

## Introduction

‘Government of the people, by the people, for the people.’<sup>1</sup> At a time when the American nation was torn by the deep divisions of a haemorrhagic civil war, the sixteenth president of the United States of America, Abraham Lincoln, with these solemn words evoked democracy as the unifying political future for the United States. Lincoln’s *Gettysburg Address* coined the triad of ‘government of, by and for the people’, which has since become deeply engrained in the political creed of liberal democracies.

On a chilly Saturday in October 2016, at the peak of the campaign for the US presidential elections, the then presidential candidate Donald Trump visited Gettysburg. On the same ‘hallowed grounds’<sup>2</sup> of the battlefield of Gettysburg, 153 years after Lincoln uttered his famed definition of democracy, Donald Trump lamented that Lincoln’s vision of American democracy was in tatters. He painted a dystopian picture of America as a deeply ‘divided nation’ whose democratic and economic ‘system is totally rigged and broken’. Trump blamed a ‘power structure’ that was epitomised in the upsurge of industry concentration in the US economy as one of the reasons for the woes of America’s political and economic system. He also lambasted several recent mergers for unifying ‘far too much power in one massive entity’ and ‘destroy[ing] democracy’.

It is certainly not a historical coincidence that Donald Trump chose the symbolic venue of Lincoln’s *Gettysburg Address* to bemoan the alleged decline of the US political and economic system. Nor is it a coincidence that he mentioned the demise of democracy in the same breath as waning market competition caused by the combination of economic power in the hands of a few. On the contrary, the view

<sup>1</sup> The quotation is based on the reproduction of Lincoln’s Gettysburg Address in RD Heffner (ed), *A Documentary History of the United States* (New York: Penguin 2013) 210.

<sup>2</sup> All quotations in this paragraph are based on CNN, ‘Trump Speaks in Pennsylvania; Examining Proposed Actions in First 100 Days of Trump Administration: Unofficial Transcript’ (22 October 2016) <http://transcripts.cnn.com>.

that the excessive concentration of private economic power is inimical and competition conducive to democracy has over the last century become a basic tenet of the self-understanding of US democracy. This idea of a symbiotic relationship between competition and democracy – which I will call the ‘competition–democracy nexus’<sup>3</sup> – is deeply rooted in the US antitrust law tradition.<sup>4</sup> It was first aired by congressmen during the legislative debates that preceded the enactment of the Sherman Act as the first federal antitrust law in the United States in 1890.<sup>5</sup> Today, the proposition that the concentration of economic power is detrimental and competition is conducive to democracy is widely shared across the political spectrum. Hence, it comes as little surprise that Trump’s successor as US President, Joe Biden, as well as a number of high-level politicians within the Democratic Party,<sup>6</sup> have recently reaffirmed that competition is ‘conducive to the preservation of our democratic political and social institutions’<sup>7</sup> and warned that ‘excessive market concentration threatens basic economic liberties [and] democratic accountability’<sup>8</sup> to garner support for a more vigorous enforcement of US antitrust law.

The idea of a competition–democracy nexus is, however, not a uniquely American invention. In Europe, policy-makers also habitually entertain the belief that there is a positive relationship between competitive markets and democracy. For instance, references to this link permeate the speeches of Margrethe Vestager, European Commissioner for Competition. According to Vestager, ‘a fair market place is part of the democracy’<sup>9</sup> and, consequently, European competition policy protects ‘ultimately plurality and democracy’.<sup>10</sup> In the same vein, the General Court of the European Union and the European Commission assert that competition law can ‘contribute to achieving objectives that go beyond consumer welfare, such as plurality in a democratic society’.<sup>11</sup> Similar to the United States, the proposition that

<sup>3</sup> This term was first coined by E. Deutscher and S. Makris, ‘Exploring the Ordoliberal Paradigm: The Competition–Democracy Nexus’ (2016) 11(2) *Competition Law Review* 181.

<sup>4</sup> RJ Peritz, *Competition Policy in America: History, Rhetoric, Law* (New York: Oxford University Press 2000).

<sup>5</sup> 20 Cong Rec 2455 (1890) 2458.

<sup>6</sup> E Warren, ‘Break Up Big Tech’ (24 April 2020) <https://2020.elizabethwarren.com>; A Klobuchar, *Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age* (New York: Alfred A. Knopf 2021).

<sup>7</sup> Executive Order on Promoting Competition in the American Economy 9 July 2021, Executive Order 14036 s. 2; *Northern Pacific Ry. Co. v United States* 356 US 1 (1958) 4.

<sup>8</sup> Executive Order on Promoting Competition in the American Economy (n 7) s. 1.

<sup>9</sup> M Vestager, ‘Remarks by Executive Vice-President Vestager for the Political Agreement on the Digital Markets Act’ (25 March 2022) SPEECH/22/2042.

<sup>10</sup> M Vestager, ‘Keynote of EVP Vestager at the European Competition Law Tuesdays: A Principles Based Approach to Competition Policy’ (25 October 2022) SPEECH/22/6393.

<sup>11</sup> European Commission, Amendments to the Communication from the Commission Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. C(2023) 1923 final, para. 1. See also to this effect, Case T-604/18 *Google and Alphabet v Commission* (*Google Android*) ECLI:EU:T:2022:541, para. 1028.

competition and competition law play an important role for democracy also has a long tradition in Europe. As early as in the first decades of the twentieth century, in light of the rise of the German Nazi Regime and the fall of the Weimar Republic, a group of scholars at the University of Freiburg, the so-called Ordoliberal or Freiburg School, warned that the destruction of competition by industrial concentration and cartelisation ultimately undermines democracy. This Ordoliberal idea that competition contributes to the preservation of democracy has become a recurrent theme in the academic, legal, and political discourse about European competition law.<sup>12</sup>

Recent iterations of the claim of a competition–democracy nexus have not only shed light on its long-standing status as a fundamental predisposition – if not a foundational myth – of competition law in the United States and in Europe but also highlight its ongoing saliency. The claim that the concentration of economic power poses a threat to democracy has again moved centre stage as a result of growing societal and political concerns over the unprecedented level of industry concentration in the United States and, albeit to a lesser extent, in the European economy.<sup>13</sup> Soaring levels of industry concentration – epitomised by the rise of a few digital platforms, such as Google, Facebook, Amazon, or Apple – are increasingly perceived as a cause of growing economic inequalities, waning productivity, and lack of competition.<sup>14</sup> Not least the deeply perturbing images of the assault of the US Capitol, one of the hallmarks of liberal democracy, incited by misinformation ventilated over social media platforms raise fundamental questions about the political risks that the concentration of private economic power poses to our liberal and democratic societies. The events of Epiphany 2021 also have their own irony. The very same amalgamated power that Donald Trump singled out in his Gettysburg speech as a threat to democracy eventually acted as an amplifier of his inflammatory comments and speeches that pushed US democracy closer to the precipice.

The implications of this re-emerging debate about the adverse effects of concentrated economic power on democracy go beyond the challenges that the digital economy poses to competition law and policy. Growing economic, societal, and political concerns over excessive levels of industry concentration have triggered a

<sup>12</sup> See, for instance, G Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Oxford: Hart 1997); DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford/New York: Clarendon Press/Oxford University Press 1998).

<sup>13</sup> See, for instance, M Bajgar et al, 'Industry Concentration in Europe and North America' (OECD Productivity Working Papers 18 2019); 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; T Philippon, *The Great Reversal: How America Gave Up on Free Markets* (Cambridge, MA: Harvard University Press 2019); Gábor Koltay, Szabolcs Lorincz, Tommaso Valletti, 'Concentration and Competition: Evidence From Europe and Implications For Policy' (2023) 19(3) *Journal of Competition Law & Economics* 466.

<sup>14</sup> See, for instance, J Furman and P Orszag, 'Slower Productivity and Higher Inequality: Are They Related?' (2018) Working Paper 18-4; de Loecker, Eeckhout and Unger (n 13).

fundamental reconfiguration of competition law and policy on both sides of the Atlantic. The consensus view that the sole purpose of competition law is to ensure that markets offer consumers access to products and services at the lowest possible price (the so-called consumer welfare standard) is increasingly under attack.<sup>15</sup> There is a growing appreciation on both sides of the Atlantic that competition law and policy have not only an economic but also a social and political function.<sup>16</sup> The protagonists of a new antimonopoly movement call for more rigorous enforcement of competition law, not only to protect consumers but also to impose checks on the power of corporate behemoths lest they endanger democracy.<sup>17</sup> The proposition that competition law constitutes a suitable tool to rein in and impose democratic checks on private economic power is no longer only shared among a marginal fringe of critical competition scholars and political activists.<sup>18</sup> On the contrary, the idea of a competition–democracy nexus is about to become common currency in academic conferences and the hallways of competition law agencies on both sides of the Atlantic. The resurfacing of the idea of a competition–democracy nexus has set in motion an incremental tectonic shift that is about to redefine the fundamentals of competition law.

Despite its long history and sudden renaissance, the thesis that the preservation of competitive markets through competition law is conducive to democracy is anything but well understood. To date, little effort has been made to provide a conceptually sound explanation as to why the concentration of economic power is detrimental and competition is conducive to democracy. Neither do policy-makers and academics explain how the rules prohibiting cartels, abuses of monopoly power, and anti-competitive mergers in US antitrust and EU competition law promote democracy. Instead, the idea of a competition–democracy nexus is increasingly repeated like a mantra that does not call for any further explanation. It is thus frequently treated as if it were a fundamental axiom or a prior belief of competition law that can be simply assumed to be true.

This lack of serious engagement with and patchy understanding of the idea of a competition–democracy nexus is problematic on a number of counts. Above all, the

<sup>15</sup> H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge, MA: Harvard University Press 2005) 1.

<sup>16</sup> See, for instance, H First and S Weber Waller, 'Antitrust's Democracy Deficit' (2013) 81(5) *Fordham Law Review* 2543; S Weber Waller, 'Antitrust and Democracy' (2019) 46(4) *Florida State University Law Review* 806; EM Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) *Legal Issues of Economic Integration* 317; DA Crane, 'Antitrust and Democracy: A Case Study from German Fascism' (2018) University of Michigan Law & Econ Research Paper No 18-009.

<sup>17</sup> L Khan, 'Amazon's Antitrust Paradox' (2017) 126(3) *Yale Law Journal* 710; T Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports 2018).

<sup>18</sup> BC Lynn, *Liberty from All Masters: The New American Autocracy vs. the Will of the People* (New York: St. Martin's Press 2020); M Stoller, *Goliath: The 100-Year War between Monopoly Power and Democracy* (New York: Simon & Schuster 2019).

superficial understanding of the competition–democracy nexus is unsatisfactory from an intellectual point of view. It is indeed anything but obvious that there should be a direct relationship between competitive markets, their protection through competition law, and a democratic societal or political order. Furthermore, neoclassical economic theory, as the predominant epistemological tool and normative framework of modern competition law on both sides of the Atlantic, is of very little help in elucidating the relationship between competitive markets and democracy. At the practical policy level, the insufficient grasp of the relationship between competition and democracy becomes all the more problematic as calls for reining in corporate power in the name of democracy gain political traction. Recent policy initiatives to regulate Big Tech companies and to tackle the trend towards industry concentration are informed by increasingly widespread societal and political concerns over the excessive amalgamation of economic power and its adverse effect on democracy.<sup>19</sup> However, without a proper comprehension of the conceptual and historical foundations of the idea of a competition–democracy nexus, neither the virtues nor the costs of a competition policy that seeks to further democracy by curtailing the concentration of economic power can be fully assessed and tested. Understanding through which channels concentrated private economic power poses a threat to democracy and how competitive markets can further democracy is also instrumental for reforming existing competition rules or designing new rules to operationalise the goal of a competition–democracy nexus.

The objective of this book is to address this knowledge gap by taking a fresh look at the often repeated but only rarely substantiated claim that there is a link between competition, competition law, and democracy. It embarks on the most comprehensive study of the relationship between competition and democracy in EU and US competition law so far undertaken. By exploring the historical, conceptual, and normative foundations of the idea of a competition–democracy nexus, this book aims to advance a clear answer to the question of how competition and competition law can promote and protect democracy.

The central claim of this book is that the idea of a competition–democracy nexus can be best explained by the republican concept of liberty as non-domination, which originated from republican thought in ancient Rome.<sup>20</sup> This republican

<sup>19</sup> See, for instance, Regulation (EU) 2022/1925 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), [2022] OJ L 265/1; H.R.3816–American Choice and Innovation Online Act ('ACIO Act') 2021, 117th Congress (2021–2022); Zehntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (die 10. GWB-Novelle), BGBl. I 2021 S. 2; Digital Markets, Competition and Consumers Bill, Bill 350 2022–23 (as amended in Public Bill Committee).

<sup>20</sup> See, most notably, Q Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press 1998); 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: Oxford University Press; British Academy 2002) 237; P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press 1997). For recent political theory scholarship that

concept of liberty differs from our predominant understanding of negative liberty, which perceives only actual or likely interference by somebody else with our choices as a source of unfreedom. In contrast, republican liberty defines unfreedom as a master–slave relationship. It considers the mere presence and defenceless subjugation to the arbitrary power and domination of another person as an obstacle to individual liberty, even if this person is benevolent and does not interfere with our choices. On a republican account, a slave or servant cannot be considered free, even if the master is benevolent and does not interfere with their choices or actions, because the benevolent master can, at any time, change their mind and interfere with the slave at will.<sup>21</sup> Therefore, a person cannot be said to be free as long as they are exposed to the whim and caprice of another person who has the discretionary power or capacity to interfere with them. In contrast to mainstream liberals advocating negative liberty as non-interference, proponents of republican liberty are hence not only concerned about the actual or likely interference resulting from the *exercise* of power but they also already perceive the possibility of arbitrary interference deriving from the mere *existence* of power as a source of unfreedom. This book will argue that the republican concept of economic liberty can explain the core premise underpinning the idea of a competition–democracy nexus – namely, that the mere existence of concentrated economic power is in itself incompatible with a republican democracy, even in the absence of any concrete risk of interference. The idea of a competition–democracy nexus thus revolves around the belief that by dispersing economic power, competitive markets operate as an institution of ‘antipower’<sup>22</sup> that minimises instances of domination, and thereby promotes republican liberty and democracy.

Using the concept of republican liberty as the explanatory variable for the idea of a competition–democracy nexus, this book makes four major contributions. First, it traces the historical trajectory and conceptual foundations of the idea of a competition–democracy nexus. It shows how the belief that competitive markets enhance republican liberty as non-domination and the equal status of market participants originates in the thought of early common lawyers and political economists, such as Sir Edward Coke, the English Levellers, Montesquieu, James Steuart, and Adam Smith. These early liberal thinkers celebrated the ascent of competitive markets as a harbinger of liberty and equality, which would transform a feudal society that was characterised by hierarchical relationships of subordination and domination into a heterarchical society of free and equals. In describing how the advent of competitive markets brought about not only greater economic but also

draws a similar link between competitive markets and the ideal of republican liberty, see RS Taylor ‘Market Freedom as Antipower’ (2013) 107(3) *American Political Science Review* 593; O Suttle, ‘The Puzzle of Competitive Fairness’ (2022) 21(2) *Politics, Philosophy & Economics* 190.

<sup>21</sup> For this master–slave metaphor, see Pettit (n 20) 22–24.

<sup>22</sup> P Pettit, ‘Freedom as Antipower’ (1996) 106(3) *Ethics* 576, 577, 588.

political liberty, the rule of law, and a more republican or democratic form of government, these early proponents of commerce and competitive markets had already coined the proposition of a competition–democracy nexus in its rudimentary form. This book highlights that this idea of a competition–democracy nexus was reinvigorated and refined towards the end of the nineteenth and during the first decades of the twentieth century by the proponents of competition law in the United States and in Europe. By revisiting the history of US antitrust law and the Ordoliberal roots of European competition law, it also reveals how the ideal of republican liberty lies at the origins of the idea of a competition–democracy nexus in US and EU competition law.

Second, this book explores how the concern about republican liberty as the normative backbone of the competition–democracy nexus shaped the interpretation and application of US antitrust law until the 1970s and of EU competition rules until the 2000s. It analyses how US and EU antitrust policy operationalised the ideal of republican liberty as non-domination through a structuralist approach, which was geared towards the protection of competition as a polycentric market structure. Focusing on the use of rule-like presumptions of illegality, a specific conception of the standard of harm, and a particular understanding of the costs and benefits of competition law intervention, this book also identifies the principal legal mechanisms and policy levers through which US and EU competition law have translated the concern about republican liberty into concrete competition policy. On this basis, this book identifies the essential features of what one can call republican antitrust or a republican approach to competition law.

Third, this book also seeks to explain why the republican concept of liberty and with it the idea of a competition–democracy nexus became largely irrelevant for contemporary competition law. The influence of the concern about liberty as non-domination started to wane and eventually vanished with the rise of the Chicago School during the 1960s and 1970s in the United States. With the shift towards a More Economic Approach in EU competition law during the 2000s, the republican approach and the idea of a competition–democracy nexus also lost its appeal in Europe. This book sheds light on how the rise of the Chicago School in the United States and the More Economic Approach in Europe has started to displace the concern about the competition–democracy nexus and republican liberty with a negative understanding of liberty that only perceives welfare-decreasing interference as an obstacle to economic liberty. The Chicago School-inspired modernisation of US and EU competition law, and the endorsement of the consumer welfare standard have thus entailed a shift from an antitrust policy, which hinged on the concern about the adverse impact of economic concentration on republican liberty and democracy, to an approach that seeks, in the first place, to protect entrepreneurial liberty against state interference. This book identifies the main parameters through which the rise of this Chicago School-inspired laissez-faire antitrust fundamentally reconfigured the interpretation and application of the substantive US and

EU competition rules, and entrenched a competition policy that consistently leans towards the protection of negative entrepreneurial liberty of businesses against state intervention.

Finally, against the backdrop of lingering societal concerns about the concentration of economic and political power in the hands of a few industrial and digital behemoths, this book also looks ahead and asks whether a reversal towards the republican antitrust tradition is possible and desirable. It signposts the parameters that need to be recalibrated to realign modern competition law with a republican understanding of economic liberty and the ideal of a competition–democracy nexus. This book argues that this reversal towards a more republican approach would not necessarily reduce consumer welfare. At the same time, this book highlights the trade-offs and costs that such a policy reform would involve.

The argument and analysis of this book will unfold in four parts. The first part (Chapters 1 and 2) explores the historical trajectory and theoretical foundations of the competition–democracy nexus. Chapter 1 describes the object of this inquiry. It surveys the history of the idea of a competition–democracy nexus from early liberal thought on competitive markets in sixteenth-century Europe to the second half of the twentieth century. Chapter 2 introduces the conceptual claim of the book that this long-standing perception of a competition–democracy nexus turns on and can be best explained by a normative commitment to republican liberty.

The second part (Chapters 3–5) of this book analyses how the twin goal of a competition–democracy nexus and republican liberty were operationalised by various competition law paradigms, as well as US and EU antitrust jurisprudence. It thus identifies the hallmarks of what can be called a republican competition law or republican antitrust tradition. Chapter 3 canvasses the different avenues through which various schools of thought in US and European competition law envisaged the realisation of the competition–democracy nexus. Chapters 4 and 5 identify the main parameters through which courts on both sides of the Atlantic gave shape to a competition policy that is anchored in a normative commitment to republican liberty as non-domination and republican democracy.

The third part (Chapters 6 and 7) interrogates the reasons behind the decline of the idea of a competition–democracy nexus. It describes how the Chicago School-inspired modernisation of US and EU competition law has gradually replaced republican antitrust with a laissez-faire antitrust approach that turns on a commitment to negative liberty. Chapter 6 describes how the Chicago School put forward the consumer welfare standard as a versatile, principled framework to supersede the concept of republican liberty with an approach that is grounded in the concern about negative liberty and seeks, in the first place, to preserve entrepreneurial liberty against state coercion. Chapter 7 shows how this shift from republican to negative liberty as the normative bedrock of competition law has led to a recalibration of its *modus operandi*.



The fourth part (Chapter 8) reviews some of the potential avenues to reinvigorate the idea of a competition–democracy nexus for contemporary competition policy. Chapter 8 draws the various analytical strands of this book together and explores some of the pathways to realign competition law with the republican antitrust tradition and the idea of a competition–democracy nexus.

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

