much domination, for instance, in the form of industry concentration, is compatible with the ideal of non-domination and above which threshold economic power becomes incompatible and requires state intervention. Likewise, the republican approach struggled to delineate the protective and prohibitive scope of antitrust law in clear terms. It omitted to give a definite answer as to whether all competitors shall be protected against the exclusion from the market or only as-efficient competitors. Nor did it provide a clear benchmark to determine when business conduct constituted competition on the merits and when undue domination. Also,

[12] J. D. Wright, 'Statement of Joshua D. Wright University Professor Antonin Scalia Law School at George Mason University before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Protection: Hearing on 'The Consumer Welfare Standard in Antitrust Law: Outdated or Harbor in a Sea of Doubt?' Washington D.C December 13, 2017' (2017) 3–12 <https://www.judiciary.senate.gov/download/12-13-17-wright-testimony> accessed 29 September 2019.
[13] H. Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84(2) Michigan Law Review 213 234.

republican antitrust dispensed with coherently setting out the balance of rights to be drawn between conflicting claims to liberty and the costs and benefits of state intervention. In short, the thick normative content of republican liberty failed to provide a clear and coherent principle to decide when state intervention through antitrust law is warranted and when not.

The Chicago School and post-Chicago consensus addressed these two boundary issues by thinning out the concept of liberty and curtailing the scope of antitrust law. The adoption of the goal of wealth maximisation allowed the Chicago School to delineate the negative concept of liberty antitrust law was supposed to protect and provided a coherent, principled framework to manage clashes of economic liberty. The consumer welfare standard, first, offers a principled framework to identify when business conduct affects competition to the extent that it frustrates the liberty of other market participants. Second, the consumer welfare standard spells out how conflicts of rights ought to be resolved and the costs and benefits of state intervention to be balanced.

By reducing the rise of *laissez-faire* antitrust and the consumer welfare standard to a quest for administrability, accuracy and legal certainty, the conventional account of the rise of the Chicago School, however, only tells half of the story. In effect, the triumph of the consumer welfare standard under the auspices of the Chicago School and the More Economic Approach has not necessarily made competition law more precise in economic terms. Herbert Hovenkamp pointedly observed that there is considerable evidence that consumers often actually value the preservation of small businesses and have an aversion against the concentration of economic power. If this is true, both considerations are actually 'economic values' and should be accounted for by a consumer welfare model properly so called. The crux is, however, that consumers often do not express those preferences for small businesses or a deconcentrated economy in monetary terms when they engage in market transactions. On the contrary, consumers tend to free-ride by buying the cheaper product from large producers in the hope that others do buy from a smaller producer. From this perspective, the preservation of an economy composed by small, independent players in which power is deconcentrated constitutes a positive externality or public good, which is actually valued by consumers but is not internalised in the market price they (are willing to) pay. Nonetheless, a fully-fledged consumer welfare approach or efficiency approach which encompasses everything to which consumers

attach value should take this preference into account.[14] The fact that the Chicago School banned those concerns from its antitrust calculus, therefore, cannot be explained by the quest for higher economic precision alone.

Why then did the Chicago School ban those externalities as non-economic considerations from the realm of modern antitrust inquiry? Chicago scholars and modern proponents of a consumer welfare approach would undoubtedly argue that integrating these externalities into antitrust analysis would have made antitrust analysis more complex and less administrable. This argument is, however, unsupported by the rich evidence of antitrust cases, which have been decided prior to the ascent of the Chicago antitrust policy and which were grounded in the concern about republican liberty. On the contrary, it is arguably modern antitrust analysis, which has made antitrust analysis more complex and less administrable than it used to be under the republican approach. The adoption of the Chicagoan consumer welfare standard has instilled a considerable dose of complexity and contingency into antitrust enforcement. The shift towards a more economic analysis and the decline of legal presumptions has increased the costs of antitrust enforcement substantially, without having made it necessarily more administrable.[15] *Laissez-faire* antitrust, moreover, has operationalised the consumer welfare approach through presumptions of legality and legal tests, which are consciously imprecise and underinclusive. Following the Chicagoan error-cost framework, modern antitrust deals with any remaining degree of uncertainty, inherent to the enforcement of antitrust law, in such a way that that it works consistently in favour of the alleged perpetrators, not the alleged victims of antitrust violations.

This implicit bias of *laissez-faire* antitrust against state intervention hints toward important ideological considerations that drove the thinning out of the republican concept of economic liberty and its replacement by a very narrow understanding of negative economic liberty. This ideological dimension is consistently obfuscated by the prevailing discourse of proponents of a consumer welfare approach which emphasises the alleged objectivity and the neutrality of the consumer welfare standard.[16] Conventional antitrust scholarship thus often ignores that the consumer welfare standard encodes a value judgment about the proper scope

[14] ibid 242–244. The Chicago scholars have clearly excluded these values from their definition of wealth maximisation, by defining wealth narrowly as everything to which consumers attach value backed by dollars. R. A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8(1) The Journal of Legal Studies 103 120.
[15] Stucke, Maurice E. 'Reconsidering Antitrust's Goals' (2012) 53 B.C. L. Rev. 551 588–589; J. J. Flynn, 'Antitrust Policy and the Concept of a Competitive Process' (1990) 35 N. Y. L. Sch. L. Rev. 893 907, 914-915.
[16] E. M. Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window' (1986) 61 N.Y.U. L. Rev. 554 555.

of economic liberty, the inclusiveness of the competitive process and the costs and benefits of state intervention. It also hides the fact that the Chicago antitrust revolution was an inherently ideological enterprise. Central to the appeal and success of the Chicago School antitrust programme was its forceful argument that the republican approach which perceived concentrated economic power and bigness themselves as incompatible with liberty and sought to preserve an industry structure composed by small, independent businesses, simply imposed too many constraints on the entrepreneurial liberty, in particular of large companies. The primary thrust of the Chicagoan critique was that the republican approach was anti-business and, therefore, anti-consumer because it prompted antitrust intervention when it was not necessary. Jettisoning the ideal of republican liberty and adopting instead a standard grounded in negative liberty, thus, constituted the attempt to attribute more weight to the interests of businesses and to curtail the reach of antitrust rules and government intervention.[17]

It is perhaps this ideological dimension which explains best the reasons of the ascent and success of the Chicagoan antitrust programme and its clear 'pro-business' attitude.[18] The rise of the Chicago antitrust paradigm indeed took place in the context of a broader ideological and macro-economic shift that profoundly transformed the US political and economic system.[19] The ascent of the Chicago School coincided with the two oil crises leading to the dismembering of the Bretton Woods system. The subsequent waves of trade liberalisation unleashed a new wave of economic globalisation. Not only suffered the US economy during the 1960 and 1970s from a number of internal crises, but it also increasingly felt the supply shock of foreign competition. Its military hegemony being bruised by the Vietnam War and its economic hegemony being suddenly challenged by global competition and trade deficits, the competitiveness of the US industries and firms took centre stage.[20] Along similar lines, proponents of a More Economic Approach in Europe claimed already in the 1980s that the form-based approach of EU competition law unduly hampered the competitiveness of European firms and jeopardised their ability to withstand globalised competition.[21]

[17] E. M. Fox, 'Consumer Beware Chicago' (1986) 84(8) Michigan Law Review 1714 1715, 1719; Fox (n 16), 559, 576, 584, 588.
[18] E. M. Fox and L. A. Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming from-Where Are We Going' (1987) 62 N.Y.U. L. Rev. 936 944–947.
[19] R. J. Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2000) 229–232.
[20] E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140 1143; J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019) 47.
[21] See for instance for the argument that the lack of a rule of reason analysis under Art. 101 (1) TFEU would 'reduce the dynamism of Community industry in competition with American and Japanese firms'. V. Korah, 'The Rise and Fall of Provisional Validity: The Need for a Rule of Reason in EEC Antitrust' (1981) 3(2) Northwestern Journal of International Law & Business 320.

In the face of foreign competition unleashed by globalisation, economic power was all of a sudden no more perceived as a threat to republican liberty, equality of opportunity and economic welfare. Instead, powerful firms themselves were suddenly challenged by foreign competition.[22] The question was no longer: 'Is big business too big?' But rather: 'Is big business big enough to resist foreign competitors and preserve American or European jobs?' The spectre of the American trusts and German cartels gave way to the imaginary of the Japanese or Chinese corporations that flooded the American and European markets with cheap electronic devices.[23] Economic concentration and firm size have ceased to raise fears about domination. Instead, they were increasingly considered as a source of competitiveness and a shield against foreign competition. Too strict antitrust rules, let alone the break-up of powerful firms or de-concentration of concentrated industries, not only appeared economically redundant in so far as they were constrained by new foreign competition, but the heavy-handed republican antitrust policy was also suddenly perceived as far too costly and contrary to the national interest. In light of the new foreign competition, there was a growing consensus that red tape, overregulation and overly intrusive antitrust were crippling the competitiveness of American and the European industry.[24] In this time of crisis, where 'government is not the solution to our problem, [but] the problem'[25], the Chicago School championed a new vision of antitrust policy which would boost productivity by unshackling corporate Behemoths from the artificial constraints that antitrust law had imposed for far too long on the negative entrepreneurial liberty.

These ideological reasons for the decline of the republican and ascent of *laissez-faire* antitrust suggest that the ideal of republican economic liberty as a normative goal of antitrust law befell a similar fate as the political ideal of republican liberty had experienced with the rise of the *laissez-faire* liberalism during the 19th century.[26] The normative thickness of the understanding of economic liberty as non-domination was suddenly deemed too demanding and costly a goal for antitrust policy. The stigma of domination that the republican ideal of liberty attached to industry concentration and firm size also appeared increasingly out of sync with the changing political perception of large corporations as the powerhouse of the American and European competitiveness and the geopolitical need to respond to the challenges of

[22] Peritz (n 19) 257–258.
[23] H. First, 'An Antitrust Remedy for International Price Predation: Lessons from Zenith v. Matsushita' (1995) 4(1) Pacific Rim Law & Policy Journal 211 212.
[24] Fox (n 20), 1145.
[25] R. Reagan, 'Inaugural Address' (1981) <https://www.reaganfoundation.org/media/128614/inaguration.pdf>.
[26] P. Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997) 47–49.

globalisation. The idea that all market participants were unfree in the presence of large corporations was simply difficult to reconcile with the realities of an industrialised economy of mass production. How could one legitimately argue that big business exerted undue domination in light of the benefits consumers derived from large-scale production and the vital contribution large companies made to the nation's wealth?

Most importantly, the realisation of the ideal of republican liberty, which would have required in its last resort the break-up and de-concentration of a large number of industries, was simply perceived as too costly to be a reasonable policy. By calling into doubt the accuracy of the S-C-P paradigm, Chicago School had indeed withdrawn the republican hostility towards industry concentration its economic basis and successfully defied the Smithian understanding of competition as a polycentric market structure as outdated. Despite its egalitarian impetus, the republican understanding of liberty and its manifestation in the Jeffersonian ideal of preserving a society of small, independent businessmen, suddenly appeared to be an utterly elitist understanding of liberty. Taken to an extreme, it implied that workers, employees or managers of large scale corporations were less virtuous citizens than small, independent businessmen.[27] The Chicago School, in fact, vilified the republican approach as an attempt to preserve the interests of a shrinking, yet still relatively wealthy, overwhelmingly white and privileged middle class at the expense of a majority of often less affluent consumers who had to pay high prices due to the efficiency-hampering constraints it imposed on large firms.[28]

In Europe, too, the imaginary of the independent market citizen as the hero of EU competition law who seizes the opportunities offered by the four fundamental freedoms had definitely lost its lustre at the turn of the 21st century. With international competition, Euroscepticism and the perception of a democratic deficit of the EU institutions on the rise,[29] the EU had to provide a more concrete and convincing narrative of how its competition policy generates palpable benefits to the ordinary EU citizen rather than celebrating the ideal of an independent and mobile entrepreneur that remained unattainable for a large majority of its constituents. The modernisation of EU competition law and the shift towards *laissez-faire* antitrust formed part of a broader policy agenda under the Internal Market Strategy announced

[27] Bork and Bowman, Ward S. Jr. (n 3), 370.
[28] ibid 370, 374.
[29] See for instance Scharpf (n 11) 21–28; S. Hix, *The political system of the European Union* (Palgrave 1999) 177–206.

in 1999[30] and the Lisbon Strategy launched in 2000.[31] Both initiatives aimed to bolster the global competitiveness of the European economy, while delivering tangible benefits for businesses and consumers alike.

This rise of *laissez-faire* antitrust in the US and in Europe superseded the thick and demanding notion of economic liberty as non-domination with a very narrow and less demanding concept of economic liberty. This thinning out of the concept of economic liberty considerably alleviated the task of antitrust policy. Instead of protecting market participants against manifold sources of domination, economic dependence and subordination, under the narrower notion of negative liberty coined by the consumer welfare standard, the task of competition law was circumscribed to guarantee the unfettered ability of consumers and competitors to enter into mutually beneficial economic transactions. Most importantly, the narrowing of the concept of economic liberty put a plethora of instances which republican antitrust had perceived as an intrusion of freedom and which, therefore, warranted state intervention, into a better light. The Chicagoan goal of wealth maximisation constituted a forceful argument to insulate size, industry concentration and hence businesses' negative liberty and property rights from state interference. Just in the same way as the republican approach was biased towards the interests of a middle-class of small entrepreneurs, the Chicago School antitrust programme reshaped or 'rigged' the rules governing the legitimate use of contractual and property rights in the interest of large corporations.[32] Recent economic studies suggest that *laissez-faire* antitrust has not only led to an increase in industry concentration in the US[33] and, albeit to a lesser extent, in Europe.[34] But it also, at least in the US,[35] failed to deliver on its promise of ensuring lower prices and greater welfare to consumers.

[30] For a specific discussion of the modernisation initiative Communication from the Commission to the European Parliament and the Council -The Strategy for Europe's Internal Market. COM(1999)624 final/2 18–19.
[31] European Council, 'Lisbon European Council - 23 and 24 March 2000 - Presidency Conclusions' <https://www.europarl.europa.eu/summits/lis1_en.htm> accessed 12 January 2020.
[32] Peritz (n 5), 319–320.
[33] S. Peltzman, 'Industrial Concentration under the Rule of Reason' (2014) 57(3) The Journal of Law and Economics 101.T. Philippon, *The great reversal: How America gave up on free markets* (Harvard University Press 2019) 45–96.
[34] Philippon (n 33) 103–106; M. Bajgar and others, 'Industry Concentration in Europe and North America' (2019). OECD Productivity Working Papers 18 8–9.
[35] Philippon (n 33) 111–123.

4 A Blueprint for Reform and the Republican Thrust of Current Reform Proposals

This account of the decline of republican antitrust and the ascent of a *laissez-faire* approach under the auspices of the Chicago/Post-Chicago School and More Economic Approach raises a final question: Is the decline of the goal of republican liberty and the disappearing of the competition-democracy nexus irreversible? And what would have to happen if we want to revive an antitrust policy which accounts for the domination flowing from concentrated economic power and its adverse effect on republican liberty as basis of a republican society and democracy? In short, how could we redemocratise competition and competition law and reverse the trend depicted in Graph 1?

By identifying the essential elements of the republican approach resting on the idea of a competition-democracy nexus and mapping the vectors of transformation that have led to the rise of the *laissez-faire* approach, this study also provides a blueprint for future reform. It signposts which parameters would have to be recalibrated in order to reverse or at least mitigate the shift from a republican towards a *laissez-faire* approach. Discussing avenues for a recalibration of the *laissez-faire* approach is not just a theoretical exercise. On the contrary, the signs that some form of reversal of the trend from a republican towards a *laissez-faire* approach is currently underway become increasingly concrete.

In recent times, growing levels of industry concentration in the US and, to a lesser extent in the EU, have fuelled new concerns about the adverse effects of concentration of economic power on equality, competitive opportunities, vigour of competition and democracy.[36] At the centre of these re-emerging concerns about growing industry concentration lies the rise of a handful of powerful online platforms.[37] A growing amount of antitrust literature points to the prevalence of considerable entry barriers and network effects in the digital economy, which may often tip the market in favour of a powerful incumbent.[38] The market power of the

[36] See for an overview OECD, 'Market Concentration - Issues paper by the Secretariat' (2018). DAF/COMP/WD(2018)46 <https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf> accessed 20 May 2019; J. Stiglitz, 'Inequality, Stagnation, and Market Power' (2017) <https://rooseveltinstitute.org/inequality-stagnation-market-power/> accessed 26 August 2019; J. Furman and P. Orszag, 'A Firm-Level on the Role of Rents in the Rise in Inequality: Presentation at "a Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University' (16 October 2015) <goodtimesweb.org/industrial-policy/2015/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf> accessed 4 November 2017; J. B. Baker, 'Market power in the U.S. economy today' (2017) <https://equitablegrowth.org/market-power-in-the-u-s-economy-today/> accessed 26 August 2019.

[37] T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018) 21, 119-126.

[38] J. Furman and others, 'Unlocking digital competition: Report of the Digital Competition Expert Panel' (2019) 31–41; J. Crémer, A.-Y. de Montjoye and H. Schweitzer, 'Competition policy for the digital era' (2019) 21–38.

incumbent platforms appears moreover increasingly entrenched by their ability to accumulate and control a large amount of personal and non-personal data as a steady source of monetisation, network effects and as a crucial input for the improvement of their algorithms, products and services.[39] As some of these platforms are increasingly vertically integrated, they often hold important 'gatekeeper' or 'bottleneck' functions by simultaneously offering intermediary services to businesses with whom they compete in the provision of downstream services.[40] Their bottleneck position and their role as providers of market places bestow those firms with the power to act as private regulators and to dictate the conditions of competition on their platforms.[41] The growing importance of algorithmic pricing, moreover, raises the spectre of new forms of collusion which can only to a limited extent be addressed by antitrust law.[42]

The data-driven business model of digital platforms and their growing control over users' access to information also raise broader societal and political concerns. The harnessing of advances in digitisation and large-scale data collection and analytics give shape to a new paradigm of 'surveillance capitalism' which is increasingly perceived as a threat to the values of liberal democracy.[43] Not only stir the large-scale accumulation of personal data and the control over informational bottlenecks privacy concerns, but there is also growing awareness for the unprecedented power of digital platforms to influence, or even manipulate,[44] democratic processes. It is this amalgamation of economic, societal and political power in the hands of a few platforms, which explains why they are increasingly seen as a threat to democracy.[45] Calls for a more heavy-handed antitrust approach, which tackles the growing industry concentration and curtails the power of digital giants have gained traction. This development raises the question as to whether and how the concept of republican liberty and the idea of a competition-

[39] D. L. Rubinfeld and M. S. Gal, 'Access Barriers to Big Data' (2017) 59 Arizona Law Review 339.
[40] Furman and others (n 38) 41, 47; Crémer, Montjoye and Schweitzer (n 38) 54.
[41] Crémer, Montjoye and Schweitzer (n 38) 60–63.
[42] A. Ezrachi and Stucke, Maurice E. *Virtual competition: The promise and perils of the algorithm-driven economy* (Harvard University Press 2016) 56–81; Baker (n 20) 99–118.
[43] S. Zuboff, *The age of surveillance capitalism: The fight for a human future at the new frontier of power* (Profile Books 2019) 21, 516-524.
[44] R. Epstein and R. E. Robertson, 'The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections' (2015) 112(33) Proceedings of the National Academy of Sciences of the United States of America E4512-21; R. Epstein, 'How Google Could Rig the 2016 Election' (19 August 2015) <http://www.politico.com/magazine/story/2015/08/how-google-could-rig-the-2016-election-121548> accessed 9 August 2017.
[45] Information Commissioner's Office, 'Democracy disrupted? Personal information and political influence' (2018); The Economist, 'Do Social Media threaten Democracy: Facebook, Google and Twitter were supposed to save politics as good information drove out prejudice and falsehood. Something has gone very wrong' (4 November 2017) <https://www.economist.com/leaders/2017/11/04/do-social-media-threaten-democracy> accessed 23 September 2019; Stigler Committee on Digital Platforms, 'Final Report' (2019) 15 <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report> accessed 20 September 2019.

democracy nexus could guide such a reconfiguration of antitrust law. What would such a blueprint for a rebalancing or even reversal of the shift from republican antitrust to *laissez-faire* antitrust look like?

4.1 A Republican Understanding of Economic Liberty

First, to realign antitrust law with the concern about republican liberty and the competition-democracy nexus, more weight would have to be attributed to the idea that economic concentration has the tendency to give rise to unfreedom and domination, even in the absence of actual or likely interference. The notion of republican liberty as non-domination indeed provides a forceful conceptual tool to understand and articulate why the power of large firms and, for instance, their control over vast amounts of user data, have given rise to growing societal and political unease. It explains why the concentration of personal data and economic power in the hands of digital giants is increasingly viewed as a threat to liberty and democracy. This fear about the concentration of too much economic and political power in the hands of digital platforms cannot be fully grasped by the concept of negative liberty underpinning the *laissez-faire* approach, because it is, at least in part, not grounded in any concrete risk that those platforms actually or likely interfere with or harm consumers. The concept of republican liberty also allows us to bridge the apparent paradox of the current debate. The power of large platforms is increasingly considered a threat to democracy and a competition law problem, although they provide us with a plethora of innovative, cheap and convenient products and services that have facilitated our lives in a manner which we could hardly imagine two decades ago.

To a large extent, the growing fears about the adverse economic, social and political effects of industry concentration and, in particular, the accumulation of economic power in the hands of a few platforms are anchored in a republican concept of liberty as non-domination rather than a concern about negative liberty. These fears testify to an overall concern about market participants' being increasingly dependent on and exposed to the capacity of digital Behemoths to interfere at will.[46] This perception of an asymmetry of power and subordination explains why the growing concentration of power in the hands of digital giants is perceived as a source of unfreedom, although they have considerably increased the range of choice sets we benefit from in our daily lives. In short, the concern about the increase in industry concentration and the rise of powerful online platforms can be at least in part explained by the republican hostility to a master-slave relationship which makes the liberty of individuals contingent upon

[46] Wu (n 37) 21–23.

the goodwill of a benevolent, non-interfering master. Substituting or complementing the concept of negative economic liberty with the thicker concept of economic liberty as non-domination would thus allow antitrust policy on both sides of the Atlantic to accommodate and address growing concerns about the concentration of economic power and the capacity to exert private government in the hands of the digital Behemoths.

4.2 A More Structural Understanding of Competition and Policy Objective

Second, for antitrust law and policy to become more receptive to concerns about the adverse effects of the concentration of economic power in the hands of a few powerful digital platforms on republican liberty and a republican democracy, antitrust policy would have to reconsider the notion of anticompetitive conduct and harm. It would have to give up its single-edged focus on consumer welfare as the touchstone for the legality of business conduct. Rather, antitrust policy would have to account for the impact of economic concentration and firm conduct not only on consumer welfare, but the market structure and the procedural characteristics of competition in terms of equality of opportunity and independent status of the market participants. This would require nothing less than a reframing of the prevailing understanding of competition. Instead of the purely outcome-oriented understanding of competition as a generator of economic welfare, antitrust policy would have to be anew anchored in a Smithian understanding of competition as a polycentric market structure and mechanism of antipower which ensures the input-oriented legitimacy of markets by guaranteeing economic liberty and equality of opportunity.

In recent times, the consumer welfare standard has come under increasing strain. A growing number of commentators call for its readjustment or even its replacement with a 'protection of competition',[47] 'process of competition'[48] or 'effective competition'[49] standard. The consumer welfare standard is faulted for its exclusive focus on the outcomes of competition in terms of low prices for consumers, which allegedly fails to account for the fact that powerful

[47] T. Wu, 'After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice' 2018 Competition Policy International 7–8. T. Wu, 'The 'Protection of the Competitive Process' Standard' (2018). Columbia Public Law Research Paper No. 14-612 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3276896> accessed 20 September 2019; Wu (n 37) 135–139; L. M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal 710 737–746; L. Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) Journal for European Competition Law & Practice 131 132.

[48] Wu (n 47), 7. Wu (n 47) 4.

[49] M. Steinbaum and Stucke, Maurice E. 'The Effective Competition Standard' (2018) accessed 29 September 2019.

firms, such as online platforms, can harm competition without necessarily charging higher prices to consumers. The adoption of an alternative standard focusing on the protection of competition, commentators argue, would instead allow competition law to address concerns about conduct which adversely affects competitors and competition without necessarily leading to higher prices for consumers. A stronger focus on the procedural dimension of competition would thus realign antitrust with its political ideals of preserving economic liberty and equality of opportunity. These proposals account for the fact that we like competition not only because it leads to better outcomes for consumers, but because it has certain desirable procedural characteristics which safeguard economic liberty, fairness and equality.

Yet, so far, little has been said as to what is precisely meant by the 'competitive process'. Some commentators seem to advocate under the label of the 'process of competition' or 'effective competition' standard a structuralist standard, which focuses on the impact of business conduct on the market structure.[50] Such a shift towards a more structuralist approach would realign competition policy with the republican tradition. Republican antitrust implemented the concern about republican liberty through a structuralist policy objective of preserving a polycentric market structure, which imposes checks upon the market power of powerful firms. To proponents of republican antitrust in the US and in the EU, the 'competitive process' was, indeed, synonymous of a 'competitive market structure'. The structuralist thrust of these alternative standards focusing on the procedural virtues of competition clearly fits into this republican mold.

4.3 A Greater Role of Presumptions of Illegality

Third, the reversal of the shift from a republican to a *laissez-faire* approach would require a greater reliance on form-based and structural presumptions of illegality and a narrowing of the rule of reason analysis. Recent reform proposals go into this direction, as they advocate stronger presumptions of illegality as a way forward to tackle the growing trend towards industry concentration and to address some of the challenges to competition brought about by the digital economy.

Some authors suggest that concerns about the risk of new forms of algorithmic collusion warrant the strengthening of *per se* rules and presumptions of illegality against certain types of algorithmic price setting.[51] With respect to unilateral conduct by dominant firms, a recent expert

[50] Steinbaum and Stucke, Maurice E. 'The Effective Competition Standard' (n 49) 29; Wu (n 47) 4.
[51] Baker (n 20) 114–115.

panel report has called for the adoption of presumptions of illegality or even *per se* rules against certain forms of potentially exclusionary conduct, such as self-preferencing, by powerful online platforms.[52] While stopping short of calling for a *per se* rule, other reports suggest a reversal of the burden of proof for certain exclusionary conduct whereby it would be for the dominant platform to show that its conduct has no long-run exclusionary effect and is pro-competitive.[53] Similar proposals suggesting the reversal of the burden of proof were aired with respect to predatory pricing[54] and vertical integration by dominant firms.[55] Other scholars support a stricter towards predatory pricing or targeted rebates, which abandons the safe-harbour for above-cost pricing.[56]

In light of the growing levels of industry concentration and recent merger waves, a growing number of antitrust scholars and policymakers call for a greater weight (US) or reintroduction (EU) of structural presumptions in mergers.[57] This renewed support for structural and form-based presumptions of illegality clearly is in line with a concern about liberty as non-domination as it allows to address not only likely but potential anticompetitive effects. By making certain forms of business conduct which carries a high potential of undermining a polycentric market structure and entailing domination unavailable to market participants, it would also reinforce the resilience of the protection of liberty. By moving antitrust law towards a less 'probabilistically weighted' approach, a greater role of presumptions of illegality would contribute to the reduction in the overall level of domination prevailing in certain parts of the economy. Attributing greater importance to form-based, structural presumptions is arguable the most administrable way of giving shape to the structural concerns underpinning the proposed 'protection of competition standard.'

[52] Furman and others (n 38) 60–62.
[53] Crémer, Montjoye and Schweitzer (n 38) 3-4, 51, 66–67.
[54] Khan (n 47), 791–792.
[55] ibid 792–797. L. M. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harv. L. & Pol 235 282–283.
[56] Baker (n 20) 147-149, 130-134, 137-145; S. C. Hemphill and P. J. Weiser, 'Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing' (2018) 127 Harvard Law Review 2048 2074–2078.
[57] C. Shapiro, 'Antitrust in a time of populism' (2018) 61 International Journal of Industrial Organization 714 738–739; C. Shapiro and H. J. Hovenkamp, 'Horizontal Mergers, Market Structure, and Burdens of Proof' (2018) 127 Yale Law Journal 1996 2018; S. C. Salop and C. Shapiro, 'Whither Antitrust Enforcement in the Trump Administration?' [2017] Antitrust Source, American Bar Association 1, 4–8; Kwoka, John E. Jr. 'The structural presumption and the safe harbor in merger review: false positives, or unwarranted concerns?' (2017) 81(3) Antitrust Law Journal 827 839-841, 865, 872; M. Motta and M. Peitz, 'Challenges for EU Merger Control: Discussion Paper' (2019) 3–7; Steinbaum and Stucke, Maurice E. 'The Effective Competition Standard' (n 49) 32; Wu (n 47) 5; Khan and Vaheesan (n 55), 281–282.

4.4 A Recalibration of the Standard of Proof

Fourth, the realignment of competition policy with republican liberty would involve a reframing of the standard of proof. Such a recalibration of the standard of proof is also supported by recent reform proposals. A growing number of scholars advocate the abandoning of a purely probabilistic standard of proof which requires the antitrust plaintiff to demonstrate that, on a balance of probabilities, anticompetitive effects are more likely than not, or that even asks for proof of anticompetitive effects to a degree of quasi-certainty.[58] As an alternative to a purely probabilistic standard of proof, it has been argued that antitrust law should rather rely on a balance of harm approach which accounts along with the likelihood also for the scale of potential antitrust harm. [59] Such an adoption of looser standard of proof, which requires merely the showing of potential anticompetitive harm and accounts for its magnitude or scale, clearly is in line with a shift from the probabilistic logic of negative liberty which only perceives actual or likely interference as source of unfreedom to a republican concept of liberty which is rather concerned about potential arbitrary interference. The adoption of a less probabilistically weighted standard of proof would thus also enhance the resilience of the protection of economic liberty guaranteed by antitrust law. An administrable way of implementing such a recalibration of the standard of proof would consist of adopting more and bolder presumptions of illegality.

4.5 A Recalibration of the Error-Cost Framework

Fifth, a reversal of antitrust law towards a more republican approach would require a change in the calculus underpinning the balance of rights and error-cost framework, which under the *laissez-faire* approach consistently leans towards non-intervention and entrepreneurial liberty. Calls for the recalibration of the error-cost framework also enlist growing support amongst antitrust experts who perceive the inbuilt preference for type II errors[60] as one source of growing industry concentration and the growing power of online platforms. Some commentators suggest that competition authorities and courts should take more risks, develop bolder theories of harm and become more tolerant towards type I errors.[61] Such redesign of an error-cost framework, which errs more often on the side of type I errors, would realign antitrust policy with the understanding of the costs and benefits of state

[58] Crémer, Montjoye and Schweitzer (n 38) 3-4, 51.
[59] Furman and others (n 38) 13, 99-100.
[60] J. B. Baker, 'Taking the Error out of "Error Cost" Analysis: What's Wrong With Antitrust's Right' (2015) 80(1) Antiturst Law Journal 1; Baker (n 20) 71–95; Crémer, Montjoye and Schweitzer (n 38) 51; Shapiro (n 57), 741; Stigler Committee on Digital Platforms (n 45) 94–95.
[61] Furman and others (n 38) 99–100.

intervention and balance of rights that was characteristic for the republican approach which perceived antitrust law not as abrogation of, but as being constitutive of economic liberty.

There are growing signs of such a recalibration of the error-cost framework being currently already under way in Europe. Most recently, in *Broadcom* the Commission had recourse to the rarely used instrument of interim measures.[62] To avert the risk of 'serious and irreparable harm' on various chipset markets, the Commission ordered Broadcom to put an end to its exclusivity strategy based on a *prima facie* finding of an abuse of dominance and before performing a complete analysis of the conduct on its merits. The adoption of interim measures in *Broadcom* testifies to a growing concern amongst policy makers and antitrust experts that exclusionary conduct in the presence of important network effects might tip fast-moving high-tech markets in favour of the dominant firm. [63] This shift towards a more prophylactic approach suggests that there is a growing appetite on the part of the EU Commission to incur the risk of type I errors with a view to averting long-lasting and serious anticompetitive harm. It thus marks a rupture with the existing dogma that the error-costs counsel against heavy-handed antitrust enforcement in dynamic markets, which was grounded in the assumption that market power in those markets is short-lived, as incumbents remain constrained by dynamic, potential competition 'for the market'. [64] The extent to which *Broadcom* constitutes a first step towards the recalibration of the error-cost framework in high-tech markets and the EU Commission will make a greater use of interim measures very much depends on the outcome of the appeal of the case which is currently still pending.[65]

4.6 'As-if' Competition and Deconcentration

The reversal of the shift from a republican to a *laissez-faire* approach may, however, also take a much more radical form. Indeed, there is a growing appetite for more radical solutions to address the concern about excessive industry concentration and expand the protective scope of antitrust law. Recent publications, for instance, advocate sector-specific market opening regulation of digital platforms,[66] based on the assumption that existing

[62] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ [2003] L 1/1 Art. 8 (1).
[63] European Commission, 'Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets' <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109> accessed 10 January 2020; Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (n 62) Art. 8 (1).
[64] See for this view M. Rato and N. Petit, 'Abuse of dominance in technology-enabled markets: Established standards reconsidered?' (2013) 9(1) European Competition Journal 1 9–10.
[65] *T-876/19 - Broadcom v Commission* pending.
[66] Khan (n 47), 792–797.

competition rules can only protect, but not promote competition in already concentrated industries. Some experts also call for a lowering of the threshold of market power, which would trigger antitrust or regulatory intervention in order to address exclusionary conduct by oligopolistic players.[67] Most recently, the European Commission has also initiated a consultation process on a 'New Competition Tool'[68] and a 'Digital Services Act'[69] that may rely on *ex-ante* regulation to address the concentration of market power in the hands of digital platforms. These initiatives interestingly echo the regulatory understanding of competition law underpinning the concept of 'as-if' competition coined by the Ordoliberal authors Eucken and Miksch, who advocated a specific form of regulatory antitrust law to tackle the problem of industry concentration in oligopolistic markets. Along with calls for a specific regulatory regime for powerful online platforms, some authors even envisage a non-fault break-up and separation of vertically integrated platforms[70] and firms possessing 'highly damaging' monopoly or oligopoly power.[71] These proposals clearly recall the idea of an 'unreasonable market power' standard initially set out by the Harvard School. Both types of proposals reverberate the republican concern about the concentration of economic power and the preservation of an open, polycentric market structure and process of competition.

The republican framework canvassed in this study thus sets out a rough roadmap for policy reform, which would reverse the shift from a republican to a *laissez-faire* approach and revive the ideal of a competition-democracy nexus. This study also helps us to grasp a better understanding of and to contextualise some of the recent proposals put forward by antitrust commentators and experts to address the concern about industry concentration and the competition challenges in the digital economy. The ongoing policy debate on the role of competition law in the digital economy, the growing trend towards industry concentration and the shortcomings of the consumer welfare standard offer signs which hint towards a recalibration of antitrust law towards a republican approach. A departure from the *laissez-faire* approach and a recalibration of antitrust law with a republican approach rooted in the concern

[67] Furman and others (n 38) 81; H. Schweitzer and others, 'Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany): English Abstract' (2018) 2–3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742> accessed 3 April 2018.
[68] European Commission, 'Press release - Single market – new tool to combat emerging risks to fair competition' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed 12 June 2020.
[69] European Commission, 'Consultation on the Digital Services Act package' <market/en/news/consultation-digital-services-act-package> accessed 12 June 2020.
[70] L. Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 793 1034; Wu (n 37) 132–133.

about republican liberty as non-domination, of course, does not require a full reconversion towards a structural approach and an endorsement of its most radical proposals, such as the non-fault break up of oligopolistic and monopolistic firms. On the contrary, instead of approaching republican and *laissez-faire* antitrust as binary categories or policy options, it might be more helpful to keep in mind that there is a broad continuum between the most radical forms of the republican and the most far-reaching forms of the *laissez-faire* approach. A recalibration of antitrust law towards a more republican approach, therefore, does not necessarily encompass all parameters set out above.

5 Further Research

The central goal of this study is to provide a comprehensive account of the conceptual foundations and the role of the idea of a competition-democracy nexus in US and EU competition law. Owing to this narrow focus on US and EU competition law, the study does not cover certain aspects of the idea of a competition-democracy nexus that would certainly merit further research.

First, the study is limited in its historical scope in so far as it uncovers the emergence of the idea of a competition-democracy nexus in the 17th and 18th century and, then, traces how this idea shaped US and EU competition law from 1890 onwards. The study thus leaves it to future research to analyse the influence of ideas advanced by the early proponents of the competition-democracy nexus, such as the English Levellers and Adam Smith, on the evolution of the English common law on monopolies and restraints of trade. Exploring the impact of the idea of a competition-democracy nexus and republican liberty on English common law might be particularly insightful for two reasons. First, some elements that shaped the republican approach in US and EU antitrust can be traced back to common law doctrines of the 17th and 18th centuries. Such is, for instance, the case for the doctrine of restraints on alienation which, as described in Chapter IV, informed the republican approach of US and EU competition law towards vertical restraints.[72] Second, existing literature seems to suggests that the evolution of English common law rules on restraints of trade and monopoly was also characterised by a shift from an approach grounded in republican liberty to a *laissez-faire* approach informed by

[72] E. Coke, *Institutes of the Laws of England [1628]* .

negative liberty similar to that documented in the present study.[73] This might suggest that the tension between republican and negative liberty driving the development of modern US and EU antitrust as described in this study, is not a unique phenomenon but a recurrent theme in the evolution of the regulation of markets that is constantly re-negotiated.

Second, owing to its geographic focus on US and EU antitrust, this study leaves aside other jurisdictions in which competition law was perceived as an important tool of democratisation, such as Japan, Indonesia, South Africa or, indeed, Central and Eastern Europe.[74] Studying the multi-faceted trajectory of the idea of a competition-democracy nexus and the role of republican liberty across these jurisdictions may further enrich our understanding of the link between competition law, various notions of economic liberty and democracy. In particular, expanding and diversifying the geographic scope of the analysis of the competition-democracy nexus would enhance our understanding of the role of competition law as a driver of political transitions and democratisation.

Third, this study largely focuses on how the idea of a competition-democracy nexus fashioned the interpretation of substantive competition law. It considers only to a limited extent how the design of enforcement institutions, for instance antitrust regulators, contributes to the link between competition and democracy and the attainment of republican liberty. Such an analysis of the role of institutions may add a number of important dimensions to our understanding of the competition-democracy nexus. Political theory suggests that the realisation of the ideal of republican liberty crucially hinges on the ability of public processes and institutions to trace the interest of citizens in order to ensure that regulations and legislation do not amount to arbitrary interference. The idea of republican liberty thus already provides some benchmarks and institutional characteristics that must be fulfilled for the competition-

[73] H. B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Johns Hopkins Press 1955) 12–36; W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago University Press 1981 [1959]) 39–52.

[74] E. M. Fox, 'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41(2) Harvard International Law Journal 579; G. Makhaya and S. Roberts, 'Expectations and outcomes: considering competition and corporate power in South Africa under democracy' (2013) 40(138) Review of African Political Economy 556; S. Vande Walle, 'Competition and Competition Law in Japan: between Scepticism and Embrace' in M. W. Dowdle, J. Gillespie and Maher Imelda (eds), *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge University Press 2013); T. A. Freyer, *Antitrust and global capitalism, 1930-2004* (Cambridge University Press 2006); E. Kameoka, *Competition Law and Policy in Japan and the EU* (Edward Elgar 2014) 11; E. M. Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) Legal Issues of Economic Integration 317; M. Bernatt, 'Illiberal Populism: Competition Law at Risk?'<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3321719&download=yes> accessed 20 March 2019.

democracy nexus to materialise. Combined with a broadening of the geographical scope of the analysis, a stronger focus on the design of institutions may allow us to understand why in certain countries the adoption of competition law does not necessarily bring about democracy. Also, harnessing the concept of republican liberty for an institutional analysis may indicate relevant institutional settings and procedures that would allow private agents to engage in non-arbitrary decision-making. Such an approach would allow us to explore various mechanisms through which antitrust law can accommodate the pursuit of so-called public interest goals, such as environmental policy concerns, sustainable development or economic resilience, by private players, without necessarily compromising republican liberty. Conversely, it would also provide new insights on how competition law could ensure the accountability of private players when they exert regulatory or quasi-regulatory power. Lastly, a stronger focus on institutional factors may shed new light on the role of institutions, epistemic communities, as well as changing institutional compositions and cultures as key drivers of the evolution of substantive antitrust analysis, exemplified by the shift from republican to laissez-faire antitrust documented in this study.

Fourth, the overall argument of this study is descriptive rather than normative. The goal of this study is to harness the concept of republican liberty as an epistemological tool to elucidate the concept of a competition-democracy nexus. The ideal of republican liberty sheds new light on the history and evolution of antitrust and may also enrich and contextualise the ongoing debate about the role of competition law in tackling the surge in industry concentration and the challenges posed in particular by the digital economy. While this study is undoubtedly sympathetic to the republican approach, it does not necessarily advocate the concept of republican liberty as a normative benchmark for the reform of antitrust law. Rather, it identifies a number of parameters, which would have to be adjusted in order to realign antitrust with the concept of republican liberty and the idea of a competition-democracy nexus. Yet, the extent to which the concept of republican liberty and the competition-democracy nexus are fit for serving as a normative benchmark and framework for a reformed approach towards industry concentration and the growing concerns about market power in the digital economy also merits more research.

Critics of the consumer welfare standard who champion the adoption of what one could call a republican version of the ‘competitive process’ standard, aimed at protecting a polycentric market structure, have so far left a plethora of questions unaddressed. Crucially, they have omitted to seriously consider the crucial boundary issues that have traditionally plagued

republican antitrust. An inquiry into the potential of republican antitrust to provide an alternative normative benchmark to the consumer welfare approach would have to address a plethora of questions: Does the 'process of competition' standard provide an administrable benchmark to draw the distinction between competition on merits and restriction or harm to competition? What is the degree to which business conduct would have to adversely affect the competitive market structure in order to give rise to competition concerns? Above which level would the concentration of economic power warrant antitrust intervention? How would the 'process of competition standard' accommodate conflicting claims about economic liberty, account for efficiency considerations and factor in the costs and benefits of state intervention? Is the process of competition standard on par with consumer welfare standard in terms of administrability?

A discussion of republican liberty as a normative benchmark of antitrust law would also require a serious discussion of the resilience and thickness of economic liberty to be guaranteed by antitrust law. Most importantly, it would have to be considered to what extent smaller, less efficient competitors should be protected against eviction from the market. From the republican vantage point, the protection of less efficient competitors could be justified by the goal of preserving equality of opportunity and status:[75] It may also be warranted to preserve residual competition that imposes constraints on the dominant firm. The republican approach, indeed, suggests that competition as a polycentric market structure and institution of antipower presupposes at least to some extent the existence of competitors in the plural.[76] A reversal towards a republican approach would thus involve a critical reflection on the dogma of the *laissez-faire* approach that competition law should protect competition, not competitors. Protecting open markets and, under certain circumstances, even less-efficient competitors, must not unavoidably go to the detriment of long-term efficiency and sustained growth. Recent work by economists and political scientists, such as Acemoglu and Robinson, illustrates the crucial importance of inclusive economic market institutions, which shield the liberty of market participants against various forms of domination, for long-term economic growth. Accordingly, long-term growth and innovation cannot exclusively be secured through the guarantee of property or contract rights (negative liberty). Instead, experimentation, innovation and investment importantly hinge on 'broad-based economic opportunities' and the prospect that the yields of investment and entrepreneurship are not contingent upon the goodwill of rent-

[75] Wu (n 47), 8.
[76] Steinbaum and Stucke, Maurice E. 'The Effective Competition Standard' (n 49) 32.

extracting powerful public or private players who can easily turn on other market participants unless they are co-opted or bribed.[77] This suggests that republican antitrust ensuring a level playing field and a resilient form of economic liberty (as non-domination) is not antonymous, but may be conducive to long-term efficiency and growth.

Lastly, a discussion of republican antitrust as the normative framework for an updated antitrust policy for the 21st century would also have to find an answer to the question of whether and how republican antitrust law is a realistic economic policy in a highly industrialised and globalised economy. Proponents of a return to the heydays of a republican antitrust policy prevailing during the 1940s to 1970s rarely consider that the economic context in which competition policy operates has changed tremendously over the last 50 years. This study has identified two main drivers of the demise of the goal of republican liberty and the hostility against concentrated economic power. First, the idea of economic liberty as non-domination has been historically closely linked with the pre-industrialist Smithian understanding of competition. The rise of the large-scale corporation and its ability to harness economies of scale and efficiencies has fundamentally challenged the republican hostility against concentrated economic power. The second reason for the decline of the goal of republican liberty was the surge in international competition as a consequence of the end of the Bretton Woods system, which explains, at least in part, the rise of the Chicago School and More Economic Approach in the US and in Europe.

Both factors – the role of scale economies and globalised competition – carry nowadays even more weight than in the late 1970s when they served the Chicago School as ammunition to dismantle republican antitrust. Progress in industrialisation and digitisation have further accentuated the importance of economies of scale and scope, as well as network effects as drivers of industry concentration. Our economy thus has drifted further away from the Smithian, pre-industrialised ideal of competition than it was the case in the 1970s. Competition and antitrust policy no longer operate within the closed perimeters of the national economy in which republican antitrust had been initially developed. The liberalisation of international trade and the emergence of global supply and value chains have fundamentally reconfigured the dynamics of competition and, in many sectors, intensified the competitive pressure on local incumbents. Globalisation and intensified international competition, therefore, operated as one of the main

[77] See for instance D. Acemoglu and J. A. Robinson, *The Narrow Corridor* (Viking-Penguin 2019) 114,-125;144–145. See for a similar argument D. Acemoglu and J. A. Robinson, *Why nations fail: The origins of power, prosperity, and poverty* (Profile Books 2013).

drivers of the decline of the republican approach and the ascent of the Chicago paradigm. And the challenge of preserving the competitiveness of the US and EU economy in face international competition, in particular from China, looms even larger than it did at the time of the Chicago antitrust revolution. The opening up of markets to more intense international competition also are an important explanatory variable for increases in firm scale and industry concentration.[78]

Against this backdrop, it indeed remains open to discussion whether the republican antitrust is possible without undoing both the process of industrialisation and globalisation that has shaped the structure of our today's economy. Apart from efficiency and welfare losses, the price of a return towards an antitrust policy grounded in republican liberty, while maintaining the commitment to international trade, might be that economic power, data and wealth is no more concentrated within the hands of American or European, but Chinese Behemoths. The question of whether a return towards republican antitrust is possible without any international consensus amongst the most important competition jurisdictions or a more protectionist trade policy, therefore, also merits further research.

Despite these manifold unknowns, one certainty remains: competition law, in its current state, is definitely at a crossroads. One potential direction of change is certainly a shift towards a more republican approach. The journey might equally go into a more protectionist direction, which attributes a greater role to industrial policy considerations and sees firm size as a catalyst of international competitiveness. The most plausible outcome is, however, that the consumer welfare standard, subject to some adaptation, will prevail as the predominant framework of antitrust policy. While it remains to be seen where the winds of change will bring antitrust policy, proponents of the *status quo* and advocates of a revival of republican antitrust alike are well-advised to hold on to a sentence by Alexandre Dumas who was amongst the most illustrious residents of the enchanting Villa Schifanoia in Florence, where I had the pleasure and honour to embark on this study of the link between competition, competition law and democracy:

'[T]oute la sagesse humaine sera dans ces deux mots : « Attendre et espérer! »'[79]

'[A]ll human wisdom is contained in these two words,—"Wait and hope!"'

[78] D. Autor and others, 'The Fall of the Labor Share and the Rise of Superstar Firms' (2019) forthcoming Quarterly Journal of Economics 2, 7; J. van Reenen, 'Increasing Differences Between Firms:Market Power and the Macro-Economy' (2018). CEP Discussion Paper No 1576 20–26 <https://cep.lse.ac.uk/pubs/download/dp1576.pdf> accessed 14 May 2020; Philippon (n 33) 49-50, 58-59.
[79] A. Dumas, *Le Comte de Monte-Cristo [1844]: Tome 2* (Gallimard 1998) 1398.

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