Competition and equality – A republican account

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Abstract

This chapter contributes to the growing literature on competition, competition law and (in)equality by shedding light on the conceptual foundations of the relationship between competitive markets and equality. In so doing, the chapter makes four contributions to the literature. First, it proposes an intellectual history of the relationship between equality and competition in liberal economic and political thought about markets. It traces the idea that competitive markets promote equality back to early liberal 17th and 18th century thinkers who celebrated the emergence of competitive markets because of their conduciveness towards greater socio-economic and political equality and freedom. This egalitarian understanding of competitive markets, the chapter argues, was deeply rooted in a republican notion of economic liberty as non-domination and independence. Second, the chapter traces how this egalitarian and republican understanding of economic liberty and competition put the concern about the adverse effect of concentrated economic power on equality of opportunity and wealth at the heart of the formative era of US antitrust and the Ordoliberal foundations of EU competition law. Third, the chapter describes how the rise of the Chicago School and the consumer welfare standard displaced this republican understanding of economic liberty and competition with a narrow negative understanding of economic liberty that is largely indifferent about inequalities of economic opportunities, power, and wealth. Fourth, the chapter explores three pragmatic avenues to realign antitrust law with the republican ideal of economic liberty with a view to reincorporating concerns about equality of opportunity and distributive equality into antitrust analysis.

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Introduction

Recent studies have thrust the trend towards growing industry concentration and corporate power into the limelight of contemporary competition policy debates. Some of these studies suggest that industry concentration and mark-ups are on the rise both in the US and, albeit to a lesser extent,[2] in Europe. These soaring levels of industry concentration and profitability are not only considered as signs of waning productivity, dynamism, and lack of competitiveness[3] but they are also increasingly viewed to be a major cause of growing economic inequalities within our societies.[4] This perceived link between rising industry concentration and

[1] T. More, *The Utopia [1516]: In Latin From the Edition of March 1518, and In English From The First Edition of Ralph Robynson's Translation in 1551 wtih Additional Translations, Introduction and Notes by J.H. Lupton* (1895) 57–58.

[2] See for instance 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; S. Corfe and N. Gicheva, 'Concentration not competition: the state of UK consumer markets' (2017); U. Akcigit and others, 'Rising Corporate Market Power: Emerging Policy Issues' (2021). IMF Staff Discussion Paper.

[3] J. Furman and P. Orszag, 'Slower Productivity and Higher Inequality: Are They Related?' (2018). Working Paper 18-4; 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; J. Stiglitz, 'Inequality, Stagnation, and Market Power' (2017) <https://rooseveltinstitute.org/inequality-stagnation-market-power/> accessed 26 August 2019; 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. T. Philippon, *The great reversal: How America gave up on free markets* (Harvard University Press 2019); 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.

[4] 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.Stiglitz (n 3); 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 2); S. Calligaris, C. Criscuolo and L. Marcolin, 'Mark-ups in the digital era' <OECD Science, Technology and Industry Working

inequality, hence, poses anew a question that has been for a long time banished[5] from the antitrust policy discourse in the US and in Europe: what is the relationship between competitive markets and equality? Should competition law be used to bring about greater socio-economic equality? And if so, which form of equality should it promote?

This chapter purports to contribute to and enrich the growing literature on competition, competition law, and (in)equality[6] by shedding light on the conceptual foundations of the relationship between competitive markets and equality. In so doing, the chapter makes four contributions to the literature. First, the chapter proposes an intellectual history of the relationship between equality and competition in the liberal economic and political thought about competitive markets. It shows that claims about the regressivity of concentrated economic power ('monopoly regressivity thesis')[7] and the conduciveness of competitive markets towards greater socio-economic and political equality ('competition-equality thesis') can be traced back to early modern political and economic thought, such as Thomas More, the English Levellers, Montesquieu, James Steuart, and Adam Smith. Indeed, these early political thinkers and economists assumed that competition promotes two dimensions of equality: namely, a procedural form of equality of opportunity and a substantive notion of distributive equality of wealth. This egalitarian understanding of competitive markets, the chapter argues, was deeply rooted in a republican notion of economic liberty as non-domination and equal status. Second, the chapter traces how this egalitarian and republican understanding of economic liberty coined by the early proponents of competitive markets shaped the formative era of US antitrust and the Ordoliberal foundations of EU competition law. Third, the chapter describes how the rise of the Chicago School and the consumer welfare standard displaced this republican understanding of economic liberty with a narrow negative understanding of economic liberty that only perceives welfare-decreasing interference as undue restriction of liberty and is, hence, largely indifferent towards inequalities of economic opportunities, power, and wealth. Fourth, the chapter explores three pragmatic avenues to realign antitrust law with the republican ideal of economic liberty with a view to reincorporating concerns about equality of opportunity and distributive equality into antitrust analysis.

The chapter is organised as follows. Section 1 unearths the intellectual origins of the 'monopoly regressivity' and 'competition equality' theses in early modern liberal political and economic thought. Section 2 traces how the egalitarian ideal of republican liberty found its way into the normative foundations of early US and European competition law. Section 3 describes how the Chicago and post-Chicago antitrust consensus purged antitrust law from considerations about equality and replaced the republican notion of economic liberty with a purely negative understanding of entrepreneurial liberty that is agnostic about imbalances of economic power and wealth. Sections 4 to 6, then, examine three potential avenues to reverse this shift from republican to laissez-faire antitrust and to reintegrate considerations about equality into modern competition law analysis. Section 7 concludes.

Papers> accessed 24 April 2019; Philippon (n 3). 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' (2020) 135(2) Q J Econ 645; S. F. Ennis, P. Gonzaga and C. Pike, 'Inequality: A hidden cost of market power' (2019) 35(3) Oxford Review of Economic Policy 518.

[5] R. A. Posner, *Antitrust Law* (University of Chicago Press 2001) 23–24; R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 110–113.

[6] For some recent examples, D. A. Crane, 'Antitrust and Wealth Inequality' (2015) 101 Cornell L. Rev. 1171; J. B. Baker and S. C. Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 Geo. L.J. Online 1 <https://heinonline.org/HOL/Page?handle=hein.journals/gljon105&id=1&div=2&collection=journals>; H. J. Hovenkamp, 'Antitrust Policy and Inequality of Wealth' [2017] Competition Policy International Antitrust Chronicle 1; I. Lianos, 'The Poverty of Competition Law: The Long Story' . CLES Research Paper Series 2/2018; D. Gerard, I. Lianos and E. M. Fox (eds), *Reconciling efficiency and equity: A global challenge for competition law?* (Cambridge University Press 2019).

[7] Daniel Crane calls this the 'monopoly regressivity claim' Crane (n 6), 1184.

1 The Republican Tradition: Competitive markets as catalysts of greater equality

Capitalism and free competitive markets are nowadays often seen as a major source of socio-economic and wealth inequalities.[8] It, therefore, should not come as a surprise that competitive markets and equality are in contemporary debates often primarily framed as antonyms. What passes, however, often unnoticed is that this has not always been the case—all to the contrary. In early economic and political thought, monopoly and oligopoly have been associated with inequality of opportunity and wealth, while the advent of competitive markets was perceived as a catalyst of greater economic, social, and political equality. For a long time, as the philosopher Elisabeth Anderson puts it, the 'ideal of a free-market society used to be a cause of the left.'[9]

1.1 A synopsis of the 'monopoly regressivity' and 'competition equality' theses in early liberal economic and political thought

Claims suggesting that monopoly power is a source of socio-economic inequality, while competition is conducive to greater equality, are frequently greeted with a healthy dose of scepticism by the contemporary antitrust community.[10] Modern economic theory, indeed, lends little support to the 'monopoly regressivity thesis', as it eschews any interpersonal comparisons of utility and welfare.[11] Put simply, modern welfare economics is interested in how various market structures perform in bringing about a bigger cake, not how the cake is distributed. Mainstream antitrust scholars, therefore, object that economic models of competition only allow us to make intelligible propositions about the distributive incidence of monopoly power and competitive markets once we adopt a number of strong – and in their eyes often implausible – additional assumptions about the identity of consumers and producers, their relative wealth, and the extent they benefit from and bear monopoly rents.[12]

Important though it is, this critique is oblivious to the fact that the terms 'monopoly', 'oligopoly' and 'competition' have not only an economic, but also an inherently political dimension and pedigree. Arguably, claims about the relationship between monopoly, competition, and equality become only intelligible once we trace them back to their origins in early modern political and economic thought. A good starting point to make sense of the 'monopoly regressivity' and 'competition equality' theses is Thomas More's seminal and radically egalitarian narrative *Utopia*. First published in Latin in 1516 and in English in 1551,[13] *Utopia* provides us with one of the – if not *the*– earliest definitions and critiques of 'monopoly' and 'oligopoly'. Book I of *Utopia* starts with a critical portrait of the social and economic conditions that prevailed in 16th century England. It notably describes how the emergence of property rights and commodification of arable land through enclosures[14] contributed to the

[8] T. Piketty, *Capital in the twenty-first century* (2017).
[9] E. Anderson, 'Liberty, Equality and Private Government' in M. Matheson (ed), *The Tanner Lectures on Human Values* (vol 35. Cambridge University Press 2016) 63.
[10] Posner (n 5) 23–24; Crane (n 6); Hovenkamp (n 6).
[11] A. Sen, *On ethics and economics* (B. Blackwell 1987) 29–31. For a detailed discussion Lianos (n 6) 23–33.
[12] Posner (n 5) 23–24. For a detailed discussion Crane (n 6), 1177–1206. Recent economic studies seem however to provide some empirical evidence for the monopoly regressivity thesis Ennis, Gonzaga and Pike (n 4).
[13] 'Quod si maxime increscat ouium numerus, precio nihil decrescit tamen; quod earum, si *monopolium* appellari non potest, quod non unus uendit, certe *oligopolium* est. Reciderunt enim fere in manus paucorum, eorundemque diuitum, quos nulla necessitas urget ante uendendi quam libet, nec ante libet quam liceat quanti libet.' More (n 1) 54–55 (emphasis added). Barker-Smith translated this passage as 'And yet, even if the numbers of sheep should rise dramatically, the price won't fall; for although one can't speak about a monopoly as it isn't controlled by a single man, yet the wool trade is most certainly an oligopoly. It's in the hands of a small group of rich men who are under no necessity to sell before it suits them, and it only suits them when they can get their price.' T. More, *Utopia [1516]: Translated, edited and introduced by Dominic Baker-Smith* (Penguin Classics 2012) 34. See also J. W. Park, 'The Utopian Economics of Sir Thomas More' (1971) 30(3) The American Journal of Economics and Sociology 275 277.
[14] '**Enclosure** […] the division or consolidation of communal fields, meadows, pastures, and other arable lands in western Europe into the carefully delineated and individually owned and managed farm plots of modern times. Before enclosure, much farmland existed in the form

decline of husbandry.[15] What is striking about this account is that More formulates his critique of the accumulation of private property in the hands of a few landowners by drawing a direct link between enclosures and the emergence of monopolies and oligopolies.[16] Most importantly for our inquiry, More coined here for the first time the 'monopoly regressivity thesis' by identifying concentrated economic power as a major source of wealth inequalities and poverty. More, indeed, uses the terms 'monopoly' and 'oligopoly' as synonyms of the control over prices and trade in the hands of a small group of wealthy men ('*divitum*').[17] What is more, he also claims that the adverse effects of monopolistic and oligopolistic market structures hit particularly hard the poorest members of society who have to bear higher food and input prices.[18] The regressivity of economic power, in More's account, is further exacerbated by the fact that the arbitrary control monopolists and oligopolists exert over their industries keeps large parts of the population in unemployment and idleness, and thus annihilates any form of equality of economic opportunity.[19]

Thomas More is not the only early political thinker who decried the adverse distributive effects of monopolies and oligopolies. The early social and political English Levellers movement active in the run-up and during the English Civil War (1642-1651), for instance, also opposed economic privileges, monopolies, and other restraints of trade[20] as private manifestations of arbitrary, unaccountable power.[21] Along similar lines,[22] Adam Smith criticised the negative impact of public and private restraints on trade as an obstacle to individuals' equal opportunity to engage in economic activity.[23] Smith stressed that these restraints prevented above all the poorest from empowering themselves by becoming economically active and independent.[24] Just as the Levellers, Smith criticised exclusive rights and other forms of privileges as undue 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.'[25]

Not only did early political and economic thinkers oppose concentrated forms of economic power, such as monopoly and oligopoly, for their adverse effects on equality of opportunity and adverse distributive effects, but they were also the first to coin the proposition that competitive markets promote equality. The belief that competition enhances equality has, for instance, been a central tenet of the pamphlets and speeches of the English Levellers (1642-1651). Early liberal political philosophers and economists such as Montesquieu, James Steuart, or Adam Smith also associated the emergence of competitive markets with greater socio-economic equality. All these protagonists had in common that they valued competitive markets for their levelling and equalising economic, social, and political impact. They witnessed the

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of numerous, dispersed strips under the control of individual cultivators only during the growing season and until harvesting was completed for a given year.' Britannica, 'Enclosure' <https://www.britannica.com/topic/enclosure> accessed 2 August 2021.

[15] More (n 1) 51–58.

[16] ibid 54-55, 57-58.

[17] ibid 55, 57.

[18] ibid 54–55.

[19] ibid 54-55, 57-58. See notably 'Refrenate coemptiones istas diuitum, ac uelut monopolii exercendi licentiam.' This has been translated as: 'Suffer not thies ryche men to bye vp all, to ingrosse and forstalle, and with theyr monopolye to kepe the market alone as please them.' ibid 57–58.

[20] Anderson (n 9) 68. W. Walwyn, 'Gold tried in the fire: [1647]' 76, 78-79. R. Overton and W. Walwyn, 'A remonstrance of many thousand citizens [1646]' in A. Sharp (ed), *The English Levellers* (Cambridge University Press 2004) 46. R. Overton, 'An arrow against all tyrants [1646]' 62. J. Lilburne and others, 'The petition of 11 September 1648: [1648]' 136–137. J. Lilburne, 'England's new chains discovered: [1649]' 144.

[21] Anderson (n 9) 72–73.

[22] 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) 489. Fleischacker provides a comprehensive overview on the academic discussion as to whether Adam Smith can be considered as an egalitarian. See in particular ibid 486–487.

[23] See Book I, Chapter X entitled ‚Inequalities occasioned by the policy of Europe' , A. Smith, *An inquiry into the nature and causes of the wealth of nations [1776]* (Oxford University Press 1976) I, x, c; see in particular §§ 1-18, pp.135 - 139; E. Rothschild, 'Adam Smith and Conservative Economics' (1992) 45(1) The Economic History Review 74 92–93.

[24] Smith (n 23) I, xi, c. § 1 and § 12, p. 135 and 138, § 31, § 32, p. 146, I.x.c. § 41 ff. pp. 151 ff.

[25] ibid IV, viii, § 30, p. 654.

emergence of competitive markets against the backdrop of the preceding societal order of feudalism which was characterised by economic subordination and dependence of lower classes to a feudal elite.[26] In eroding this inherently hierarchical order, the emergence of competitive markets had a deeply transformative economic and societal impact.

The radical nature of this transformation becomes most palpable in Adam Smith's *Wealth of Nations* (1776), which celebrates the advent of competitive markets first and foremost as a 'great revolution'[27] that dismantled the social order of feudalism. Smith and other early political economists describe how the emergence of markets brought about more equalised forms of bargains and exchanges that fundamentally differed from the hierarchical organisation of economic interactions between feudal seigniors and productive classes. By transforming relationships of economic dependence into more equalised forms of economic exchanges, the advent of competitive markets gradually diminished the economic dependence of the lower productive classes on the feudal seigniors.[28] Incrementally, the advent of competitive markets thus eroded the patterns of economic dependence, social subordination, and domination that characterised the feudal economic and social order.[29]

Early political and economic thinkers are adamant that this transformation triggered by the advent of competitive markets was not confined to the economic or social spheres but paved the way towards greater political emancipation, freedom, and equality. They emphasise how competitive markets not only eroded existing economic relationships of subordination and domination but also generated a more equalised distribution of wealth and political power.[30] Adam Smith colourfully describes how, with the ushering in of competitive markets, the feudal seigniors started to lose their 'whole power and authority' over the people by trading with more productive classes.[31] 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.'[32] 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.'[33] In a similar vein, Montesquieu and John Steuart observe how the emergence of competitive markets incrementally diffused wealth and political power and set in motion an incremental transformation of the feudal system into a republican or democratic political order and society.[34] With the levelling and equalisation of economic relationships induced by the advent of competitive markets, the feudal order based on the subordination of the many to the domination of a few gave way to a new form of society characterised by the equal subordination of all members of society to general laws of the republic ensuring equal freedom.[35]

The 17th and 18th century accounts of the nascent market society were hence also amongst the first to forge a link between the equalising tendency of competitive markets and the emergence of a more equal, republican political order. Adam Smith, for instance, viewed this equalising social and political transformation as the most consequential and valuable

[26] 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, p. 240, 245. Smith (n 23) III, iii -iv, § 4 -12, pp. 412, 412-420.
[27] ibid III, iv, § 17, p. 422.
[28] ibid III, iv, § 11-12, pp. 419-420. See for a similar argument Steuart (n 26) Book II, Chapter XIII, pp. 238-240.
[29] P. Rosanvallon, *Le libéralisme économique: Histoire de l'idée de marché* (Seuil 1989) 48.
[30] Steuart (n 26) Book II, Chapter XIII, p. 245.
[31] Smith (n 23) III, iv, § 10, p. 418-419.
[32] ibid III, iv, § 15, p. 421.
[33] ibid.
[34] Steuart (n 26) Book II, Chapter XIII, 239-239; Rosanvallon (n 29) 48–49. 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, *De l'Esprit Des Lois [1748]* (Garnier-Flammarion 1979) XX, iv - xxii.
[35] Steuart (n 26) Book II, Chapter XIII, 237 and 242; Montesquieu, Charles-Louis de Secondat (n 34) XX, xxi.

implication of the rise of competitive markets. He underscored the importance of these broader political and societal repercussions 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.* [36]

It is against the backdrop of this inherently political understanding of the equality- and liberty-enhancing features of competitive markets that instances of concentrated and unaccountable private economic power were condemned as a source of 'oppression'[37] or a manifestation of what Anderson calls 'private government'[38] incompatible with a society of free and equals.[39] Restraints to competition and economic privileges were indeed viewed as obstacles to the freedom and equal status of citizens. For, by restricting economic freedom, they deprived individuals of the precondition of becoming economically 'self-employed, independent, masterless men'. [40]

In early political and economic thought, greater economic equality and economic liberty were hence tightly intertwined. The early proponents of competitive markets cast the independent and small proprietor, yeoman, or tradesman as the epitome of the republican independent 'freeman'.[41] The advent of competitive markets was heralded for freeing up access to property and professions and for expanding the opportunity for individuals to become smallholders and independent traders. Early political economists, thus, assumed that, by dispersing economic power and bringing about equality of opportunity, competition would allow individuals to emancipate themselves by becoming independent economic agents.[42] A competitive economic order promoting broad-based incentives, participation, and economic opportunity was, in turn, believed to also generate an equal distribution of wealth and property.[43] In short, polycentric[44] competitive markets were viewed as 'institutional components of a free society of equals'.[45]

1.2 The common threads of a republican understanding of competition and economic liberty

This synopsis of the historical origins of the 'monopoly regressivity' and 'competition equality' theses in early modern liberal economic and political thought yields several important insights. The most important one is that competitive markets were initially not associated with inequality. On the contrary, early political economists celebrated competitive markets for their tendency to promote economic liberty *and* equality, while they decried concentrated economic power as a source of unfreedom and inequality. This perceived positive relationship between

[36] Smith (n 23) III, iv, § 4, p. 412.
[37] Overton and Walwyn (n 20) 46. See also, for the criticism of the 'oppressive monopoly' as 'great abridgement of the liberties of the people' Walwyn (n 20) 79; Lilburne and others (n 20) 136; Lilburne (n 20) 144.
[38] Anderson (n 9) 66.
[39] ibid 67–68.
[40] Lilburne (n 20) 144. Anderson (n 9) 72.
[41] Smith (n 23) III, iii, § 19, pp. 423-424.
[42] Anderson (n 9) 76–77.
[43] For a recent account of this link between economic liberty, broad-based economic incentives and opportunity and greater equality D. Acemoglu and J. A. Robinson, *The Narrow Corridor* (Viking-Penguin 2019) 194–200.
[44] For the notion of 'polycentricity', M. Polanyi, *The Logic of Liberty* (Routledge 1951) 170–184. P. D. Aligica and V. Tarko, 'Polycentricity: From Polanyi to Ostrom, and Beyond' (2012) 25(2) Governance 237.
[45] Anderson (n 9) 67–68, 72.

competition and equality and the assumption of the regressivity of monopoly power have several common features.

1.2.1 Two dimensions of equality

A first common thread cutting across the early political and economic accounts is that they portray competition as the harbinger of two dimensions of equality. 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.[46] In their account, competition, by dispersing economic power, bringing down socio-economic hierarchies and, hence, levelling the playing field, promotes in the first place some procedural form of economic equality as equality of status, opportunity, and fairness – not equality of outcomes. This, however, does not mean that the idea of material equality and distributive justice[47] is completely alien to their arguments in favour of competitive markets. Rather, they assumed that competitive markets, by eroding instances of concentrated economic power, ensuring broad-based economic opportunities and a fair participative process, also indirectly promote distributive equality of income and wealth, as they simultaneously constrain the exercise of market power and bring about a more equal and merit-based distribution of wealth and political power.[48]

By contrast, monopoly/oligopoly power and restraints of trade were thought to undermine the fairness of the competitive process and to impair both procedural and substantive equality. Early political and economic thinkers indeed identified two channels of the regressivity[49] of monopolistic or oligopolistic market concentration: on the one hand, concentrated economic power of monopolists or oligopolists reduces consumer surplus[50] by leading to price increases and shortages that disproportionately harm the poorest classes while benefitting the rich;[51] one the other hand, monopoly and oligopoly power, by crowding out other players from the market or driving up input prices, prevents individuals from becoming economically active, keeping them in unemployment, idleness, and poverty.[52]

The relationship between competitive markets and equality in early economic thought thus always had a procedural, in the form of equality of opportunity or fairness, and a substantive or distributive (socio-economic) component, in the form of equal distribution of income and wealth. Indeed, procedural equality in terms of equality of opportunity and equal freedom to take part in the competitive process is assumed to condition distributive equality and fairness. Competitive markets thus were considered as an institutional setting that secures a fair process of economic interactions and transactions amongst equals, the outcomes of which will be most of the time fair and, albeit not perfectly but roughly, equal. Competition itself thus became synonymous with procedural and substantive fairness and equality, as it embodied a principle of equality of opportunity and fairness. This crystallises in the work of Adam Smith, who reverted to the concept of competition to illustrate his notion of procedural fairness that he

[46] ibid 67.
[47] Fleischacker (n 22) 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 23) I, viii, § 36, p. 96.
[48] Steuart (n 26) Book II, Chapter XIII, p. 245.
[49] Crane (n 6).
[50] See for instance, Smith's description of the wealth transfer from consumers to monopolists as unfair 'taxation' Smith (n 23) V, i, e. § 30, pp. 754-755.
[51] More (n 1) 51–58; Smith (n 23) I.vii, § 26-27, pp. 78-79.
[52] More (n 1) 54-55, 57-58. Smith (n 23) I.vii, § 28, p. 79; I.x.c § 5 and 12, pp. 135–138; V. i.e. § 30, pp. 754-755. The famous *Darcy v Allein* case also emphasises this adverse distributive effect in support of the finding that monopolies are against the common law: 'This same leadeth to the impoverishing of divers Artificers and others, who before by labor of their hands in their Art or Trade had kept themselves and their families, who now of necessity shall be constrained to live in idlenesse and beggary.' *Darcy v Allein ('The Case of Monopolies') [1602]* Trinity Term, 44 Elizabeth I In the Court of King's Bench. Reports, volume 11, page 84b. 86a–87a.

associated with the allegory of the 'impartial spectator'. In the *Theory of Moral Sentiments*,[53] Smith writes

> *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*.[54]

With this allegory, Smith was amongst the first to coin a distinction between what we would call today 'competition on the merits' and unfair competition. It describes competition as a process governed by a certain set of rules that ensure a level playing field and equal opportunities for all participants. So long as the players compete within the perimeters set by these rules, both the process and the outcome of the game can be accepted as fair. In the absence of distortions of the process by power imbalances or unfair conduct, and as long as the rules of the competitive process are not consistently favouring a specific group, the fairness of these outcomes can also be expected to be relatively equal. If the procedural impartiality of the competitive process is intact and equality of opportunity is ensured, any resulting inequalities in the outcome can be explained by differences in the competitive performance of the players.

1.2.2 The consonance between equality of opportunity of competitors and greater distributive equality in the interest of consumers

A second point that bears noting is that early proponents of competitive markets did not perceive any tension between greater equality of opportunity between competitors and consumer welfare. On the contrary, they assumed that greater equality between competitors would ensure an economic system that would put the consumer at the centre of economic activity and generate a roughly equal distribution of wealth in the interest of consumers. Unlike the mercantilist system, which benefited in the first place the guilded professions and monopolists, competitive markets were considered to promote and be responsive to consumers' interests. [55] In other words, early economic thinkers asserted that competitive markets would secure an economic system that serves the interests of the many, not the few.

Central to the opposition of early political economists against monopolies, restraints of trade, and other forms of collusion is the perception that they unduly sacrifice the interests of consumers to that of producers.[56] By contrast, competitive markets characterised by broad-based economic opportunities, participation, and rivalrous interaction of many players were thought to prevent producers from colluding with each other and exploit consumers. Adam Smith, for instance, highlighted that deconcentrated market structures ensure that economic agents are 'dispersed in distant places [and] cannot easily combine together'[57] and impose their interest upon their fellow citizens.[58] Accordingly, greater economic equality of opportunity and the de-concentration of economic power amongst many players also enhance greater distributive equality in the interest of consumers because it prevents producers from combining and abusing their economic power. Conversely, greater concentration of economic power and

[53] For the proposition that this allegory stands for a commitment to human equality lying at the core of Smith's moral thought Fleischacker (n 22) 487.
[54] A. Smith, *The Theory of Moral Sentiments: [1759]* (Penguin 2009) II. ii, 101.
[55] 'Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. […] But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption as the ultimate end and object of all industry and commerce.' Smith (n 23) IV. viii, § 49, p. 660.
[56] ibid IV, vii, § 50, p. 661.
[57] ibid I, x, c. § 23, p. 143; see also II, v, § 7, pp. 361-362.
[58] ibid IV, viii, § 34, pp. 654-655.

less equality of opportunity among producers were believed to lead to greater distributive inequalities to the detriment of the interests of consumers.

1.2.3 An egalitarian understanding of economic liberty

A third important insight of our synopsis of the origins of the 'monopoly regressivity' and 'competition equality' theses is that early proponents of competitive markets did not sense any tension between equality and economic liberty. Rather, they perceived equality and emancipation from economic subordination as the central feature and component of economic liberty. Their notion of economic liberty hence fundamentally differs from our contemporary negative notion of economic liberty as the absence of coercion or interference. This negative notion of liberty suggests that we are free when nobody else is interfering and obstructing our otherwise unrestricted choices or actions. Accordingly, negative economic liberty is understood as the absence of state and private interference with the sphere of autonomy and choices of (other) market participants. [59]

Our contemporary negative notion of liberty is of little help in explaining why early proponents of competitive markets perceived concentrated economic power in the form of combinations (i.e., guilds or cartels) or monopolies in themselves as an abrogation of economic liberty. Indeed, from the perspective of negative liberty the mere concentration of economic power within the hands of a single or few firms does not amount to an obstruction of negative liberty of other market participants, so long as this power is not abused in a way that the monopolist or cartel interferes or is likely to interfere with the sphere of autonomy of other market participants. Economic liberty in the negative sense is hence largely indifferent towards the concentration and imbalances of economic power and ensuing inequalities in terms of opportunities or wealth. [60]

The egalitarian understanding of economic freedom cultivated by the early proponents thus sits uneasily with our contemporary negative conception of economic liberty as non-interference. Rather, it is reminiscent of a much older, republican notion of liberty which describes liberty as non-domination, that is to say the absence of domination or dependence upon somebody else's will.[61] This republican concept of liberty traces back to the political thought in the ancient Roman Republic,[62] which defined liberty in opposition to servitude. Being free in ancient republican thought was synonymous with not being a slave but being a citizen capable of acting in one's own right. [63] From the perspective of republican liberty, we are free because (and as long as) we enjoy the status of free and independent citizens who are not subordinated to a master-slave-like relationship and not exposed to somebody else's capacity to interfere arbitrarily with our actions or choices.

It is this older, republican notion of liberty that lies at the heart of the close relationship between competitive markets, equality, economic liberty, and republican form of government

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[59] B. Constant, *Political Writings* (Cambridge University Press 1988) 307–328. I. Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty : incorporating Four essays on liberty/ Isaiah Berlin* (Oxford University Press 2002) 171–174; Hayek, Friedrich A. von, *The Constitution of Liberty [1960]* (University of Chicago Press 2011) 57, 60-61.

[60] P. Pettit, *On The People's Terms : A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 11.

[61] P. Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576 576. 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) 255; Q. Skinner, 'Rethinking Political Liberty' [2006] History Workshop Journal 156, 162.

[62] P. Pettit, *Republicanism: A theory of freedom and government* (Clarendon Press; Oxford University Press 1997) 5, 19-20. Q. Skinner, *Liberty before Liberalism* (Cambridge University Press 1998) 38–46.

[63] ibid. Skinner (n 61) 248–252. Cicero and Livy for instance defined liberty in clear opposition to servitude M. T. Cicero, *On the Commonwealth and On the Laws* (Cambridge University Press 1999) 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. This understanding of liberty as the absence of domination and antonym to servitude was also encoded in Roman law. '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 62) 38–39.

thrust into the limelight in the writings of early political economists. Instead of conceiving liberty in a purely negative sense as non-interference, the Levellers [64], John Steuart,[65] and Adam Smith rather defined civil and economic liberty, in line with the republican tradition, in opposition to the 'subordination'[66] 'dependence'[67] servitude,[68] bondage[69] or 'slavery'[70] prevailing under the feudal order. Consistent with the republican tradition, the notion of economic liberty celebrated by the early proponents of competitive markets thus had a strong egalitarian dimension. Economic liberty always meant equal liberty.[71] Whereas proponents of the modern notion of negative liberty do not object to imbalances of power,[72] the early advocates of competitive markets perceived concentrated economic power as a source of domination and subordination as it entrenched relationships of economic subordination and inhibited equality of opportunity as a precondition of the independent status of all citizens as free and equals. Consequently, not only the abuse of concentrated economic power, leading to an undue interference with the sphere of autonomy of other market participants, but its mere existence was considered antithetical to the republican notion of economic liberty as non-domination.

It is also this egalitarian and republican notion of liberty as non-domination that builds the conceptual core of the claim advanced by the early political economists that the advent of competitive markets contributed to the emergence of a republican and democratic form of government.[73] In their account, as competitive markets increasingly eroded concentrated economic power, relationships of domination and inequality, they promoted liberty as non-domination and thereby paved the way towards a republican society and policy of free and equals.[74] By virtue of their tendency to disperse concentrated economic power and minimise domination, competitive markets were thus perceived as a system of 'antipower'.[75] Conversely, the very existence (and not only the abuse) of concentrated economic power, monopoly, and privileges was condemned as an illegitimate form of private government and domination incompatible with liberty as non-domination and equality of status of the citizens of a republican society.[76] Restrictions of competition had in these early accounts of competitive markets not only an economic but also a political dimension. They were not only criticised for their harmful impact on allocative efficiency but as 'a conspiracy against the publick'[77] - in short, as an assault on a republican society of free and equals.

2 The egalitarian tenets of the 'republican antitrust' tradition in the US and in Europe

The egalitarian understanding of competitive markets as an institution of antipower which levels economic hierarchies and opens up broad-based economic opportunities has left a significant and lasting imprint on the ideological foundations of US and EU competition law. The republican idea that competitive markets act as a safeguard of a society of free and equals

[64] J. Lilburne, 'Postscript to The freeman's freedom vindicated [1646]' in A. Sharp (ed), *The English Levellers* (Cambridge University Press 2004) 31. Overton and Walwyn (n 20) 46; Lilburne and others (n 20) 136–137.
[65] Steuart (n 26) 240.
[66] ibid 238.
[67] ibid.
[68] Overton and Walwyn (n 20) 38.
[69] ibid 34.
[70] Smith (n 23) I, x, c. § 22, pp. 142-143; III, iii, § 5, p. 400; III, iv, § 15, p. 421.
[71] Cicero (n 63) I, 47; Pettit (n 60) 5.
[72] Pettit (n 60) 11.
[73] E. Deutscher and S. Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11(2) Competition Law Review 181.
[74] Steuart (n 26) Chapter XIII, 242 - 243.ibid Book II, Chapter XIII, p .242. Montesquieu, Charles-Louis de Secondat (n 34) XX, xii.
[75] Pettit (n 61).
[76] Steuart (n 26) Book II, Chapter XIII, p. 242. See along similar lines, Montesquieu, Charles-Louis de Secondat (n 34) V, iii and vi and XX, iv and XX, x, xi and xix.
[77] Smith (n 23) I, x, c, § 27, p. 145; see also I, x, c, § 5 pp. 135-136.

had an important bearing on the formative era of US antitrust law until the 1960s and early European competition paradigms, such as the German Ordoliberal School. These 'republican antitrust' traditions, emerging on both continents towards the end of the 19th and the early 20th century, revolved around a few basic tenets that can be traced back to the republican ideas of the early political and economic thinkers reviewed in Section 1.

2.1 Competitive markets as a precondition of a republican society of free and equals

A first central tenet of the republican antitrust traditions on both sides of the Atlantic was that they perceived competitive markets in which economic power is dispersed polycentrically and evenly amongst a multitude of market players as a safeguard of republican liberty understood as non-domination and equality of status.

This idea lies at the roots of modern competition law. During the legislative debates of the Sherman Act, the proponents of the proposed antitrust act asserted that 'industrial liberty [...] lies at the foundation of the equality of all rights and privileges'.[78] In a similar vein as the Levellers, John Steuart, or Adam Smith, they conceptualised economic liberty in the republican sense as equal liberty and status. They also perceived the concentration of economic power resulting from the emergence of powerful trusts and large-scale corporations as a remnant of the social hierarchies and relationships of subjugation that characterised the feudal and absolutist order of the past.[79] The adoption of the Sherman Act was informed by the republican belief that the concentration of economic power in the hands of a few large-scale corporations and the ensuing forms of dependence and subjugation are antithetical to the Jeffersonian ideal of an egalitarian society and polity, in which power and wealth are atomised amongst a multitude of independent and equal masterless men.[80]

Later, this Jeffersonian ideal of a society in which economic power is dispersed amongst many small and independent businessmen also lay at the core of the egalitarian critique of 'bigness' and the promise of a 'new freedom' promoted by Louis Brandeis and Woodrow Wilson. The progressive antitrust movement championed by Brandeis and Wilson faulted big business for its dominating impact on the rest of society. Industry concentration was perceived as an antonym to a republican society grounded in the equal and independent status of its citizens.[81]

On the other side of the Atlantic, too, the idea that competitive markets constitute a safeguard of republican liberty gained new ground in the first half of the 20th century. The German Ordoliberal School advocated competitive markets as an epitome of a 'domination-free economic order' ('*herrschaftsfreie Wirtschaftsordnung*')[82] characterised by the decentralised and mutual self-adaptation of autonomous plans of independent market participants. Competition thus constituted for Ordoliberals the organising principle of an impersonal, 'domination-free' process of economic coordination that operates without any

[78] 20 Cong Rec 2455 (1890) 1890 2457.
[79] 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.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; 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.
[80] Hofstadter (n 79) 227; P. H. Brietzke, 'Constitutionalization of Antitrust: Jefferson, Madison, Hamilton, and Thomas C. Arthur, The' (1987) 22 Val. U. L. Rev. 275 276; R. Pitofsky, 'The Political Content of Antitrust' (1979) 127(4) University of Pennsylvania Law Review 1051 1058–1059.
[81] L. D. Brandeis, *Other People's Money: And How The Bankers Use It* (Frederick A. Stokes Company 1914) 152; W. Wilson, *The New Freedom* (Tauchnitz 1913) 23; 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) 124.
[82] F. Böhm (ed), *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden [1933]* (Nomos 2010) 303.

subordination or hierarchical decision-making.[83] Concentration of economic power, by contrast, was in the eyes of Ordoliberal thinkers profoundly at odds with the ideal of a society of free and equals[84] because it introduces elements of hierarchy, subordination, and domination into economic exchanges and interactions.[85]

The Ordoliberals, therefore, warned that the excessive concentration of market power would entail a 're-feudalization' (*Refeudalisierung*) of economic and social relationships.[86] Instances of concentrated economic power were in their view inimical to the republican ideal of a domination-free society of free and equals, [87] as they subject individuals to hierarchical forms of economic relationships and transactions that are characterised by domination and hierarchy rather than polycentric coordination of independent and autonomous plans. [88] In keeping with the republican tradition, Ordoliberals hence regarded the mere existence of concentrated economic power and not only its exercise as obstruction of liberty because it subjects market participants into relationships of dependency and subordination to the arbitrary will of more powerful economic players.[89]

The republican idea that competitive markets in which economic power is dispersed amongst many independent players constitute a safeguard against domination and a crucial pillar of a society of free and equals was hence a common feature of early antitrust movements on both sides of the Atlantic. Central to these republican paradigms was that they did not perceive a fundamental contradiction between equality and liberty. On the contrary, in a similar vein as the early proponents of competitive markets, they considered equality of opportunity and status as an inherent element of liberty. They hence considered liberty not in a purely negative sense, as non-interference. Rather, in emphasising the importance of competitive markets in shielding the independent status of market participants against subordination and domination they adhered to a republican notion of liberty as non-domination. This republican notion of republican liberty as equal liberty also lay at the heart of the belief that competitive markets promote – and economic concentration is detrimental to – democracy.[90]

2.2 Equality of opportunity as the **equalisandum** *of competition law*

A second central precept of the republican antitrust paradigms on both sides of the Atlantic was that competition law would contribute to a freer and more egalitarian society primarily by promoting equality of opportunity.

The republican antitrust tradition on both sides of the Atlantic indeed saw the preservation of the equality of opportunity of competitors as a central task of competition law. This becomes most apparent in Senator Sherman's warnings about the adverse impact of economic concentration on equality of opportunity, wealth inequality, and ultimately the integrity of the social 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*

[83] ibid 301. ibid 64, 301, 305, 314. F. Böhm, *Freiheit und Ordnung in der Marktwirtschaft [1971]* (Nomos 1980) 36–37; W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 22, 246.
[84] Böhm (n 83) 225.
[85] L. Miksch, *Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung* (Verlag Helmut Küpper 1947) 15, 17, 27, 117, 119. Eucken (n 83) 51–52.
[86] 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) 273–279. Böhm (n 83) 258–259.
[87] ibid 225.
[88] Miksch (n 85) 15, 17, 27, 117, 119. Eucken (n 83) 22, 51–52, 40. Miksch (n 85) 15, 17, 27, 117, 119; Böhm (n 83) 221.
[89] Böhm (ed) (n 82) 237, 275-276. Eucken (n 83) 52, 174, 176-177, 246, 334.
[90] Senator Sherman 20 Cong Rec 2455 (1890) (n 78) 2457; Wilson (n 81) 191; Eucken (n 83) 16, 304-308. Böhm (n 83) 256–257; Böhm (n 86). For a detailed analysis E. Deutscher, *Of masters, slaves, behemoths and bees: The rise and fall of the link between competition, competition law and democracy* (European University Institute 2020).

> *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.*[91]

Consistent with this egalitarian concern about the adverse impact of the concentration of economic power, the framers of the Sherman Act advocated the proposed antitrust bill as a safeguard of equality of opportunity for small, independent businessmen.[92] The enactment of the Sherman Act was in the first place a response to the widespread popular discontent over practices by big businesses that stifled smaller competitors' ability and opportunity to compete [93] and, thereby, 'crush out the little men and little enterprises'.[94] Abuses of economic power were perceived as an assault on 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.'[95] Numerous passages of the legislative debate reveal that the Sherman Act was adopted in an effort to set some basic ground rules that would guarantee a level playing field and preserve the equality of opportunity of smaller competitors to compete at arm's length.[96] Just as the early proponents of competitive markets, the framers of the Sherman Act assumed that, by ensuring a fair competitive process and providing broad-based economic opportunities, competitive markets would bring about a fairer and more equalised distribution of wealth and resources.

Similar concerns about the adverse impact of concentrated power on equality of opportunity also informed Brandeis' and Wilson's call for tougher antitrust rules and intervention against big businesses. The progressive antitrust movement warned that the adverse impact of big business on equality opportunity would fundamentally undermine the promise of the American free enterprise system and the American ideal of meritocracy anchored in the belief that 'the ambitious and gifted workingman makes his way up'.[97] To revitalize equality of economic opportunity, Brandeis and Wilson called for antitrust laws which 'keep open the path of opportunity'[98] and 'look after the men who are on the make rather than the men who are already made.'[99] In line with the republican tradition, the progressive antitrust movement also underscored the fundamental relationship between equality of opportunity, republican liberty, and a republican form of government:

> *The reason that America was set up was that she might be different of the world in this: that the strong could not put the weak to the wall, that the strong could not prevent the weak from entering the race. America stands for opportunity. America stands for a free field and no favor. America stands for a government responsive to the interests of all*.[100]

[91] 20 Cong Rec 2455 (1890) (n 78) 2460.
[92] Senator Sherman ibid 2457.
[93] Senator George 19 Cong. Rec. 8559 (1890) 8561. Senator Sherman 20 Cong Rec 2455 (1890) (n 78) 2457–2458.
[94] Senator George 19 Cong. Rec. 8559 (1890) (n 93) 8561.
[95] Senator Sherman 20 Cong Rec 2455 (1890) (n 78) 2457.
[96] E. M. Fox, 'Modernization of Antitrust: A New Equilibrium' (1980) 66 Cornell L. Rev. 1140 1151–1152; Pitofsky (n 80), 1059; Stucke, Maurice E. 'Reconsidering Antitrust's Goals' (2012) 53 B.C. L. Rev. 551 562; J. J. Flynn, 'Antitrust Policy and the Concept of a Competitive Process' (1990) 35 N. Y. L. Sch. L. Rev. 893 910.
[97] Wilson (n 81) 24.
[98] 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.
[99] Wilson (n 81) 23–24.
[100] ibid 208–209.

The preservation of equality of opportunity was also a central feature of the Ordoliberal conception of competition law.[101] Ordoliberals indeed understood competition primarily as 'open markets'[102] and as an inclusive process that guarantees equal opportunities to carry out an economic activity.[103] This concern about equality of opportunity becomes particularly apparent in the distinction between legitimate methods of 'performance-based competition' (*Leistungswettbewerb*) and illegitimate methods of 'hindrance competition' (*Behinderungswettbewerb*) that lies at the heart of the Ordoliberal conception of competition law. To Ordoliberals the central mandate of competition law consists of promoting and protecting performance-based competition (*Leistungswettbewerb*) – a term which can be best translated into English as 'competition on the merits'.[104] This concept understands competition as a process in which all market participants enter into a rivalrous rule-based[105] contest for consumer demand.[106] 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'.[107]

The Ordoliberals contrasted performance-based competition with 'hindrance competition' (*Behinderungswettbewerb*). Whereas market players who engage in performance-based competition try 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 impairing rivals' ability to compete.[108] For Ordoliberals, distortions of competition resulting from hindrance competition do not only entail the misallocation of resources. More importantly, they undermine the equality of opportunity as the central benchmark of fairness of the competitive process and market system.[109] 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.[110]

The relationship between competition and equality in the republican understanding of competition law thus revolved primarily around the ideal of equality of opportunity. In other words, the *equalisandum*, that is to say, the state of affairs that antitrust law was supposed to equalise,[111] was primarily the equality of opportunity of all market participants. For republican antitrust paradigms on both sides of the Atlantic, the primary task of competition law was hence to prevent instances of excessively concentrated power and keep markets open for competitors. Greater economic opportunities and the erosion of economic concentration, in turn, would level wealth inequalities.

[101] Böhm (n 83) 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.
[102] Eucken (n 83) 42, 264-269; Miksch (n 85) 38.
[103] Böhm (ed) (n 82) 272. F. Böhm, 'Freiheit und Ordnung in der Marktwirtschaft [1971]' in N. Goldschmidt (ed), *Grundtexte zur Freiburger Tradition der Ordnungsökonomik* (Mohr Siebeck 2008) 306; D. J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe' (1994) 42(25) American Journal of Comparative Law 25 38.
[104] Böhm (ed) (n 82) 206. W. Eucken, *Grundsätze der Wirtschaftspolitik* (Mohr Siebeck 2004) 42, 247–249. Miksch (n 85) 15, 54.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, 11-12.
[105] Böhm (ed) (n 82) 206–207.
[106] ibid 207–209, 240, 257. Eucken (n 104) 244–249.
[107] Smith (n 54) II, ii, p. 101.
[108] Böhm (ed) (n 82) 208-209, 219. ibid 38, 240-249, 257-265, 275-276. Eucken (n 104) 43, 247-249, 267, 296, 329.
[109] Eucken (n 83) 166, 183, 315.Böhm (n 83) 257. Eucken (n 83) 166, 183, 315.
[110] Böhm (ed) (n 82) 256, 271.
[111] Lianos (n 6) 10.

2.3 Distributive equality as a by-product of equality of opportunity

This proposition that equality of opportunity amongst competitors would eventually promote greater distributive equality thus points towards a third assumption that underpinned the republican antitrust tradition on both sides of the Atlantic. The republican antitrust tradition, in fact, endorsed the belief – first articulated by early proponents of competitive markets – that keeping markets open and ensuring broad-based equality of opportunity would ultimately also enhance equality of wealth in the interest of consumers. This link between equality of opportunity and equality of wealth has two dimensions. On the one hand, it was premised on the idea that competition law by preserving equality of opportunity and open markets would actually enable individuals to become small, independent businessmen who all will get a fair share of the pie. On the other hand, it was also believed that greater equality of opportunity and, hence, greater rivalry in competitive markets would enhance a fairer and more equalised distribution of wealth in the interest of consumers. Promoting competitive opportunities for a multitude of small, independent competitors would keep market power in check. The protection polycentric markets would thus prevent any unfair and regressive wealth transfers from consumers to large corporations.

Proponents of the Sherman Act, for instance, argued that greater competition would eventually ensure a fairer distribution of wealth for consumers.[112] The legislative debates of the Sherman Act bear abundant testimony to the fact that the distributive effects of monopoly power and the wealth transfer both from consumers and competitors to monopolies and cartels were at the top of the minds of the Congressmen when they adopted the Sherman Act.[113] The unfair distributive effects of cartels (trusts) and monopolies on consumers and, in particular, on the poorer classes also featured prominently in the criticism of big business by the progressive antitrust movement.[114]

Ordoliberals also assumed, albeit to a lesser extent than their US counterparts, that competition law by preserving equality of opportunity would contribute to a fairer[115] and often more equal distribution of wealth in the interest of consumers. The Ordoliberals emphasised that competition rules by guaranteeing the fairness of the competitive process would also secure the fairness and legitimacy of its outcomes.[116] In their view, the rules of the competitive game, in determining the opportunities of economic agents to participate in the competitive process and their responsiveness to the interests of consumers, [117] have a major bearing on the outcomes of the competitive process in terms of distribution of wealth and income.[118] The Ordoliberals affirmed that by guaranteeing a fair competitive process, competition law ensures 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.[119] The members of the Freiburg

[112] Senator Sherman 19th Cong. Rec. 6041 (1888) 6041.
[113] See resolution submitted by Senator Sherman directing the Committee on Finance to inquire into and report on the trust problem ibid. 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) 1457–1458. See also Senator Sherman 20 Cong Rec 2455 (1890) (n 78) 2458 and 2460; R. H. Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings L.J. 65; 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).
[114] Brandeis (n 81) 151–152.
[115] E.-J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (Nomos 2003) 36.
[116] 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 82) 230; Eucken (n 83) 300.
[117] Böhm (ed) (n 82) 220-222, 306. Eucken (n 83) 30. Miksch (n 85) 14.
[118] Böhm (ed) (n 82) 257, 300-301.
[119] 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 85) 54.; Böhm (n 119), 147; Miksch (n 85) 54; Böhm (n 86) 268; Eucken (n 83) 300.

School thus recognised that the design of the institutional rules governing competition has important distributive consequences for competitors and consumers alike.[120]

The republican antitrust paradigms on both sides of the Atlantic thus acknowledged that the distribution and fairness of market outcomes largely depend on the design of the rules of the game that govern the competitive process. Competition law, by securing the equality of opportunity of competitors, also promotes as a by-product a more equal and fair distribution of wealth in the interest of consumers (upper left-hand quadrant of Table 1). On the other hand, the republican antitrust traditions warned that excessive economic concentration would not only frustrate equality of opportunity amongst competitors but also entail greater distributive inequalities to the detriment of consumers (lower right-hand quadrant of Table 1). Just like the early political and economic thinkers, proponents of the republican antitrust paradigm adhered to the belief that the interests of small, independent competitors and consumers were largely in accord with each other.

	Positive distributive effects for consumers	Negative distributive effects for consumers
Equality of opportunity	Republican antitrust	
Inequalities of opportunity		Republican antitrust

Table 1 - The relationship between equality of opportunity and distributive equality under the republican antitrust paradigm

2.4 Competition, republican liberty, equality, and the judicial interpretation of antitrust law

The ideal of an egalitarian, republican understanding of economic liberty and its realisation through competitive markets had a long-lasting impact on the formative era of competition law on both sides of the Atlantic. The interpretation of the antitrust law statutes by US courts until the late early 1970s and EU competition law jurisprudence until the 1990s assigned important weight to the preservation of equality of opportunity, notably of small competitors, against concentrated economic power.

2.4.1 Republican antitrust and US case law

The formative case law of the US Supreme Court abounds with references to the antitrust laws as a safeguard of equality of opportunity which prevents single and collective instances of economic power from 'driving out of business the small dealers and worth men whose lives have been spent therein.'[121] Its early case law is anchored in the concern that combinations of economic power, by destroying the economic opportunities of an entire class of small entrepreneurs, would transform the 'independent business man […] into a mere servant or agent of a corporation […]bound to obey orders issued by others'[122] and subject to 'the sole power and […] the sole will of one powerful combination of capital.'[123] On numerous occasions, the US Supreme Court highlighted the role of antitrust law as a safeguard of equality of opportunity, which allows 'every business, no matter how small' to take part in the competitive race.[124]

[120] Böhm (ed) (n 82) 256.
[121] *United States v. Trans-Missouri Freight Asso.* 166 U.S. 290 (1897) 323. See also *United States v. Swift & Co.* 286 U.S. 106 (1932) 118.
[122] *United States v. Trans-Missouri Freight Asso.* (n 121) 324.
[123] *United States v. Trans-Missouri Freight Asso.* (n 121) 324; *Fashion Originators' Guild, Inc. v. FTC* 312 U.S. 457 (1941) 467.
[124] *United States v. Topco Assocs. Inc.* 405 U.S. 596 (1972) 610. See for a similar concern about the opportunities and status of small, independent businesses *Klor's, Inc. v. Broadway-Hale Stores, Inc.* 359 U.S. 207 (1959) 212–213; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.* 364 U.S. 656 (1960) 660.

The US judiciary thus perceived the preservation of a polycentric market structure in which economic power is dispersed amongst many players as a safeguard of the economic livelihood and independent status of market participants, in particular of 'small, local enterprises'.[125] This egalitarian dimension of competition law was prominently articulated by Judge Learned Hand in *Alcoa*. Judge Hand asserted 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'[126] Accordingly, one of the central 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.' [127]

The egalitarian objective of preserving broad-based economic opportunities and the independent status of small dealers also underpinned the strict treatment of vertical restraints as *per se* violations of § 1 of the Sherman Act. In *Dr. Miles,* the Supreme Court, for instance, cast vertical restraints as an illegitimate form of subordination and domination, which subjugates retailers to the arbitrary will of manufacturers.[128] Similar considerations about the equality of opportunity of small, independent businessmen also manifested themselves in the application of antitrust law to unilateral conduct. The Supreme Court's interpretation of § 2 Sherman Act and § 2 (a) of the Robinson-Patman Act in predatory and geographic price discrimination cases, such as *Moore v Mead's Fine Bread* and *Utah Pie,* was, for instance, driven by concerns about the adverse impact of aggressive price cutting by large-scale corporations on the livelihood of smaller, local competitors[129] The egalitarian ideal of republican liberty also had an important bearing on merger control and prompted the Supreme Court to prohibit mergers with a combined market share of less than 10%.[130] In *Brown Shoe*, the Supreme Court went as far as suggesting that even though the Clayton Merger Act sought to protect 'competition, not competitors'[131] 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.*[132]

2.4.2 Republican antitrust and EU case law

The egalitarian impetus of the Ordoliberal understanding of economic liberty in its republican sense as non-domination also had an important bearing on the formative era of EU competition law.

The republican concern about the status of independence of market participants and its hostility against hierarchies and subordination, for instance, explains the restrictive approach of EU competition law toward vertical restraints. In a similar vein as the Supreme Court's *Dr. Miles* ruling, the European Commission's and Court of Justice's Art. 101 TFEU case law was grounded in the view that vertical restraints would curtail the freedom and equal status of

[125] *United States v. Columbia Steel Co.* 334 U.S. 495 (1948) Justice Douglas, Black, Murphy, Rutledge dissenting 538; *United States v. Paramount Pictures* 334 U.S. 131 (1948) 159.162, 164-165.
[126] *United States v. Alcoa* 148 F.2d 416 (2d Cir. 1945) 427.
[127] *United States v. Alcoa* (n 126) 429; *United States v. United Shoe Machinery Corp.* 110 F. Supp. 295 (D. Mass. 1953) 342.
[128] *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U.S. 373 (1911) 408. This hostile attitude towards vertical restraints is grounded in the ancient common law doctrine on 'restraints on alienation' E. Coke, *Institutes of the Laws of England [1628]* .
[129] *Moore v. Mead's Fine Bread Co.* 348 U.S. 115 (1954) 119. *Utah Pie Co. v. Continental Baking Co.* 386 U.S. 685 (1967) 689.
[130] *United States v. Pabst Brewing Co.* 384 U.S. 546 (1966) 550–552. *United States v. Von's Grocery Co.* 384 U.S. 270 (1966) 272–273; L. A. Sullivan, *Antitrust* (West Publishing 1977) 618–619.
[131] *Brown Shoe Co. Inc. v. United States* 370 U.S. 294 (1962) 320. 344.
[132] ibid 344.

independent retailers.[133] This concern about preserving the independent status and equality of opportunity of traders carried particular weight in cases involving vertical restraints that hindered distributors from engaging in parallel trade between EU Member States. Following *Consten and Grundig*, the Commission and the EU Courts consistently condemned vertical restraints, which entailed a *de facto* ban on parallel imports by independent distributors as a restriction of competition by object.[134] This hostile approach against vertical and horizontal restrictions of parallel trade reflects the fundamental role of small, independent traders as 'heroes'[135] and driving forces of European economic integration. The strict enforcement of Art. 101 TFEU against vertical restraints is testament to the EU Commission's and judiciary's attempt of ensuring that the gains of market integration are not exclusively reaped by large-scale companies. It was aimed at preserving the opportunities of small, independent traders to also engage in cross-border trade and benefit from the growing interpenetration of previously national markets. At the same time, protecting the economic opportunities of small, independent traders to engage in cross-border trade was perceived as being in the interest of consumers who would benefit from lower prices from greater dealer competition.[136]

A second area of EU competition law where the influence of the egalitarian Ordoliberal understanding of economic liberty and competition had a long-standing and palpable impact is the abuse of dominance case law under 102 TFEU. The Ordoliberal distinction between performance-based and hindrance-based competition shaped the Court of Justice's interpretation of the prohibitive scope of Art. 102 TFEU.[137] In *Hoffmann-La Roche* and subsequent cases, the Court defined the concept of abuse of dominant position as unilateral conduct by a dominant firm that adversely affects the competitive market structure through methods other than 'normal competition'[138] or 'competition on the merits'[139] based on 'economic performance'.[140] By juxtaposing normal performance competition with methods having the 'effect of hindering'[141] competition, the Court reverted to the Ordoliberal distinction between 'performance-based' (*Leistungswettbewerb*) and 'hindrance' (*Behinderungswettbewerb*) competition,[142] to define when dominant firm conduct unfairly undermines the competitive opportunities of smaller competitors. Based on this distinction, the Court consistently condemned dominant firm conduct that tends to make it more difficult for smaller firms to compete at arm's length – such as tying, predatory pricing, exclusive dealing, and rebates – as obstacles to economic opportunities of smaller, independent competitors.[143] The Commission and the Court of Justice thereby attributed little weight to the assessment of

[133] See for instance the *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 T-67/01 JCB Service v Commission* ECLI:EU:T:2004:3 para. 85.
[134] *Case 56/64 Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41 p. 344; *Case C-439/09 Pierre Fabre Dermo-Cosmétique* ECLI:EU:C:2011:649 paras. 47, 53-54.
[135] 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.
[136] *Case 56/64 Consten and Grundig v Commission of the EEC* (n 134) p. 343.
[137] 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 <http://cadmus.eui.eu/handle/1814/7626> accessed 30 September 2018.
[138] *Case 85/76 Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36 para. 90.
[139] *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.
[140] *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.
[141] *Case 85/76 Hoffmann-La Roche v Commission* (n 501) para. 91; *Case 322/81 Michelin v Commission* (n 516) para. 70; *Case C-95/04P British Airways plc v Commission of the European Communities* (n 501) para. 66.
[142] See for instance Böhm (ed) (n 82) 242, 275-276; Eucken (n 83) 247; Böhm (n 83) 64. 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..
[143] *Case 40/73 Suiker Unie and Others v Commission* ECLI:EU:C:1975:174 para. 502; *Case 85/76 Hoffmann-La Roche v Commission* (n 138) paras. 89-90; *Case C-62/86 AKZO v Commission* ECLI:EU:C:1991:286 para. 149. *Case T-83/91 Tetra Pak v Commission (Tetra Pak II)* ECLI:EU:T:1994:246 paras. 135, 137 140.

the efficiency of the harmed competitors. Nor did they refrain from condemning dominant firms for foreclosing smaller rivals by engaging in above-cost price cuts.[144]

The egalitarian concern about power imbalances and their adverse effect on the economic opportunities of smaller rivals also underpins the principle that a dominant firm has a 'special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.'[145] This principle prohibits dominant firms from engaging in conduct that risk to further marginalize residual competition, cement economic concentration, and increase the dependence of market participants on the arbitrary will of the dominant firm.[146] The principle acknowledges the asymmetry in power and inequality of arms that exists between dominant firms and non-dominant rivals. It seeks to address the fact that certain business conduct by dominant firms may have an exclusionary effect on other market participants, while this is not the case if non-dominant firms adopt the same course of action. [147]

The principle of special responsibility thus 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 caused by different degrees of efficiencies but might be the result of the mere difference in scale, scope, and financial resources between dominant firms and smaller competitors. In some abuse of dominance cases, the Court of Justice made this close link between the special responsibility of dominant firms and the equality of opportunity of smaller rivals even more explicit. The Court repeatedly stressed 'that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators'.[148] The republican understanding of liberty as equal freedom of market participants is thus deeply engraved in the normative fabric of Art. 102 TFEU in particular and EU competition law more generally.

The egalitarian concern about the adverse impact of excessive industry concentration on the opportunities of smaller competitors and its distributive consequences also had important implications for EU merger policy. Competition law in Europe never displayed the same hostility towards merger-driven industry consolidation as US antitrust law during the Warren Court era. On the contrary, the EU Commission and the Member States perceived international mergers as an important driving force of European market integration and a source of efficiencies and international competitiveness.[149] This, however, does not mean that concerns about industry concentration and its potentially detrimental impact on the survival of small businesses have been extraneous to EU merger control. Already in the 1960s, the Commission expressed the fear that excessive industry concentration through mergers would impair the competitive opportunities of small and medium-sized enterprises (SMEs).[150] The Commission

[144] Case No IV/30.787 and 31.488 Eurofix-Bauco v. Hilti. OJ [1988] L 65/19 para. 81; Case No IV/34.621 Irish Sugar plc. OJ [1997] L 258/1 paras. 127-135, in particular 133-135. See also Case No IV/31.900 BPB Industries plc. OJ [1989] L 10/50 para. 129; *Case T-30/89 Hilti v Commission* ECLI:EU:T:1991:70 para. 100; *Case T-228/97 Irish Sugar v Commission* (n 139) paras. 117-124; 215-225; *Case C-395/96 P Compagnie Maritime Belge Transports and Others v Commission* ECLI:EU:C:2000:132 paras. 115-119.

[145] *Case 322/81 Michelin v Commission* ECLI:EU:C:1983:313 para. 57.

[146] *Case 6/72 Europemballage Corporation and Continental Can Company v Commission* ECLI:EU:C:1973:22 para. 26. *Case C-395/96 P Compagnie Maritime Belge Transports and Others v Commission* (n 144) para. 113.

[147] *Case 27/76 United Brands v Commission* ECLI:EU:C:1978:22 para. 189. *Case C-333/94 P Tetra Pak v Commission* ECLI:EU:C:1996:436 paras. 24-32, 37. *Case C-62/86 AKZO v Commission* (n 143) paras. 69-70. *Case T-203/01 Michelin v Commission (Michelin II)* (n 139) para. 97. *Case C-202/07 P France Télécom v Commission* (n 139) paras. 105-106.

[148] *Case C-202/88 - France v Commission* ECLI:EU:C:1991:120 para. 51. *Case C-18/88 RTT v GB-Inno-BM* ECLI:EU:C:1991:474 para. 25; *Case C-49/07 MOTOE* ECLI:EU:C:2008:376 para. 51.*Case C-462/99 Connect Austria* ECLI:EU:C:2003:297 para. 83; *Case C-327/03 ISIS Multimedia and Firma 02* ECLI:EU:C:2005:622 para. 39; *Case C-280/08 P Deutsche Telekom v Commission* (n 139) para. 233; *Case C-553/12 P Commission v DEI* ECLI:EU:C:2014:2083 paras. 43-44.

[149] 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 7–8 <http://aei.pitt.edu/40303/> accessed 28 September 2019; Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ [1989] L 395 recital 2-3; Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. OJ [2004] L 24/1 recitals 3-4; Commission proposal concerning the control of mergers - Information Memo P-37/73, July 1973 1.

[150] European Commission (n 149) 5,9,11,26. IXth Report on competition policy (1979) 9–10; A. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 96.

thus viewed the creation of an effective merger control regime as an essential tool to ensure that merger-driven industry concentration would not thwart the equality of opportunity of independent SMEs[151] which constitutes an important feature of economic freedom guaranteed under EU competition law.[152] At the same time, the Commission also stressed the adverse distributive consequences of excessive industry concentration on consumers[153] and the ability of 'workers' freedom to choose among several employers'.[154]

This objective of keeping industrial concentration in check also underpins the EC Merger Regulation 4064/89,[155] as well as the revised EU Merger Regulation 139/2004. Both texts direct the Commission to assess mergers with respect to their 'effect on the structure of competition'[156] rather than their impact on consumer or total welfare. The egalitarian impetus of this structuralist goal of EU merger control also transpires from the early EU merger case law. In *Aerospatiale-Alenia/de Havilland* the Commission, for instance, raised concerns about a merger between the two leading producers of regional aircraft *inter alia* because of its adverse effects on the competitive opportunities of smaller customers[157] and competitors[158] even though they were less efficient than the merged entity.[159]

The Ordoliberal ideals of republican economic liberty and equality of opportunity thus fundamentally shaped the interpretation of all three substantive areas of EU competition law. The history of the Ordoliberal influence on EU competition law and the existing case law call into doubt misguided attempts to associate EU competition law with a 'big is good tradition'.[160] On the contrary, until the late 1990s, concerns about the negative impact of excessive economic concentration and imbalances of power on the equality of opportunity of small and independent competitors played a prominent role in EU competition law.

3 The decline of the symbiotic relationship between competition and equality

For centuries, the idea that excessive concentration of economic power is detrimental and competition is conducive to equality has shaped the economic and political thinking about competitive markets. The previous sections show that this republican understanding of competition as a catalyst and safeguard of economic liberty as non-domination and equal opportunities importantly shaped US antitrust until the 1970s and EU competition law until the late 1990s. Since then, the egalitarian understanding of competition cultivated by the 'republican antitrust' paradigms in the US and in the EU has faded away. From the 1970s onwards, the Chicago and post-Chicago antitrust paradigms started to disparage concerns about equality of opportunity and distributive effects of economic concentration as 'antitrust populism'.[161] With the shift towards the so-called 'more economic approach' in the late 1990s and early 2000s,[162] the egalitarian impetus of competition law also started to dwindle in Europe.

[151] VIIth Report on competition policy (1977) 10–11; XIIth Report on competition policy 13; Commission proposal concerning the control of mergers - Information Memo P-37/73, July 1973 (n 149) 1.
[152] Commission proposal concerning the control of mergers - Information Memo P-37/73, July 1973 (n 149) 1.
[153] Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings 1973. COM (73) 1210 final 6.
[154] Commission proposal concerning the control of mergers - Information Memo P-37/73, July 1973 (n 149) 6.
[155] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (n 149) rec. 7, 9.
[156] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 149) recitals 6, 8.
[157] Case No IV/M.053 Aerospatiale-Alenia/de Havilland. OJ [1991] L 334/42 paras. 46. 70.
[158] ibid paras. 30-33, 69.
[159] 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.
[160] See for such an attempt 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.
[161] Posner (n 5) 23–28.
[162] Witt (n 150).

This section seeks to answer a simple question: What has triggered this decline of the egalitarian, republican dimension of antitrust law?

3.1 The Chicagoan critique of the republican antitrust paradigm

The demise of the egalitarian dimension of competition is the combined effect of the failures of the republican antitrust approach and the rise of the Chicago and post-Chicago approaches to antitrust law. The Chicago Scholars made a compelling case that concerns about the protection of the economic liberty and opportunities of small businesses, in particular during the Warren Court era, had led antitrust policy astray. Cases such as *Utah Pie*[163] and *Brown Shoe*[164] served the Chicago School as emblematic examples of how concerns about equality of opportunity may lead to a situation where antitrust law under the banner of economic liberty condemned larger businesses 'not of injuring competition but, quite simply, of competing'[165] The Chicago School contended that the egalitarian thrust of the republican antitrust approach not only stifled efficiencies and reduced consumer welfare but also had unfair distributive consequences. Chicagoans indeed asserted that republican antitrust was inherently unfair, as it abused competition law as a 'protectionist'[166] tool to guarantee the livelihood and privileges of a small, inefficient, relatively affluent, and predominantly white class of independent businesses at the expense of the great majority of consumers.[167] The Chicago School thus managed to portray republican antitrust and its concern about the equality of opportunity as an aberration, or even worse, the product of regulatory capture by a small, albeit influential, social group.[168]

Above all, the Chicago Scholars put the finger on the failure of the republican antitrust approach to provide a principled framework that allowed competition authorities, courts, and businesses to distinguish between situations when the deterioration of competitors' equality of opportunity must be regarded as the result of legitimate competition and when it must be sanctioned as an undue exercise of single or collective market power.[169] Central to the Chicagoan critique was that the failure of republican antitrust to formulate a clear limiting principle which defines when the intervention of antitrust law is necessary and legitimate to preserve the economic liberty and equality of opportunity of small competitors frustrated the negative economic liberty of efficient competitors. The 'market egalitarianism'[170] of republican antitrust was hence increasingly perceived as a burdensome constraint on the entrepreneurial liberty notably of large-scale firms, as it seemed to justify or even compel continuous state interference with the commercial freedom of efficient businesses.

Against this backdrop, the Chicago School made three inter-related points that shook up the basic tenets underpinning the republican antitrust building. First, the Chicago School drove a wedge between the equality of opportunity of competitors and positive distributive outcomes for consumers that the republican tradition assumed to be largely aligned. Conversely, by unpicking the methodological shortcomings of the structure-conduct-performance (S-C-P) paradigm and highlighting the efficiency- and welfare-enhancing characteristics of firm size and industry concentration,[171] the Chicago School also debunked the assumption that greater

[163] *Utah Pie Co. v. Continental Baking Co.* (n 129).
[164] *Brown Shoe Co. Inc. v. United States* (n 131).
[165] Bork (n 5) 387.
[166] R. H. Bork and Bowman, Ward S. Jr. 'The Crisis of Antitrust' (1965) 65(3) Columbia Law Journal 363 364.
[167] Bork and Bowman, Ward S. Jr. (n 166), 375–376; R. J. Peritz, 'A Counter-History of Antitrust Law' (1990) 39(2) Duke Law Journal 263 299–303.
[168] Bork and Bowman, Ward S. Jr. (n 166), 376.
[169] A. Director and E. H. Levi, 'Law and the Future: Trade Regulation' (1956) 51 Nw. U. L. Rev. 281.
[170] Bork (n 5) 216.
[171] Director and Levi (n 169), 282, 285-286. Bork (n 5) 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* (University of

industry concentration inevitably entails adverse distributive consequences for consumers.[172] Table 1 depicts the fundamental transformation brought about by the Chicago School thinking. The Chicago School cast doubt on the century-old idea that equality of opportunity between competitors is necessarily conducive to a more equal and fair distribution of resources in the interest of consumers. The Chicago scholarship showed, instead, that greater equality amongst competitors may have undesired distributive outcomes for society, as consumers will have to foot the bill for the preservation of an economy composed of many, yet inefficient small and independent businesses (see upper-right hand quadrant in Table 2).

	Positive distributive effects for consumers	Negative distributive effects for consumers
Equality of opportunity	Republican antitrust	Chicago School
Inequalities of opportunity	Chicago School	Republican antitrust

Table 2 - The relationship between equality of opportunity and distributive equality: The shift from republican antitrust to Chicago School

Second, the Chicago School also burst the close bond between liberty and equality that underpins the republican understanding of (economic) liberty as equal freedom and equality of status. Whereas the republican tradition for centuries assumed that competitive markets would maximise liberty and equality as two dimensions of the very same concept of republican liberty, the Chicago School made the case that the pursuit of equality of opportunity through antitrust law would inextricably lead to excessive state interference with efficient business conduct and hence destroy negative entrepreneurial liberty. Unlike the republican tradition, which associated equality of opportunity with liberty and inequality of opportunity with unfreedom, the Chicago Scholars posited that the promotion of equality of opportunity may destroy liberty, while inequality of opportunity may well be compatible with greater economic liberty (Table 3).

	Liberty	Unfreedom
Equality	Republican antitrust	Chicago School
Inequality	Chicago School	Republican antitrust

Table 3 - The changing understanding of the relationship between liberty and equality

In short, Chicago Scholars showed that what the republican antitrust tradition regarded as largely complementary or even synonymous goals of competition law were, in realty, often in stark conflict with each other. This tension between conflicting social and economic goals was, in the eyes of the Chicago Scholars, the very reason for the 'crisis of antitrust'[173] as it would inevitably lead to inconsistent policy outcomes. To overcome this crisis, the Chicago School advocated a simple solution: namely, to purge antitrust law from ideological concerns about liberty, equality and wealth distribution[174] and supersede them with the purportedly clear,

Chicago Press 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; 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 5) 180–181.

[172] Bork and Bowman, Ward S. Jr. (n 166), 368–369. Bork (n 5) 196-197, 164, 18-179–369. Posner (n 5) 113–116. Brozen (n 171), 827–831.

[173] Bork and Bowman, Ward S. Jr. (n 166).

[174] Bork (n 5) 110–113. Posner (n 5) 23–29.

precise, and unique goal of consumer welfare.[175] By adopting consumer welfare as the exclusive policy objective, antitrust law could be grounded in the inherently coherent and logical axioms of neoclassical price theory which would ensure the coherence of a workable and sound antitrust policy.[176]

3.2 The politics of the consumer welfare standard: the operationalization of negative economic liberty

Unlike what Chicago scholars and contemporary advocates of the consumer welfare standard tend to claim,[177] the Chicagoan consumer welfare standard is anything but value-free and neutral in distributive terms. All to the contrary. The consumer welfare standard served the Chicago School as a framework to replace the republican conception of economic liberty as non-domination and equal status with a negative understanding of economic liberty that perceives any form of state intervention as coercion. Indeed, the consumer welfare standard allowed the Chicago School to clearly and narrowly delineate those – in their view – rare instances in which the businesses' unbridled exercise of negative economic liberty unduly interferes with the economic freedom of other market participants (boundary issue 1).[178] The consumer welfare standard and the Chicagoan understanding of error costs also offer a clear framework that provides guidance on how the conflicting liberties and interests of market participants should be balanced to decide whether state intervention is warranted (boundary issue 2).

3.2.1 Boundary Issue 1: Is there a clash between spheres of negative economic liberty?

The consumer welfare standard allowed the Chicago School to address the major failure of the republican antitrust paradigm: It offered a versatile limiting principle to answer the question of when the exercise of economic liberty by one market player unduly clashes with and reduces the economic liberty of other market participants so that remedial antitrust intervention may be indicated. Using the consumer welfare standard as the new normative benchmark, Chicagoans contended that this is only the case if business conduct interferes with the economic choices or opportunities of another market participant in such a way that it entails a deadweight loss due to a restriction of output (in the case of Bork's total welfare version of the 'consumer welfare' standard)[179] or a reduction in consumer surplus (in the case of a genuine consumer welfare aka. consumer surplus standard).

If applied to unilateral conduct, for instance, the consumer welfare standard is able to precisely determine when the conduct of powerful businesses unduly encroaches on the liberty of competitors. The consumer welfare standard would only indicate that the economic liberty of a competitor is frustrated if a dominant player interferes with this competitor in such a way that the latter is (i) prevented from entering mutually beneficial economic transactions with consumers, and (ii) these transactions are either not offered by the dominant firm at all (in the case of the total welfare standard) or at less advantageous terms (consumer welfare standard). This would be the case if the foreclosed competitor, absent the exclusionary conduct, could have produced and sold its product or services at least as efficiently as the dominant firm. In

[175] R. H. Bork, 'The Goals of Antitrust Policy' (1967) 57(2) The American Economic Review 242 244–246; Bork (n 5) 90–129. 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.
[176] Bork (n 5) 5, 8, 91. 116-129.
[177] 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.
[178] See for a similar argument Peritz (n 167), 299–311; 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; Fox (n 96), 1156–1157.
[179] Bork (n 5) 110–113. Posner (n 5) 23–24.

short, this is only the case if the business conduct is likely to foreclose an equally or more efficient competitor.[180]

The consumer welfare standard thus aligned the ideal of economic liberty protected by antitrust law with a very narrow concept of negative liberty, which only perceives welfare-reducing interference as a source of unfreedom. By contrast, domination flowing from the mere presence of concentrated economic power or imbalances of power and opportunities that republican antitrust was concerned about no longer qualified as obstacles to economic liberty that should alarm antitrust policy.

3.2.2 Boundary Issue 2: How to manage clashes between spheres of negative liberty?

Not only provided the consumer welfare standard the Chicago School with a versatile tool to determine with a high degree of precision the rare instances where the exercise of economic liberty by one market player unduly restricts the liberty of other market participants, but it also offered a workable framework for balancing the rights and liberties of the relevant stakeholders (e.g., consumers, competitors, perpetrator firm) to decide when such a reduction of liberty actually warrants state intervention. In keeping with traditional proponents of negative (economic) liberty,[181] the Chicago School assumed that state interference is only legitimate if the reduction of negative liberty of perpetrators firms as a consequence of remedial state coercion is more than compensated by the gains in the liberty of other market players owing to the fact that anticompetitive harm is averted or remedied.

The consumer welfare standard offers with the wealth maximisation principle a handy device to carry out such a balancing exercise by comparing and weighing off otherwise incommensurable liberties or rights of all relevant stakeholders. The wealth maximisation principle, indeed, offers a common cardinal unit[182] to measure the offsetting effects of state interference with the liberty of a perpetrator firm, and of the loss of liberty of consumers and competitors resulting from the conduct of the perpetrator firm. Under the premise that the goal of antitrust policy (as of any other government policy) is wealth maximisation, state intervention is only legitimate so long as the gains of total surplus (total welfare standard) or consumer surplus (consumer welfare standard) resulting from the increase in the liberty of consumers and/or competitors protected by antitrust law intervention outweigh any potential reduction in wealth due to the state interference with the liberty of the perpetrator firm. In other words, state intervention against a perpetrator firm to remedy the latter's interference with the liberty of market participants is only warranted if it maximises general welfare (total welfare standard) or consumer welfare (consumer welfare standard) more than does the unrestrained exercise of negative entrepreneurial liberty by the perpetrator firm.[183] Put simply, the wealth maximisation principle indicates that antitrust intervention is only legitimate if it maximises the net expected liberty – measured in net expected welfare – in the society.[184]

The Chicago School operationalised this welfare balancing by using the Williamsonian trade-off model.[185] 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 economic liberty of a perpetrator firm and that of consumers/ competitors due

[180] Posner (n 5) 194–197; R. A. Posner, 'Exclusionary Practices and the Antitrust Laws' (1974) 41(3) The University of Chicago Law Review 506. This has also been endorsed by late Harvard Scholars 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.
[181] Pettit (n 61), 596, 598-599, 601. P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997) 37-38, 42-44, 46.
[182] 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.
[183] R. A. Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8(1) The Journal of Legal Studies 103 130.
[184] See for a similar formulation P. Pettit, 'Freedom in the Market' (2006) 5(2) politics, philosophy & economics 131 145.
[185] Bork (n 5) 107–110; Posner (n 5) 23, 29.O. E. Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoffs' (1968) 58(1) The American Economic Review 18.

to the impugned conduct of the latter. Under this framework, antitrust intervention is only warranted if the reduction in allocative efficiency and hence the liberty of consumers/competitors due to the interfering conduct of the perpetrator firm is not outweighed by gains in the form of productive efficiency generated through the exercise of the negative liberty by the perpetrator firm.[186]

The differences between the total and consumer welfare standard with respect to the balancing of liberties are only marginal. Under the total welfare standard, the gains in productive efficiency that a perpetrator firm derives from the exercise of its negative liberty must only be large enough to theoretically compensate consumers for the losses in allocative efficiency resulting from the deadweight loss caused by the impugned conduct. This balancing of rights relies on the benchmark of Kaldor-Hicks efficiency, which merely requires that the perpetrator firm be theoretically capable of compensating other market players for their losses of liberty, without there being the need for any actual compensation.[187]

Under the consumer welfare standard, the balancing exercise differs from that envisaged by the Chicagoan total welfare standard 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 a perpetrator firm derives from the unrestricted exercise of its negative commercial liberty must be larger than under the total welfare standard for it to outweigh any losses in negative liberty, measured as wealth, on the part of consumers/competitors. Second, under the consumer welfare standard, it is not sufficient that the gains in productive efficiency allow the perpetrator firm to theoretically compensate consumers or competitors for the reduction in liberty suffered. Rather, the perpetrator firm must actually compensate consumers in order to make sure that consumers as a class are not worse off as a result of the exercise of its negative liberty. The consumer welfare standard thus requires that the interfering business conduct generate Pareto-efficient, instead of Kaldor-Hicks or theoretically Pareto-efficient, outcomes. The consumer welfare standard, thus, establishes a lower threshold for state intervention (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 within the perimeters of the framework set out by the Chicago School to balance the rights and liberties of various market participants.

3.2.3 The Chicagoan error-cost framework and negative liberty

A third element of the Chicago School's consumer welfare framework that skews this balancing of rights in favour of negative entrepreneurial liberty of alleged perpetrator firms is the Chicagoan approach towards error costs. The Chicago School coined the notion that the welfare costs of erroneous over-enforcement (type 1 errors) always tend to exceed the error costs resulting from under-enforcement (type 2 errors) of antitrust law.[188]

Along with the general costs of the administration of the legal system (including litigation), the Chicago School warned that erroneous antitrust intervention has two forms of

[186] Bork (n 5) 107–110; Posner (n 5) 23, 29.Williamson (n 185).
[187] Posner (n 5) 23.Posner (n 183), 127; R. A. Posner, 'Wealth Maximization Revisited' (1985) 2 Notre Dame Journal of Law, Ethics and Public Policy 85 102–103; 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) 11; Coase, R. H. 'The Federal Communications Commission' (1959) 2 Journal of Law and Economics 1 26–29; R. H. Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law&Economics 1 10.
[188] F. H. Easterbrook, 'The limits of Antitrust' (1984) 63(1) Tex. L. Rev. 1 3, 15-16.

cost. On the one hand, the erroneous decision itself creates costs as it erroneously prohibits efficient business conduct. On the other hand, false positives also create welfare costs through deterrence, as other or future market players will also be dissuaded from engaging in efficient, welfare-enhancing conduct. [189] 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.[190] At the same time, the Chicago School also entrenched the view that the costs of false negatives (type 2) errors tend to be low. This proposition was grounded in the assumption markets would easily self-correct false negatives (i.e., erroneously acquitted anticompetitive, output-reducing behaviour), whereas judicial and legislative processes are unlikely to self-correct judicial errors taking the form of false condemnations[191]

Comparing the costs of type 1 and type 2 errors, Chicago scholars asserted that type 1 errors are more costly than type 2 errors[192] This is because erroneously acquitted anti-competitive conduct only leads to a restriction of output or price increases on the units sold by the firms indulging in the conduct. 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 anti-competitive nature of a specific conduct will be forever lost.[193] The Chicago School thus entrenched the notion that the real problem of antitrust enforcement lies not in the risk that some form of anti-competitive conduct goes undetected but that efficient and aggressive competitive conduct is erroneously classified as anti-competitive.[194] In case of doubt, antitrust law should, therefore, err on the side of type 2 errors and the negative liberty of powerful firms.[195]

The assumption that state intervention tends in most of the cases to be more expensive than 'doing nothing'[196] and that type 2 errors are, therefore, preferable to type 1 errors, provided the Chicago School with a powerful economic argument in support of shielding the negative entrepreneurial liberty of alleged perpetrator firms against antitrust intervention. The Chicago School error-cost framework, indeed, puts some economic gloss on the assumption that in most cases the loss in commercial liberty suffered by 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.[197] The Chicagoan consumer welfare standard and error-cost framework thus encode a balance of rights, which is clearly geared towards preserving the negative liberty of businesses against state intervention. They thus provided the blueprint for a 'laissez-faire' antitrust approach whose ultimate aim is to insulate to the largest extent possible the entrepreneurial liberty of corporations against antitrust intervention. The Chicagoan endorsement of a laissez-faire approach also had important distributive implications as it slanted antitrust enforcement in a way that, in the case of doubt, condones the redistribution of wealth from consumers and competitors to corporate antitrust defendants.

[189] ibid 15.
[190] ibid 16.
[191] Bork (n 5) 143–144; Easterbrook (n 188), 15; A. Devlin and M. Jacobs, 'Antitrust Error' (2010) 52 Wm. & Mary L. Rev. 75 84–85.
[192] 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 H. First and S. Weber Waller, 'Antitrust's Democracy Deficit' (2013) 81(5) Fordham Law Review 2570–2572.
[193] Easterbrook (n 188), 15–16.
[194] Bork (n 5) 157.
[195] Easterbrook (n 188), 16.
[196] Coase (n 187), 18.
[197] Bork (n 5) 134-135, 143-144, 157, 196.

3.3 The Chicago laissez-faire antitrust approach and the new equilibrium

The impact of Chicago School thought on US and EU Competition law can hardly be overstated. The precepts of the Chicagoan antitrust framework were wholeheartedly endorsed by the US Supreme Court.[198] The Chicago consensus on the consumer welfare standard and error costs framework also found growing support among practitioners and academics in Europe.[199] Albeit to a lesser extent than in the US, the Chicagoan laissez-faire antitrust framework had, with the rise of the so-called 'more economic approach', an important bearing on the thinking and case law of the EU Commission[200] and Courts[201] during the late 2000s and early 2010s.

How has this shift from a republican to a Chicago-inspired laissez-faire antitrust paradigm on both sides of the Atlantic affected markets and the distribution of wealth? To this date, existing studies only provide, at best, tentative answers to this question. What recent economic research, however, seems to suggest is that the Chicago School laissez-faire approach has definitely delivered on its promise of freeing big business from the strictures of antitrust (and other) regulation. A number of recent studies show that the industry concentration, price-cost margins, and corporate profits in numerous US[202], and, at least to some extent, EU[203] industries have soared over the last decade. A growing number of economists and antitrust experts see this increase in industry concentration as a symptom of a decline in competition and a slow-down in business dynamism.[204] The relaxation of competition law enforcement under the auspices of the Chicago and post-Chicago movement during the last decades, in particular in the US, is seen as one, if not the major, causes of growing industry concentration.[205]

The growing trend towards industry concentration has also sparked broader concerns as it is considered to be indicative of the growing economic and political power[206] of large companies.[207] At the same time, recent increases in industry concentration and the ensuing accumulation of economic and political power in the hand of a few powerful corporations are

[198] See for the endorsement of the consumer welfare standard *Reiter v. Sonotone Corp.* 442 U.S. 330 (1979) 343. See for the endorsement of the Chicagoan error-cost framework *Verizon Communications Inc v Law Offices of Curtis Trinko* 540 US 398 (2004) 407.
[199] See for example 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); Economic Advisory Group on Competition Policy (EAGCP), 'An economic approach to Article 82' (2005) accessed 4 April 2015.
[200] 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.Guidelines on the application of Article 81(3) of the Treaty, Guidelines on the application of Article 81(3). OJ [2004] C 101/97 para. 24.
[201] See for a recent endorsement of the consumer welfare standard *Case C-67/13 P Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204 para. 51. See for instance with respect to error-costs *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.
[202] Council of Economic Advisers to the US President, 'Brief: Benefits of Competition and Indicators' (2016); J. de Loecker, J. Eeckhout and G. Unger, 'The Rise of Market Power and the Macroeconomic Implications' (2020) 135(2) The Quarterly Journal of Economics 561; Akcigit and others (n 2); Philippon (n 3).
[203] Bajgar and others (n 2); Cavalleri and others (n 2).
[204] Council of Economic Advisers to the US President (n 202) 4–5; Decker, Haltiwanger and Jarmin, Ron S. Miranda, Javier (n 3); R. Decker, J. Haltiwanger and Jarmin, Ron S. Miranda, Javier, 'Declining Business Dynamism: What We Know and the Way Forward' (2016) 106(5) American Economic Review 203; 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.
[205] See for instance, S. Peltzman, 'Industrial Concentration under the Rule of Reason' (2014) 57(3) The Journal of Law and Economics 101; Council of Economic Advisers to the US President (n 202) 6-7,9; 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; O. Ashenfelter and D. Hosken, 'The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin' (2010) 53(3) The Journal of Law and Economics 417; Kwoka, John E. Jr. *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (MIT Press 2015); J. Kwoka, *Controlling mergers and market power: A program for reviving antitrust in America* (Competition Policy International 2020); Philippon (n 3).
[206] Baker (n 3) 10; Stiglitz (n 3) 16; Z. Teachout and L. M. Khan, 'Market Structure and Political Law: A Taxonomy of Power' (2016) 9(1) Duke Journal of Constitutional Law & Public Policy 37.
[207] For a critical review of this literature and its methodological limitations Shapiro (n 3); Werden and Froeb (n 3).

perceived as an important driver for increasingly pronounced economic inequalities. [208] If one is to believe the studies suggesting a relationship between relaxed antitrust enforcement, increase in industry concentration, corporate power, and inequality, the Chicago School laissez-faire approach seems to have put an end to the century-old republican idea or promise that competitive markets would promote a more egalitarian society by promoting equalities of opportunities and, thereby, a more equalised distribution of wealth in the interest of consumers. Provided the studies are correct in finding a relationship between rising corporate power and inequality levels, the implicit bias of laissez-faire antitrust in favour of the entrepreneurial liberty and interests of large-scale corporations appears to have had palpable distributive consequences. If this is the case, the adoption of the Chicagoan laissez-faire approach moved us toward a state of affairs against which the republican antitrust paradigm has always guarded: namely, a new equilibrium where competition neither promotes equality of opportunity nor the distributive equality of wealth in the interest of consumers (depicted in the fourth, bottom right quadrant of Figure 4).

	Positive distributive effects for consumers	Positive distributive effects for consumers
Equality of opportunity (between competitors)	Republican antitrust	Chicago School
Inequality of opportunity	Chicago school	The new equilibrium (Republican antitrust)

Table 4 - The new equilibrium: absence of equality considerations

This transition from republican towards laissez-faire antitrust and the ensuing impact on inequality, documented in previous sections, raises the question of whether it is possible to reverse this shift, at least partially. How can we revitalise the idea of a more equal and robust form of economic liberty and the egalitarian promise that competition promotes a society of free and equals? And is such a reversal possible without repeating the aberrations of the republican approach during the Warren Court era and, thereby, harming consumers? In other words, can we recalibrate competition policy towards a more republican approach that promotes greater equality of opportunity and wealth without sacrificing consumer interests? Can we resuscitate the original assumption of consonance or complementarity between the interests of competitors and consumers that underpin the republican understanding of the relationship between competition and equality since the English Levellers?

The following sections provide a tentative answer to this question by identifying three potential avenues that would allow us to rethink and redesign competition law in order to re-integrate equality concerns concerning both equality of opportunity for competitors and distributive equality in the interest of consumers into competition law analysis. The three approaches differ in the extent to which they require a departure from the currently prevailing antitrust paradigm. All three avenues, however, would allow for the recalibration of (US and EU) competition law without requiring major legislative changes. Two out of the three avenues considered propose the recalibration of competition law enforcement in a way that enhances the equality of opportunity amongst independent competitors (or sellers) while also ensuring fairer distributive outcomes for consumers. The first, least far-reaching, proposition focuses primarily on distributive equality concerns. It is of particular relevance in situations where

[208] Council of Economic Advisers to the US President (n 202) 2; Furman and 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' (n 4); Furman and Orszag (n 3). Ennis, Gonzaga and Pike (n 4). See however Autor and others (n 4).

competitors are unable or have no incentive to constrain powerful firms from extracting consumer surplus in the short- to medium-term.

4 Taking type 2 errors seriously: a recalibration of the laissez-faire error cost framework

Our previous discussion has identified the biased Chicagoan take on error costs as a central channel through which the Chicago School realigned antitrust law with a laissez-faire approach. Laissez-faire antitrust has as its primary goal the preservation of negative entrepreneurial liberty against state intervention and is indifferent about the distributive effects of monopoly power. By coining an inherently lopsided understanding of the costs of false positives and false negatives, the Chicagoan error-cost framework provided the blueprint for an antitrust policy that is inherently skewed towards non-intervention and which is, hence, above all protective of the commercial liberty of antitrust defendants. The Chicagoan error cost frameworks thus served as an economic fig leaf that obfuscates the distributive effects of an antitrust policy that condones the transfer of wealth from consumers and competitors to powerful corporations in order to preserve the latters' entrepreneurial liberty. A first avenue to assign greater weight to distributive considerations in competition law enforcement and thus to realign antitrust law with the egalitarian republican tradition would consist of debiasing and recalibrating this laissez-faire error-cost framework by crediting the adverse distributive effects of anticompetitive conduct as an additional element of the cost of false acquittals (type 2 errors). Put differently, the prevention of adverse distributive effects should enter the error-cost equation as an additional 'accuracy benefit'[209] of correct antitrust intervention.

4.1 Incorporating equality concerns in the design of evidentiary standards

This envisaged recalibration of the error-cost framework draws on and expands the relatively uncontroversial proposal[210] that competition authorities should make greater use of their prosecutorial discretion and prioritise the prosecution of certain types of anticompetitive conduct which have a particularly adverse distributive incidence. Even commentators who are generally sceptical about the incorporation of equality concerns as a standalone consideration in antitrust analysis seem to support this proposal of using prosecutorial discretion to tackle the impact of monopoly power on distributive equality.[211]

Recalibrating the error-cost framework would push the logic underpinning the idea of prosecutorial discretion further. Instead of merely crediting the gains of accurate antitrust enforcement ('accuracy benefits')[212] at the case-selection stage, we propose to also account for the impact of correct convictions and false acquittals on wealth distribution when designing optimal evidentiary standards for specific types of conduct or markets. This proposal grounds in a more nuanced understanding of the costs and benefits of antitrust intervention than the one championed by the skewed error-cost framework of laissez-faire antitrust. Instead of being merely concerned about the adverse impact of false positives (type I errors) on the incentives and negative liberty of defendant businesses, the proposed recalibration of evidentiary standards would pay due consideration to the costs of under-enforcement and the benefits of accurate deterrence in particular for low-income or vulnerable consumers.

The proposed approach assumes that markets can often be segmented into two broad categories. On the one hand, there are certain markets, call them 'type 1 error markets', in which

[209] First and Weber Waller (n 192), 2570–2572; 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 5 fn 17.
[210] Baker and Salop (n 6), 18–20.
[211] Crane (n 6), 1225–1226.
[212] First and Weber Waller (n 192), 2570–2572; Baker (n 209), 5 fn 17.

false positives are likely to cause high costs, for instance, by stifling incentives to innovate. The costs of type 2 errors in these markets may be low because entry will easily compete away supracompetitive prices. On the other hand, there are also markets, call them 'type-2 error markets', where the costs of false negatives (type 2 errors) and the benefits of deterring anticompetitive conduct (i.e. 'accuracy benefits') are high. This might be the case for markets characterised by high barriers to entry, a limited ability for consumers to switch, the presence of vulnerable consumers, or the fact that the expenses for the products/services sold absorb a disproportionate share of consumers' household spending. At the same time, the costs of false positives in type 2 error markets may be relatively low, for instance, because erroneous intervention is relatively unlikely to deter innovation. Put differently, in type 1 error markets, the likelihood and magnitude of unchallenged anticompetitive harm tend to be low while those of false positives are high; by contrast, in type 2 error markets, the likelihood and scale of unchallenged anticompetitive harm are high, while the costs of false positives tend to be low.[213]

A central tenet of decision theory is that the standard of proof or critical intervention threshold for antitrust enforcement should be geared towards minimising error costs. To this end, evidentiary standards should be calibrated with both the likelihood and magnitude of harm caused by anticompetitive conduct.[214] Decision theory would, therefore, counsel a high intervention threshold in type 1 error markets and support a relatively low standard of proof in type 2 error markets (see Figure 1). In keeping with this sliding-scale approach, in markets with high (discounted) type 1 error costs, the evidentiary burden for the competition authority to sustain the finding of anticompetitive conduct warranting intervention should be heightened. To avoid type 1 errors, the competition authority (plaintiff) would be required to proffer a high amount of case-specific information indicating likely anticompetitive effects to discharge its evidentiary burden. By contrast, in type 2 error markets where the (discounted) costs of type 1 errors are relatively low, the evidentiary burden for the competition authority should also be set at a lower level. The competition authority should be able to intervene on the basis of less case-specific information showing anticompetitive effects than in type 1 error markets. Similar considerations also apply to the evidentiary burden that the defendant(s) would have to meet to rebut the *prima facie* finding of anticompetitive effects. To minimise error costs, the standard for defendants in type 1 error markets should be less demanding. By contrast, the standard should be tightened in type 2 error markets to avoid that defendants could rebut a *prima facie* finding of anticompetitive effects all too easily.

[213] This proposition relies on the strong assumptions that (there are markets on which) the risk and costs of type 1 and type 2 errors are negatively correlated.

[214] C. F. Beckner, III and S. C. Salop, 'Decision Theory and Antitrust Rules' (1999) 67 Antitrust L.J. 41 61–62. S. C. Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (2017) 3,10, 14-15, 17 <https://scholarship.law.georgetown.edu/facpub/2007/>.See for a formal analysis L. Kaplow, 'Likelihood Ratio Tests and Legal Decision Rules' (2014) 16(1) American Law and Economics Review 1 16–18.

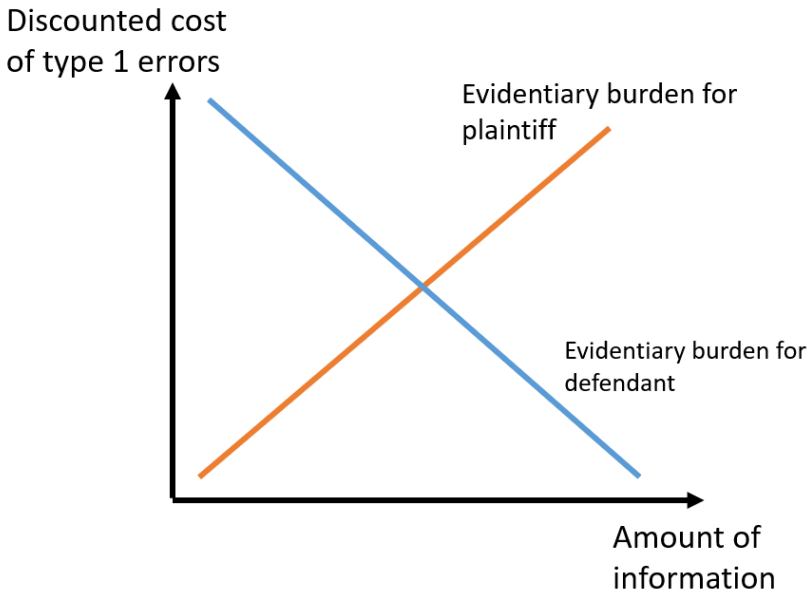

Figure 1 - Fine-tuning the evidentiary burden in type 1 and 2 error markets

To give greater weight to distributional effects in antitrust analysis, our proposal would classify markets in which anticompetitive effects have material adverse distributive effects, for instance, because they harm particularly vulnerable consumers or hit low-income households disproportionately harder than higher-income households, as type 2 error markets. Decision theory would hence support a lowering of the evidentiary threshold a competition authority would have to meet to intervene in these markets where anticompetitive effects have a high distributive incidence.

4.2 A concrete example: fine-tuning of merger standards

How would the proposed incorporation of equality concerns in competition analysis through the fine-tuning of the evidentiary standards work in practice? One area where this approach might be relevant is merger control. Considerations about the distributive impact of merger-induced price increases could play a role in the choice of critical thresholds for the (Gross) Upward Pricing Pressure (GUPPI/ UPP) analysis and for Indicative Price Rises (IPR) that competition authorities use to determine when horizontal mergers result in significant price increases.[215] Calibrating quantitative merger thresholds with the likely distributive impact and costs of type 2 errors of mergers in specific markets would allow merger control to account for the fact that the consumer harm and distributive consequences of merger-induced price increases differ across industries and products.

The recent decision by the UK Competition and Markets Authority (CMA) in the proposed merger between two grocery chains, Asda and Sainsbury, may illustrate how this finetuning of merger standards may look like. The CMA, in this case, accounted for distributive effects when assessing whether the merger was likely to lead to unilateral effects in the retail markets for in-store groceries and road fuel sold at petrol stations owned by the supermarket chains. The authority observed that certain products, such as groceries or fuel, often constitute non-discretionary household expenditure, absorbing a disproportionate share of household

[215] J. Farrell and C. Shapiro, 'Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition' (2010) 10(1) The BE Journal of Theoretical Economics 1; S. C. Salop and S. Moresi, 'Updating the Merger Guidelines: Comments' (2009) <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2675&context=facpub>; S. C. Salop, S. Moresi and J. R. Woodbury, 'Scoring Unilateral Effects with the GUPPI: The Approach of the New Horizontal Merger Guidelines' (2010). CRA Insight.

spending. For these products, even small increases in price (or equivalent effects on other parameters of competition) may inflict material harm on consumers. Price effects on these products thus have important distributive effects, as they hit low-income households disproportionately harder than more affluent consumer groups.[216] For this reason, the CMA considered what might appear at first sight relatively modest price increases of 1.5% (2.75% with the inclusion of substantiated efficiencies of 1.25%) on groceries[217] and fuel[218] to result in a 'substantial' or 'significant' harm to competition.

The CMA's Asda/Sainsbury merger decision constitutes an insightful example of how the fine-tuning of evidentiary merger standards can account for adverse distributive effects of market power. It is relatively safe to assume that the likelihood and costs of type 1 errors in retail markets for in-store groceries and fuel tend to be low, relative to, say, more innovation-driven markets. At the same time, if one subsumes and weighs the adverse distributive effects of mergers as an additional dimension of anticompetitive harm inflicted by price increases (or non-price effects), the costs of type 2 errors in in-store groceries and road fuel markets are often high. The retail markets for groceries and road fuel therefore arguably qualify as type 2 error markets where decision theory would support a relaxation of evidentiary standards.

4.3 The broader implications

The Asda/Sainsbury merger thus sets out a pragmatic and workable avenue to incorporate and implicitly weigh the adverse impact of mergers on distributive equality without having recourse to complex computations of the distributive incidence of mergers on (various classes of) consumers and producers.[219] To account for the adverse effect of mergers on wealth inequalities, competition authorities could set the critical threshold for finding significant price effects at a very low level in type 2 product or geographic markets where price raises are likely to have a disproportionate impact on low-income households. This would be the case in markets for products or services that account for significant amounts of, in some cases non-discretionary, household spending. Along similar lines, competition authorities could also choose a low intervention threshold in mergers or antitrust cases affecting markets characterized by the presence of particularly vulnerable consumers, whose ability to switch is limited. In markets, such as telecommunications, energy, credit or insurance or health care,[220] even small increases in price (or decreases in non-price parameters of competition such as quality) may therefore be sufficient for the finding of significant anticompetitive effects of a merger.

Crediting the distributional incidence of anticompetitive conduct or distortions of competition in specific markets as additional costs of type 2 errors or 'accuracy benefits' may help recalibrate the skewed error-cost framework coined by the Chicago School that continues to be influential in contemporary antitrust analysis.[221] The proposed fine-tuning could take place on a market basis by establishing a common understanding which markets qualify as 'type-2 error' markets. At the same time, it can also inform, and is arguably already at work, in the antitrust analysis of specific types of anticompetitive conduct (e.g., price fixing cartels, horizontal mergers) that are prone to have substantial adverse distributive effects. More

[216] Anticipated merger between J Sainsbury PLC and Asda Group Ltd 2019 para. 8.283 and 14. 151.
[217] ibid paras. 8.270–8.296.
[218] ibid para. 14.152-14.153.
[219] L. Kaplow, 'On the Choice of Welfare Standards in Competition Law' (2011/5). John M. Olin Center for Law, Economics, and Business 6; J. Farrell and M. Katz, 'The Economics of Welfare Standards in Antitrust' (2006) 2(2) Competition Policy International 3 10–12. See for such a computation and balancing of distributive effects in Canadian merger control *Canada v Superior Propane* (2003).
[220] Britain Thinks, 'Getting a good deal on a low income: Qualitative research conduct with vulnerable consumers on behalf of the Competition and Markets Authority (CMA)' (December 2018) 8–9 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766191/britain_thinks_report.pdf>. For the discussion of a broader set of markets S. Tipping and others, 'Advice on the Measurement of the Poverty Premium across UK markets: Final report' (2019) 19–32.
[221] For a recent example *FTC v. Qualcomm Inc.* 969 F. 3d 974 (2020) 990.

economic and empirical research is necessary to identify which type of markets and conduct would warrant the proposed finetuning of evidentiary standards.

5 Taking equality of opportunity seriously: abandoning the as-efficient competitor framework

A second proposition to attribute greater weight to equality concerns in antitrust enforcement would consist of scrapping the as-efficient competitor test for the assessment of exclusionary pricing conduct by dominant firms. The as-efficient competitor test has been developed against the backdrop of the failures of republican antitrust to formulate consistent standards that allow a competition authority or court to determine when aggressive pricing entails illegitimate anticompetitive foreclosure and when it leads to the legitimate market exclusion of competitors due to their inferior efficiency.[222] This failure was prominently embodied in the predatory pricing case law of the Warren Court, in particular *Utah Pie*.[223] This case law served the Chicago School as an example to support its claim that the republican antitrust approach was more concerned about the protection of small local competitors than the promotion of competition.[224] The strict antitrust enforcement against aggressive pricing by large firms under the republican approach thus appeared to deprive consumers of the benefits of aggressive price competition and was an emblematic example of a competition policy that is 'essentially anticompetitive and anticonsumer'.[225]

5.1 The as-efficient competitor test as the operationalisation of a laissez-faire antitrust approach

To address the shortcomings of the republican antitrust paradigm, Chicago and Harvard scholars developed with the so-called 'as-efficient competitor' test a litmus test to decide when unilateral conduct of a dominant firm unduly interferes with the negative liberty of competitors. Chicago and Harvard scholars reached the consensus view that impugned exclusionary pricing conduct should only raise antitrust concerns and trigger state intervention when the defendant sets its price below a reasonable measure of its variable or incremental costs.[226] Only in this case is it safe to assume that the defendant's conduct forecloses an equally efficient competitor that has the same cost structure and productive efficiency as the defendant and thereby deprives consumers of welfare-enhancing transactions. [227]

The as-efficient competitor test thus constitutes a successful attempt to translate the logic of the Chicagoan welfare standard as the ultimate benchmark to decide when unilateral firm conduct unduly interferes with the economic liberty of other competitors into concrete competition law analysis. It also imposes an effective limiting principle on state intervention in so far as it confines antitrust intervention to the, as the Chicago School argued, very rare instances where the exclusion of competitors is not caused by their lack of efficiency but the abuse of market power by the alleged perpetrator firm. [228] By contrast, the as-efficient competitor test removes market exclusion of less efficient competitors from the realm of antitrust intervention, as it is considered the natural or even desired outcome of welfare-enhancing price competition.[229]

[222] Posner (n 5) 220–221. Easterbrook (n 188), 34 fn 71.
[223] *Utah Pie Co. v. Continental Baking Co.* (n 129); *Moore v. Mead's Fine Bread Co.* (n 129); *F. T. C. v. Anheuser-Busch, Inc.* 363 U.S. 536 (1960).
[224] Bork (n 5) 387.
[225] ibid.
[226] Areeda and Turner (n 180), 711. See for a similar approach Posner (n 5) 215; R. A. Posner, 'The Chicago School of Antitrust Analysis' (1979) 127(4) University of Pennsylvania Law Review 925 940.
[227] Areeda and Turner (n 180), 711.
[228] ibid. See for a similar approach Posner (n 5) 215.
[229] Areeda and Turner (n 180), 711. See for a similar approach Posner (n 5) 215.

The as-efficient competitor test also identifies a relevant criterion of merit to decide whose economic liberty and equality of opportunity is worth protection under antitrust law. The as-efficient competitor test thus addressed the shortcomings of what was perceived by Chicago Scholars as an unduly over-inclusive definition of equality of opportunity that had informed the interventionist approach of the republican antitrust tradition. At the same time, it also served as a powerful tool to operationalise the laissez-faire error cost framework coined by the Chicago School which assumes that antitrust intervention against aggressive pricing by dominant incumbents is rarely, if at all, warranted. [230] By giving effect to the assumption that antitrust law should intervene as little as possible against aggressive pricing strategies, the incremental price-cost test effectively shields any above-cost pricing of defendant firms from antitrust scrutiny and thereby insulates most forms of negative entrepreneurial liberty from state intervention.

Over the course of the last decades, the as-efficient competitor test has been widely endorsed by US[231] and EU[232] enforcers and courts alike as the ultimate touchstone to determine when impugned exclusionary pricing strategies fall afoul of competition rules on unilateral conduct by dominant firms. The application of the incremental price cost test has been consistently expanded beyond predatory pricing cases and is nowadays used to assess all forms of exclusionary pricing, ranging from bundled and loyalty discounts[233] to margin squeeze (in the EU).[234] At the same time, there is widespread consensus that above-cost pricing by dominant firms, as a matter of principle, ought to be shielded from antitrust liability.[235]

5.2 The under-inclusiveness of the as-efficient competitor test

The broad endorsement of the incremental price-cost test on both sides of the Atlantic often obfuscates that it constitutes a highly permissive and under-inclusive approach towards pricing abuses by dominant players. The as-efficient competitor test does not necessarily catch all sets of strategies that allow a monopolist to exclude or deter equally efficient competitors. It indeed lets go unchallenged an entire category of pricing conduct that allows a dominant firm to foreclose competitors without reducing its prices below its incremental costs, often expressed as average variable costs (AVC) which are used as surrogates for marginal costs (MC).[236] Not only has the widespread adoption of the as-efficient competitor test aligned antitrust law with the logic of negative economic liberty, but it also entrenched a standard that fails to secure the economic opportunities of smaller competitors and, simultaneously, omits to protect consumers against the adverse distributive impact of market power.

The reasons for the under-inclusiveness of the incremental price-cost test are manifold. First, the incremental price-cost test is premised on the rather strong assumptions of a static model of competition with linear costs. In markets characterised by non-linear costs, the relationship between MC and AVC is not constant and, at high levels of output, AVC fall below MC. Using AVC as the critical cost benchmark of the incremental price-cost test means that

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[230] Bork (n 5) 44, 149, 153-154.J. S. McGee, 'Predatory Price Cutting: The Standard Oil (N. J.) Case' (1958) 1 Journal of Law and Economics 137.

[231] *Brooke Group v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1993) 223. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* 549 U.S. 312 (2007) 325.

[232] *Case C-62/86 AKZO v Commission* (n 143) para. 71.

[233] *Cascade Health Solutions v. PeaceHealth* 502 F.3d 895 (9th Cir. 2007) 909. *Concord Boat Corp. v. Brunswick Corp.* 207 F.3d 1039 (8th Cir. 2000). *ZF Meritor, LLC v. Eaton Corp.* 696 F.3d 254 (3d Cir. 2012) 277. *Eisai, Inc. v. Sanofi Aventis U.S. LLC* 821 F.3d 394 (3d Cir. 2015) 409. 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. 20, 23–27, 41-44. *Case C-23/14 Post Danmark II* ECLI:EU:C:2015:651 para. 58; *Case C-413/14 P Intel v Commission* ECLI:EU:C:2017:632 paras. 133-134, 139-140.

[234] *Case C-280/08 P Deutsche Telekom v Commission* (n 139) paras. 198-203; *Case C-52/09 TeliaSonera Sverige* ECLI:EU:C:2011:83 paras. 33, 40-46.

[235] *Verizon Communications Inc v Law Offices of Curtis Trinko* (n 198) 414; *Pacific Bell Telephone Co. dba AT&T California, et al. v. linkLine Communications, Inc. et al.* 555 U.S. 438 (2009) 11; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (n 233) paras. 23-27; *Case C-209/10 Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172 para. 25, 38.

[236] Areeda and Turner (n 180), 716.

certain below-MC pricing remains unchallenged.[237] Moreover, the as-efficient competitor test focuses exclusively on static, short-term efficiency while ignoring the intertemporal dimension of aggressive pricing which can be used as a strategic 'signalling device' to deter future entry. Post-Chicago game theoretical models of strategic entry deterrence show that aggressive pricing can be a successful foreclosure strategy even in the absence of below-cost pricing and recoupment. [238]

A second limitation is that there are a number of markets or types of conduct where the central assumption underpinning the as-efficient competitor test that only below-incremental cost pricing is capable of excluding equally efficient competitors does not hold true. This is notably the case in capital-intensive and innovation-driven industries where firms have to recover high fixed costs to break even in the medium-term and be able to compete sustainably.[239] Moreover, size advantages, such as the ability to grant rebates across a large customer base, may enable dominant firms to exclude equally efficient competitors even if their bundled[240] and loyalty rebates[241] do not constitute below-cost pricing.[242]

The as-efficient competitor test also relies on an overly narrow notion of when competitors are foreclosed and competition is harmed. It ignores that exclusionary pricing, for instance in the form of rebates, may raise rivals' costs and stifle competition even without leading to the total exclusion of competitors.[243] 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, not whether it raises its costs by rendering entry more difficult. This means that the as-efficient competitor test fails to identify all potential foreclosure effects which fall short of total foreclosure.[244]

This under-inclusiveness of the incremental price-cost test is further exacerbated by the fact that it uses the costs of the dominant firm as the relevant benchmark of productive efficiency. Price-costs tests thus also abstract from cost and/or non-cost incumbency advantages the incumbent firm may benefit from. Such incumbency benefits are often difficult to replicate for new entrants even though they are efficient or have the potential to evolve into innovative challengers. These cost- and non-cost advantages may enable the dominant incumbent to foreclose potentially equally efficient competitors by targeted price cuts (so-called limit pricing) which drive prices below the costs of the entrant without however pushing them below

[237] Areeda and Turner (n 180), 704-706, 710; J. F. Brodley and G. A. Hay, 'Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards' (1980-1981) 66 Cornell Law Review 738 738,752-753.
[238] F. M. Scherer, 'Predatory Pricing and the Sherman Act: A Comment' (1975-1976) 79 Harvard Law Review 869 871–880. O. E. Williamson, 'Predatory Pricing: A Strategic and Welfare Analysis' (1977) 87(2) The Yale Law Journal 284 285–286, 292-302; W. J. Baumol, 'Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing' (1979) 89 Yale Law Journal 1 2–4. For a comprehensive discussion of more recent entry deterrence models P. Bolton, J. F. Brodley and M. H. Riordan, 'Predatory pricing: Strategic theory and legal policy' (2000) 88(8) Georgetown Law Journal 2239 2247–2250, 2299-2321. 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.
[239] H. Hovenkamp, 'The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal' (2015) 46 Review of Industrial Organization 209 214.
[240] See for instance Judge Kaplan in *Ortho Diagnostic Systems v. Abbott Laboratories* 920 F. Supp. 455 (S.D.N.Y. 1996) 467. B. Nalebuff, 'Exclusionary Bundling' (2005) 50(3) Antitrust Bulletin 321 321. *LePage's Inc. v. 3M* 324 F.3d 141 (3d. Cir. 2003) 150.
[241] 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. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses 2005, Discussion Paper paras. 165; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (n 233) para. 37.
[242] For various attempts to modify the incremental price-cost test to account for the need for fixed cost recovery and the ability of monopolists to leverage their size by using alternative cost measures *Case C-62/86 AKZO v Commission* (n 143) para. 71; Posner (n 226), 941–944. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (n 233) paras. 26, 41-44. G. Federico, 'When are rebates exclusionary?' (2005) 26(9) European Competition Law Review 477 478–480.
[243] 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 371 410–411.
[244] *Case T-286/09 Intel v Commission* ECLI:EU:T:2014:547 paras. 149-150.

the incumbent's own costs.[245] The exclusive focus of price-cost tests on the incumbent's costs is thus predicated on a static and underinclusive notion of efficiency that fails to address above-cost predation against efficient competitors who do not benefit from incumbency advantages but exert important dynamic competitive constraints.

By reverting to the incumbent's costs as the relevant benchmark against which the efficiency of competitors is assessed, price-cost tests have the tendency to analyse pricing conduct by dominant incumbents as if they took place in a perfectly competitive market and ignore that dominant incumbents are bidding for customer loyalty to maintain market power.[246] This obfuscates the asymmetry in power and bidding advantages that favour the dominant firm relative to non-dominant competitors. It also disregards the asymmetric incentives of a dominant firm to sacrifice profits relative to competitors or potential entrants. When the pay-offs of a competitor to secure its monopoly position exceed those for competitors to enter, an incumbent dominant firm has indeed an incentive to spend more to insulate its monopoly profits from competitors than competitors or entrants may be willing to invest in order to remain operational or achieve a viable competitive position. [247] In particular in markets dominated by long-standing incumbents, the use of the incremental price cost test thus blatantly fails to protect equality of opportunity amongst competitors: There may simply never be any competitor who would be able to replicate the dominant firms' incumbency advantages and match its deep pockets that allow the incumbent to share monopoly rents with downstream customers and pay them for entering exclusive contracts.[248]

The most important shortcoming of the as-efficient competitor test is that it not only fails to secure the equality of opportunity amongst competitors but is also likely to have adverse distributive effects on consumers. The assumption underpinning the incremental price-cost test that consumer welfare and allocative efficiency will not be harmed by above-cost price cuts, as they cannot foreclose equally efficient competitors, does not always hold true. It indeed fails to account for the fact that even less efficient competitors can effectively constrain the ability of a dominant player to raise prices. In the presence of high entry barriers, even the foreclosure of a less efficient competitor may lead to higher prices if it allows the dominant incumbent to restore or entrench its monopoly position. The foreclosure of a less efficient competitor may thus result in a loss in consumer welfare that exceeds the savings flowing from the lower production costs of the monopolist.[249] The as-efficient competitor test thus disregards that protecting the economic opportunities of even less efficient competitors may enhance greater distributive equality in the interest of consumers, as their mere presence may impose important constraints upon the dominant firm's power to raise prices.[250]

In sum, there are numerous reasons to believe that the incremental price-cost test fails both to preserve equality of opportunity amongst competitors and protect consumers from the unfair distributive effects of monopoly power. This under-inclusiveness has, however, not prevented the success of the as-efficient competitor test as the predilect legal and economic

[245] A. S. Edlin, 'Stopping Above Cost Predatory Pricing' (2002) 111(4) Yale Law Journal 941 944, 956-960.
[246] Salop (n 243), 408–410.
[247] T. G. Krattenmaker and S. C. Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96(3) The Yale Law Journal 209 269-270, fn 190. E. Hovenkamp and S. C. Salop, 'Asymmetric Stakes in Antitrust Litigation' (2020). USC Legal Studies Research Papers Series No. 20-12 (2020). 1.
[248] P. Bolton and P. Aghion, 'Contracts as Barriers to Entry' (1987) 77(3) The American Economic Review 388; E. B. Rasmusen, J. M. Ramseyer and Wiley, John S. Jr. 'Naked Exclusion' (1991) 81 American Economic Review 1137; P. DeGraba, 'Naked exclusion by a dominant input supplier: Exclusive contracting and loyalty discounts' (2013) 31(5) International Journal of Industrial Organization 516.
[249] Brodley and Hay (n 237), 745. B. S. Yamey, 'Predatory Price Cutting: Notes and Comments' (1972) 15(1) The Journal of Law and Economics 129 134–135; Brodley and Hay (n 237), 744–746; 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.D
[250] For the proposition that less-efficient competitors may impose important constraints on the market power of monopolistic firms and thus benefit consumers Salop (n 243), 414–415. S. C. Salop, 'Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard' (2006) 73 Antitrust Law Journal 311 328–329. This has been recognised by the Court of Justice in *Case C-23/14 Post Danmark II* (n 233) paras. 59-60.

yardstick to determine when aggressive pricing amounts to anticompetitive conduct. On the contrary, its under-inclusiveness is one of the sources of its success. Scholars and courts alike have embraced the incremental price-cost test precisely because it errs in the case of doubt in favour of the monopolist[251] and makes it very difficult,[252] if not impossible, for plaintiffs to prove anticompetitive pricing conduct. This under-inclusiveness is informed by the Chicagoan error cost framework which assumes that the costs of state interference with the economic liberty of dominant firms to set prices are generally high.[253] Not only does the incremental price-cost allow judges easily to discern when unilateral firm conduct is a legitimate exercise of entrepreneurial liberty from situations in which it unduly interferes with the negative liberty of other market participants;[254] but it also constitutes an effective tool to insulate the negative economic liberty of dominant firms to the largest extent possible from antitrust scrutiny.

In protecting above all the negative liberty of dominant firms, the as-efficient competitor has important distributive consequences. It prevents antitrust law from securing the economic liberty and equality of opportunity of competitors in a way that not only fails to protect less, but also equally efficient competitors. The incremental price-cost test is hence ineffective in preserving any meaningful equality of opportunity amongst market players. In highly concentrated markets with high entry barriers, it may also have adverse distributive implications for consumers, as it fails to preserve the competitive constraints that even less efficient rivals impose on dominant firms' pricing conduct.

5.3 Potential alternatives to the as-efficient competitor test

The under-inclusiveness of the incremental price-cost test suggests that overhauling or discarding the as-efficient competitor test may constitute a promising avenue to move away from a laissez-faire antitrust approach grounded in negative liberty and to realign competition law with a more republican approach that protects the equality of opportunity of competitors and, thereby, also contributes to greater distributive equality in the interest of consumers. To this end, competition authorities and courts could consider several non-cost-based tests for exclusionary pricing that have been proposed by various economists[255] as alternatives to overcome the under-inclusiveness of the incremental and other price-cost tests. These non-cost-based tests may outperform price-cost tests in securing resilient and broad-based economic opportunities of competitors and at the same time combat the distributive effects of monopoly.[256]

A promising example for such non-cost-based tests has been proposed by Edlin. With a view to addressing above-cost exclusionary (limit) pricing, [257] Edlin advocates a test that would prohibit an incumbent dominant firm with significant incumbency advantages from responding to entry by offering substantial price cuts (i) until the entrant has benefitted from a reasonable time to recover its entry cost and achieve viable scale or (ii) until its share has increased to the extent that the dominant position of the incumbent has been eroded.[258] This standard ensures that incumbents, to make entry unattractive for competitors, will have a continuous incentive to price very low prior to any entry instead of cutting prices only periodically in response to entry. The test thus safeguards incumbents' incentive to consistently set low prices and, thereby,

[251] Areeda and Turner (n 180), 707–709.
[252] *Brooke Group v. Brown & Williamson Tobacco Corp.* (n 231) 226.
[253] Bork (n 5) 157.Posner (n 5) 214.
[254] Areeda and Turner (n 180), 704–711.
[255] Williamson (n 238), 331–337; Baumol (n 238), 4–6; Scherer (n 238), 890; Brodley and Hay (n 237), 763 ff.
[256] Williamson (n 238), 331–337.
[257] Edlin (n 245), 947, 960, 964-966; S. C. Salop, 'Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard' (2006) 73 Antitrust Law Journal 311 328.
[258] Edlin (n 245), 945.

benefits consumers. At the same time, the test protects competitors whose competition will impose important constraints on the market power of the incumbent.[259]

This example shows that the as-efficient competitor test is not without any alternative. Replacing the as-efficient competitor with a non-cost-based test may constitute a promising avenue to reconcile the equality of opportunity of competitors and greater distributive equality for consumers by creating a win-win situation for both groups. The proposed application of an alternative non-cost-based test to exclusionary pricing conduct by incumbents could also be combined with the recalibration of the error-cost framework proposed as a first avenue to incorporate equality considerations into competition law. The use of non-cost-based tests could be limited to type 2 markets, say highly concentrated markets that have been controlled historically by a monopolistic incumbent with incumbency advantages or markets in which market power effects will hit lower-income consumers particularly hard. In these type 2 error markets, additional competition even of less efficient competitors may bring most benefits for consumers by spurring innovation, eroding monopoly profits, and securing a fairer distribution of economic opportunities and resources.[260] In other words, both the costs of type 2 errors and the accuracy benefits of antitrust intervention tend to be high. In these markets, protecting competitors and competition is not an oxymoron. By contrast, adhering to the lopsided laissez-faire error-cost framework encoded in the as-efficient competitor test prevents competition law from protecting competition in exactly those markets where it is most needed and will have arguably the most significant distributive impact. This policy choice is not irreversible. Giving up the as-efficient competitor test in favour of a non-cost-based test for exclusionary pricing may constitute a promising way to recalibrate antitrust law towards a more republican and egalitarian approach that ensures the economic liberty of competitors and consumers as equal freedom.

6 Rethinking hierarchy: vertical restraints in the digital economy

A third pathway to recalibrate the enforcement of competition law with the aim of greater equality of opportunity and wealth would consist of rethinking contractual hierarchies.[261] More specifically, this avenue proposes to revisit the conventional wisdom initially coined by Chicago scholars that vertical restraints are, for the most part, pro-competitive. Reconsidering the analysis of vertical restraints is of particular relevance for the online distribution and e-commerce sector, where the proliferation of vertical price and non-price restraints may have adverse distributive effects for both independent retailers and consumers alike.

6.1 The genesis of the modern analysis of vertical restraints: from domination to the internalisation of transaction costs

Vertically restraints have been historically met with a healthy dose of hostility by republican antitrust law in the US and in Europe. Early US and EU case law rested on the concern that vertical restraints undermine independent dealer's freedom as non-domination and equal status by subjecting them to illegitimate forms of subordination and hierarchies.[262] From the late 1960s onwards, this hostile approach towards vertical restraints has been incrementally dislodged by the Chicago School analysis of vertical restraints. Drawing on transaction cost

[259] ibid 946.
[260] Edlin (n 245), 947, 960, 964-966; Salop (n 257), 328.
[261] For the notion of contractual hierarchies, O. E. Williamson, 'Markets and Hierarchies: Some Elementary Considerations' (1973) 63(2) The American Economic Review 316.
[262] *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (n 128) 403, for a full discussion 403-406. See also *White Motor Co. v. United States* 372 U.S. 253 (1963) Justice Brennan concurring, 264; *Case 56/64 Consten and Grundig v Commission of the EEC* (n 134) pp. 309, 339-340, 342, 346. n'

theory,[263] Chicago Scholars contended that most of the time vertical restraints are an efficient tool for manufacturers or brand owners to reduce transaction costs, as they enable them to internalise vertical and horizontal externalities and collective action problems, such as double-marginalisation or free-riding, within their distribution networks. [264]

The Chicagoan transaction cost and free-rider rationale of vertical restraints have been fully embraced by US antitrust law.[265] The free-rider rationale also informed the recalibration of the EU competition policy towards vertical agreements,[266] although the EU has never converged towards a rule of reason approach towards all vertical restraints to the extent US antitrust did after *Leegin*.[267] The adverse effect of vertical restraints on the economic liberty and opportunities of independent dealers plays, if any, only a marginal role in the post-Chicago analysis of vertical restraints.[268] Rather, the free-rider doctrine recasts the once celebrated independent businessman who seeks to reap benefit from various opportunities to arbitrage as a parasite who unduly enriches himself by appropriating the investments of others. The free-rider account is hence yet another example of how the Chicago School relied on distributive claims to devise a powerful narrative that legitimises the exercise of vertical domination and subordination that appeared previously antithetical to the egalitarian ideal of economic liberty underpinning republican antitrust.[269]

Reconsidering the lenient approach towards vertical agreements advocated by the Chicago School may constitute a third avenue through which competition policy could reincorporate equality considerations. This proposal is of particular relevance in light of the transformation of value creation and the distribution of products and services brought about by the rise of the digital economy. Not only do online sales play an increasingly important role as a distribution channel, but value creation and extraction in online distribution are also organised in an increasingly hierarchical manner. This proliferation of vertical restraints in online distribution constitutes one example of how vertical restraints may impair the equality of opportunity between small and large retailers, as well as retailers and brand-owners and thereby have an adverse distributive incidence on consumers and retailers.[270]

Over the last two decades, brand owners have resorted to various types of vertical restraints to control and restrict how independent retailers distribute their brands online. In some cases, brand-owners imposed complete internet sale bans whereby retailers are by contract or *de facto* prevented from selling products via their own online stores.[271] In other instances, the vertical restraints took the form of selective or partial online sales bans prohibiting retailers from selling their products through certain online sales channels, in particular third-party websites or market places, such as e-Bay or Amazon.[272] Manufacturers also imposed vertical

[263] Coase, R. H. 'The nature of the firm' (1937) 4(16) Economica 386; Coase (n 187).
[264] L. G. Telser, 'Why Should Manufacturers Want Fair Trade' (1960) 3 Journal of Law and Economics 86; Bork (n 5) 226-232, 270-279290-298; R. H. Bork, 'Robert Bork, Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception' (1954) 22(1) University of Chicago Law Review 157.
[265] *Cont'l T.V. v. GTE Sylvania* 433 U.S. 36 (1978); *State Oil Co. v. Khan* 522 U.S. 3 (1997); *Leegin Creative Leather Prods. v. PSKS, Inc.* 551 U.S. 877 (2007).
[266] *Case 26/76 Metro v Commission* ECLI:EU:C:1977:167. Commission Green Paper on Vertical Restraints in EC Competition Policy. COM (96) 721; 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; Commission notice - Guidelines on Vertical Restraints. OJ [2000] C 291/1.
[267] See however Guidelines on Vertical Restraints, Guidelines on Vertical Restraints. OJ [2010] C 130/01 para. 225.
[268] See however, R. J. Peritz, 'A Genealogy of Vertical Restraints Doctrine' (1988) 40 Hastings L. J. 511; J. J. Flynn and J. F. Ponsoldt, 'Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes' (1987) 62 New York University Law Review 1125.
[269] 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. 936 945.
[270] Final report on the E-commerce Sector Inquiry - Staff Working Document. SWD(2017) 154 final.
[271] *Case C-439/09 Pierre Fabre Dermo-Cosmétique* (n 134); Case COMP/AT. 40436 Ancillary Sports Merchandise (Nike). C(2019) 2172 final para. 52; Case COMP/AT.40428 Guess, Guess. C(2018) 8455 final paras. 53-63; *Ping Europe Ltd v Competition and Markets Authority* [2020] EWCA Civ 13.
[272] *Urteil vom 25.11.2009 - 6 U 47/08 Kart; Urteil vom 19.09.2013 - 2 U 8/09 Kart.* B2-98/11 - Asics, Asics para. 67; *Urteil vom 12.07.2018* 11 U 96/14 (Kart); *Case C-230/16 Coty Germany* ECLI:EU:C:2017:941.

pricing (for instance, in the form of retail price maintenance[273]) and non-price restraints restricting the ability of independent retailers to sell their products outside their assigned sales territory[274] or to use specific forms of keyword advertising[275] or price comparison websites[276] to promote their products.

6.2 The adverse distributive effects of online restraints on consumers

From a Chicagoan perspective, few, if any, of these vertical restraints should raise antitrust concerns, as they can be presumed on balance to be pro-competitive. A first problem with such a lenient approach towards vertical online restraints is that it tends to obfuscate their adverse distributive impact on consumers. The advent of digital technologies and e-commerce has contributed to a steep reduction in information and search costs for consumers. At the same time, it has also led to an expansion of geographic markets in which online retailers compete for the same consumers. By dramatically reducing transaction costs, the rise of e-commerce thus has considerably intensified competition to the benefit of consumer welfare. By contrast, price and non-price restrictions on online sales and advertising introduce significant search frictions. They reduce consumers' ability to engage in *inter*-store price comparison. This may dampen both *intra*- and *inter*-brand price competition.[277] In case vertical restrictions also constrain how multi-brand dealers sell and advertise their products on the internet, the ability of consumers to carry out meaningful *inter*-brand price and quality comparisons within a single shop is likely to suffer, too.[278] By curtailing consumers' ability to engage in price and non-price comparisons, vertical online restraints may reduce consumer welfare.

This adverse effect of vertical online restraints on consumer welfare is unlikely to be fully alleviated by efficiencies resulting from the internalisation of free-riding issues. Calls for a broad, indiscriminate application of the free-rider justification to all types of vertical online restraints disregard that vertical restraints are only necessary to internalise free-riding in a limited number of cases where dealers provide additional pre-sales services that cannot be priced separately.[279] Yet, in many cases, retailers do not offer additional sales promotion services online to the extent they do through their physical sales channels. Unlike in the brick-and-mortar environment, customers can also be charged individually for additional pre-sales services, such as product-specific advice.[280] The free-riding explanation hence carries less weight in the online than in the offline world.

The Chicago School wisdom that the incentives of manufacturers and consumers tend to be aligned and that vertical restraints tend to enhance consumer welfare also fails to acknowledge the heterogeneity of consumers which might be particularly important in online markets. Vertical restraints do not necessarily enhance consumer welfare if, for instance, a majority of infra-marginal consumers already know the product and prefer to purchase it at a lower price without receiving additional services.[281] This observation is particularly relevant in the context of online sales. Consumers shopping online tend to be increasingly tech- and information-savvy, using the various e-commerce channels to find the best deal for a product

[273] Case COMP/40.469 Denon & Marantz; Case COMP/40182 Pioneer.Case COMP/40.465 ASUS; Case COMP/40181 Philips. Case COMP/AT.40428 Guess (n 271) paras. 84-88.
[274] Case COMP/AT. 40432 Character merchandise (Sanrio). C(2019) 5087 final, para. 36-44; Case COMP/AT. 40436 Ancillary Sports Merchandise (Nike) (n 271) paras. 44-51; Case COMP/AT.40428 Guess (n 271) paras. 79-83.
[275] Case COMP/AT.40428 Guess (n 271) para. 45, see also paras. 40-52; B2-98/11 - Asics (n 272) para. 70.
[276] B2-98/11 - Asics (n 272).
[277] R. L. Steiner, 'The Nature of Vertical Restraints' (1985) 30 Antitrust Bulletin 143 146, 190.
[278] ibid 183.
[279] F. M. Scherer, 'The Economics of Vertical Restraints' (1983) 52 Antitrust L.J. 687 690–697. W. S. Commanor, 'The Two Economics of Vertical Restraints' (1992) 21 Southwestern University Law Review 1269 1269–1272.
[280] Guidelines on Vertical Restraints (n 267) para. 107 (b).
[281] Scherer (n 279), 699–704; W. S. Commanor, 'Vertical Price-Fixing, Vertical Market Restrictions and the New Antitrust Policy' (1985) 98 Harvard Law Review 98 990–999.

that they know quite well.[282] Many online shoppers are, hence, exactly the type of infra-marginal consumers who do not necessarily value additional sales services or require a certification of the quality and style of the products they purchase. In case the harm inflicted by vertical restraints on these infra-marginal consumers outweighs the benefit that marginal consumers draw from the additional sales services or quality certification ensured through the prevention of free-riding, vertical online restraints will reduce aggregate consumer surplus.

The distributional effects of vertical online restraints are particularly acute if the infra-marginal consumers are less willing to pay for additional services or quality certification exactly because they are less affluent and, hence, face greater budgetary constraints than the less price-sensitive marginal consumer who values additional sales services or quality certification. Vertical restraints may have even greater distributive effects if the search frictions they create prevent vulnerable consumers, who are subject to cognitive biases and find it more challenging to engage with markets, from finding a better-priced product.[283] A broad reliance on the free-rider doctrine may thus increase wealth inequalities by condoning vertical restraints that entail wealth transfers from consumers to large brands and disproportionately affect low-income or vulnerable consumers.

6.3 The adverse effects of online restraints on the equality of opportunity of independent retailers

Vertical online restraints, however, may not only lead to adverse distributive effects for consumers due to greater surplus extraction on the part of manufacturers and retailers. The thrust of vertical online restraints is to restrict retailers' liberty to choose through which sales channels they wish to sell. They thus considerably curtail retailers' opportunity to draw benefits from the various forms of online distribution. The proliferation of vertical online restraints puts notably smaller retailers at a competitive disadvantage by depriving them of distribution channels and methods that are less costly than offline distribution.[284] Online distribution channels are not only considerably cheaper than the distribution through physical shops (or carefully designed electronic shop windows), but they also ensure greater reach, visibility and 'findability'[285] of small and medium-size retailers.[286] Vertical online restraints thus, at the same time, restrict the economic liberty and undermine the equality of opportunity of small and medium-size distributors as they significantly curtail retailers' ability to effectively use the internet as a sales channel.[287] By contrast, large-scale retailers who are able to invest in physical sales points with larger geographical reach or large online stores and who, due to their greater notoriety, are more likely to be found by online customers often benefit from vertical online restraints.[288] Vertical online restraints thus allow brand-owners and large retailers to share supra-competitive rents at the expense of smaller retailers.

Aside from entrenching the market position of large retailers, vertical online restraints also often benefit the sales channels owned by brand-owners themselves. This is notably the case in the context of dual distribution, where brand owners distribute their products through a selective distribution system of independent retailers and, at the same time, also operate their own online shop.[289] By restricting or barring retailers entirely from using (certain) online sales

[282] Online sales ban in the golf equipment sector (Ping). Case 50230 3.54.
[283] See in this respect Competition and Markets Authority, 'Tackling the loyalty penalty' (2018) <https://www.gov.uk/government/publications/tackling-the-loyalty-penalty/tackling-the-loyalty-penalty>.
[284] A. Ezrachi, 'The Ripple Effects of Online Marketplace Bans' (2017) 40(1) World Competition 47 50, 61-62.
[285] Case COMP/AT.40428 Guess (n 271) paras. 120-121.
[286] B3-137/12 - adidas 4–5. B2-98/11 - Asics (n 272) paras. 41-43, 87, 253-255, 307, 315-318, 323.
[287] ibid paras. 29-30, 41,87, 253-254, 272-273, 307, 312-219, 327-328. Case COMP/AT.40428 Guess (n 271) paras. 120-121, 124-125, 157.
[288] B2-98/11 - Asics (n 272) para. 42.
[289] *Urteil vom 25.11.2009 - 6 U 47/08 Kart* (n 272); *Urteil vom 19.09.2013 - 2 U 8/09 Kart* (n 272); B3-137/12 - adidas (n 286); B2-98/11 - Asics (n 272); Case COMP/AT.40428 Guess (n 271). See for a similar issue in the offline environment Decision 20-D-04 of 16 March 2020 regarding practices implemented in the Apple products distribution sector (English version), paras. 58-59.

and advertising channels, these brand owners are able to demote the visibility of their retailers online, while ensuring increased visibility to their own websites. This secures the brand-owned online shop a substantial competitive advantage over its *intra*-brand competitors.[290] In the context of dual distribution models, vertical restraints may thus give rise to some form of 'reverse free-riding problem'. For they allow the brand owner to take a free ride on the investments of its distributors in their promotional services and sales infrastructure through the offline channel, while reserving the most profitable online sales channels to its own online store without offering comparable offline sales services. [291]

Vertical online restraints thus do not only entail undesired distributive effects by leading to greater surplus extraction but, by undermining equality of opportunity amongst retailers and manufacturers, they also generate an unequal distribution of this extracted surplus to the benefit of the larger members of the distribution system and brand owners. An overly lenient antitrust approach, which treats vertical online restraints as pro-competitive forms of contractual integration that overcome transaction costs and free-rider problems, is liable to adversely affect both the procedural and distributive dimension of equality that the republican approach associated with competitive markets. To revitalize both dimensions of equality, a stricter approach towards online vertical restraints is warranted, and the free-rider issues should be attributed less weight than suggested by Chicago and neo-Chicago Scholars.

The EU Commission and the Court have maintained such a strict, by-object approach towards online RPM, [292] territorial restrictions (on passive and, in selective distribution agreements, active sales), [293] advertising restrictions,[294] as well as total bans on online sales.[295] Yet, the Court of Justice has recently adopted a more welcoming approach towards partial online sales via third-party websites, provided they are proportionate and necessary to protect the luxury image of the product at issue.[296] The European Commission also appears to inch towards this more lenient approach towards online restraints as part of the ongoing reform of the General Block Exemption Regulation (VBER)[297] and the Vertical Guidelines (VGL)[298]. The Commission's draft VBER[299] and VGL proposals not only codify the *Coty* ruling[300] but also drop the so-called 'equivalence principle', which required brand owners not to impose conditions on online sales channels that are less favourable than those imposed on offline sales channels.[301]

The proposed reform of the EU approach towards vertical restraints thus marks a partial rupture from a long-standing policy that sought to enable consumers and competitors alike to

[290] B2-98/11 - Asics (n 272) paras. 253 - 262, 307, 309-314; Case COMP/AT.40428 Guess (n 271) paras. 120-121.
[291] B3-137/12 - adidas (n 286) 6.B2-98/11 - Asics (n 272) paras. 42, 84.
[292] Case COMP/40.469 Denon & Marantz (n 273); Case COMP/40182 Pioneer (n 273).Case COMP/40.465 ASUS (n 273); Case COMP/40181 Philips (n 273). Case COMP/AT.40428 Guess (n 271) paras. 84-88.
[293] Case COMP/AT. 40432 Character merchandise (Sanrio) (n 274) para. 36-44; Case COMP/AT. 40436 Ancillary Sports Merchandise (Nike) (n 271) paras. 44-51; Case COMP/AT.40428 Guess (n 271) paras. 79-83.
[294] Case COMP/AT.40428 Guess (n 271).
[295] *Case C-439/09 Pierre Fabre Dermo-Cosmétique* (n 134); Case COMP/AT. 40436 Ancillary Sports Merchandise (Nike) (n 271) para. 52; Case COMP/AT.40428 Guess (n 271) paras. 53-63; *Ping Europe Ltd v Competition and Markets Authority* (n 271).
[296] *Case C-230/16 Coty Germany* (n 272).
[297] Commission Regulation (EU) No 330/2010 of 20 April 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 [2010] OJ, L 102/1 2010. O.J. L 102/1.
[298] Guidelines on Vertical Restraints (n 267).
[299] Annex to a Communication from the Commission - Approval of the content of a draft for a Commission Regulation 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. C(2021) 5026 final Annex.
[300] See in particular, Annex to the Communication from the Commission - Approval of the content of a draft for a Communication from the Commission - Commission Notice - Guidelines on vertical restraints, Draft Revised Vertical Guidelines. C(2021) 5038 final Annex paras. 313-332.
[301] Guidelines on Vertical Restraints (n 267) para. 56. Annex to the Communication from the Commission - Approval of the content of a draft for a Communication from the Commission - Commission Notice - Guidelines on vertical restraints (n 300) para. 221, see also paras. 156, 194-196. Revision of the Vertical Block Exemption Regulation -Explanatory note, Revision of the Vertical Block Exemption Regulation - Explanatory note 4–5.

draw benefits from the rise of the digital economy and e-commerce which harbour the promise of new economic opportunities. This shift towards a more lenient approach towards online restraints may considerably weaken the capacity of EU competition law to both promote greater distributional equality by protecting consumers against wealth transfers and greater procedural equality by securing the economic opportunities of small and medium-sized retailers. To enhance equality of opportunity and distributive equality, a stricter approach towards vertical online restraints would be warranted to ensure that consumers and small and medium-sized enterprises alike can harness the new competitive opportunities and advances brought about by the rise of the digital economy. It would thus guarantee that the benefits of economic growth and opportunities brought about by the rise of e-commerce are reaped by consumers and small- and medium-sized entrepreneurs, rather than being fully appropriated by large brand owners and online platforms.

7 Conclusion

Against the backdrop of rising levels of industry concentration, mark-ups and inequality, this chapter contributes to the growing literature on competition, competition law and (in)equality by shedding light on the conceptual foundations of the relationship between competitive markets and equality. In so doing, the chapter makes four contributions to the literature.

First, the chapter unearths the intellectual history of the relationship between equality and competition in the early liberal economic and political thought about markets. It shows that early proponents of competitive markets, such as the English Levellers, Montesquieu, James Steuart, and Adam Smith, celebrated the emergence of competitive markets because of their conduciveness towards greater socio-economic and political equality. Indeed, these early political economists assumed that competition promotes two closely intertwined and, in their view, complementary dimensions of equality: namely, a procedural form of equality of opportunity and a substantive notion of distributive equality of wealth. The chapter shows that this egalitarian understanding of competitive markets was deeply rooted in a republican notion of economic liberty as non-domination and independence.

Second, the chapter traces how this egalitarian and republican understanding of economic liberty coined by the early proponents of competitive markets shaped the formative era of US antitrust and the Ordoliberal foundations of EU competition law. The chapter argues that the idea that competition by promoting an egalitarian form of economic liberty constitutes a central institutional building-block of a republican society and polity of free and equals had an important bearing on early antitrust movements on both sides of the Atlantic. A common feature of these 'republican antitrust' paradigms was that they saw the preservation of equality of opportunity of independent competitors as a central mandate of competition law. In a similar vein as the early proponents of competitive markets, the republican antitrust paradigms adhered to the belief that competition law through the promotion of equality of opportunity and the prevention of excessive concentration of corporate power would also contribute to greater distributive equality of wealth in the interests of consumers. In short, republican antitrust paradigms assumed that competition law by focusing on equality of opportunity as *equalisandum* would also promote greater equality of wealth as a by-product.

Third, the chapter describes how the rise of the Chicago School and consumer welfare standard replaced this republican understanding of economic liberty with a narrow negative understanding of economic liberty that is largely agnostic about inequalities of economic opportunities, power, and wealth. The chapter dissects how the purportedly ideologically neutral consumer welfare standard and the endorsement of a lopsided understanding of error

costs lay the groundwork for a 'laissez-faire antitrust' approach that is primarily concerned with protecting the negative entrepreneurial liberty of large firms from state interference. This laissez-faire approach has for a long time banned considerations about equality of opportunity of competitors and the distributive incidence of economic concentration from the realm of modern antitrust policy.

Fourth, in light of the trend towards greater industry concentration, corporate power and inequality, the chapter asks whether this shift from a republican to a laissez-faire antitrust approach is reversible. It explores three pragmatic avenues to realign antitrust law with the republican ideal of economic liberty with a view to reintegrating concerns about equality of opportunity and distributive equality into competition law analysis. As a first avenue, it proposes a recalibration of the Chicagoan error-cost framework to account for the distributive incidence of market power on low-income or vulnerable consumers as type 2 error costs or 'accuracy benefits' in the design of evidentiary standards. As a second avenue, the chapter calls for a critical rethink of the as-efficient competitor test, which has entrenched an under-inclusive definition of exclusionary conduct and equality of opportunity antitrust law is supposed to prevent and to protect. As a third avenue, the chapter proposes a critical rethink of hierarchies constructed by vertical restraints. It argues that the current surge in vertical online distribution restraints is liable to have adverse distributive effects on both smaller, independent online retailers and consumers.

The main takeaway of this chapter is that equality of opportunity and wealth played for centuries a central role in the liberal thought about competitive markets and the design of US and EU competition law. It also shows that the fact that this is no longer the case is ultimately a political or ideological choice which is all too often couched in the purportedly neutral concepts of the consumer welfare standard and error costs. This choice, the chapter also asserts, is not irreversible. This said, some caveats are in order. While current studies are indicating a greater trend towards concentration, profitability and inequality, the causes and interplay of these phenomena are not yet fully understood.[302] Nor is there a consensus on the distributive effects of monopoly power in general and certain business practices in particular.[303] Normatively attractive though it is, the republican idea that competition law should promote equality came under assault and has been dislodged by the Chicagoan version of a laissez-faire approach for specific reasons. More empirical, economic, and legal research is necessary to eschew the aberrations of the republican approach lest antitrust go anew to war with itself.

[302] Autor and others (n 4); Werden and Froeb (n 3).
[303] Crane (n 6).