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Markets need not be Perfect: Competition Policy and Market Structure Analysis in the Global South[1]

Mercados não têm que ser perfeitos: política da concorrência e análise de estrutura de Mercado no Sul global

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Abstract

This article explores alternatives to the proscribed ideal of perfect competition and allocative efficiency that are more suitable to countries in the Global South. Seeking perfect competition in order to realize allocative efficiency is not only an unsuitable guide for competition enforcement in countries in the Global South, but it also leads to an undesirable competition policy. An alternative competition policy seeking dynamic efficiency, innovation and growth is proposed to replace the static ideal of allocative efficiency. Under this proposed alternative the ideal market structure, necessary to realize these goals, is no longer confined to perfect competition, but is one that strikes a balance between competition and concentration. Under this alternative, the concentrated enterprises are considered beneficial for society as they can innovate, spend on R&D, and in the long run can reduce their cost functions to allow for even lower prices than those prevailing in perfectly competitive markets. This proposal relies on a redistributive mechanism that is integral to the pursuit and realization of this alternative policy and market structure. With redistribution pursed within the implementation of this alternative, the background rules of competition law are thereby changed. Support for this proposed alternative, where competition policy and market structure analysis deviate from the dominant discourse, is drawn from historical evidence, empirical studies and progressive economic thought.

Keywords: market structure analysis; competition law; global South.

Resumo

O artigo explora alternativas ao ideal de concorrência perfeita e eficiência alocativa mais adequadas aos países do Sul global. A busca pela concorrência perfeita como meio para realizar a eficiência alocativa não é apenas um guia inadequado para a aplicação do direito concorrencial em países do Sul global, mas também leva a uma política concorrencial indesejável. Como substituta ao ideal estático de eficiência alocativa, propõe-se uma política concorrencial alternativa, que busque a eficiência dinâmica, a inovação e o crescimento. Sob essa proposta,

a estrutura de mercado ideal, necessária para atingir esses objetivos, não está confinada à concorrência perfeita, mas se abre ao equilíbrio entre concorrência e concentração. Nesta alternativa, as empresas concentradas são consideradas benéficas à sociedade na medida em que são capazes de inovar, investir em pesquisa e desenvolvimento e, no longo prazo, reduzir seus custos, permitindo que preços menores do que aqueles que existiriam em mercados competitivos sejam praticados. Esta proposta se baseia em um mecanismo redistributivo que é essencial à busca e realização de tal alternativa de política e estrutura de mercado. Com a redistribuição sendo perseguida na implementação dessa alternativa, as regras de base do direito da concorrência são transformadas. Suporte para a alternativa proposta, em que a política concorrencial e a análise da estrutura de mercado desviam do discurso dominante, é retirado de evidências históricas, estudos empíricos e do pensamento econômico progressista.

Palavras-chave: análise de estrutura de mercado; direito da concorrência; Sul global.

I. Introduction

When we make antitrust arguments, we employ the rhetoric of competition. We simply take for granted the received learning that competition policy (and its celebrate logic of efficiency) has always provided the ground for antitrust arguments.[2]

Countries in the Global South have been taught to follow a competition policy that seeks to maximize the allocative efficiency of society under a proscribed ideal of perfect competition. They are encouraged, often even pressured, to attain this ideal of perfect competition so that their resources are allocated in the most efficient way. Any other goal they desire to achieve has been deemed unscientific, political and lacks objectivity. This has influenced their market structure and market failure regulations, particularly their newly adopted competition laws.

This article presents the encounter between countries in the Global South with this ideal. It challenges the allocative efficiency-perfect competition nexus as an unsuitable guide for countries in the South. An alternative is then proposed where dynamic efficiency, innovation and growth replace the static ideal of allocative efficiency. Under this proposed alternative, the markets necessary to realize these goals are now open to a mix of competition and concentration. Under this alternative, the concentrated enterprises are considered beneficial for society as they can innovate, spend on R&D, and in the long run can reduce their cost functions to allow for even lower prices than those prevailing in perfectly competitive markets.

This alternative proposal relies on a redistributive mechanism that is integral to the pursuit of these alternative goals, whereby not only are the ills of the monopolistic and dominant firms outdone, as the higher prices will now be taxed and redistributed back to the consumers paying these overcharges, but also,

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[2] Rudolph J. Peritz; A Counter-History of Antitrust Law, 2 DUKE L. J. 263, 264 (1990).

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the tax imposed is bound to be born by these enterprises themselves and not passed on to consumers. Hence, assuring an increased state income that is funded from monopoly rents and can now be redistributed back not only to the direct purchasers, but also to fund infrastructure project and social welfare programs.

There are five parts to this article. Part II introduces the allocative efficiency - perfect competition nexus and how, as the ideal driving markets and welfare analysis, has impacted markets in the Global South. Part III proposes an alternative to this market configuration that pursues goals more suitable to countries in the South. Part IV sets forth arguments in support of this alternative. The first arguments in support of this alternative draw on evidence from other countries, particularly those that have developed using similar policies to those proposed in this alternative and not the allocative efficiency - perfect competition nexus. The second arguments supporting the alternative rely on empirical evidence. And the third arguments support the alternative by presenting ideas from the progressive era history of economic thought. Part V of the article concludes.

II. The allocative efficiency – perfect competition nexus

Countries in the Global South, with an increasing number ever since the 1990s, have adopted competition laws often to please donor institutions and other times hoping to realize to development promises.[3] The main advocates for "competition law for development" have been the international organizations such as the Organization for Economic Cooperation and Development (OECD); the World Bank; the International Monetary Fund (IMF) and others.

[3] See Dina I. Waked, Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges, 12(2) J. L. ECON. & POLICY 193 (2016) (for a detailed account for why countries in the Global South have adopted competition laws).

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These international organization have issued relentless advice pointing to these laws as the missing link for development and growth. Trade partners in more advanced countries, notably the European Union (EU) have conditioned trade deals with countries in the Global South on the adoption of such laws modeled on their own legislations. Other lending institutions have done the same: preconditioning the loans on the adoption competition laws modeled on international principles of advanced nations' competition laws. The surge in adopting competition laws has reached its zenith in the 1990s with the hight of neoliberal reforms part of the Washington Consensus, integration of many countries in the Global South in world trade arrangements and the sidelining of socialist alternatives to free market configurations and globalization requirements.

The model laws that were transplanted into the Global South are very similar to the laws adopted in Northern more advanced countries and have very little local flavor. Few exceptions stand out, such as e.g. South Africa where its competition law seeks a "broader range of considerations including the promotion of a more equitable spread of ownership as well as the 'interests' of workers."[4]

South Africa's exceptionalism aside, the modus operandi of competition laws, in the North and South alike, is to structure markets built on the economic model of perfect competition to attain allocative efficiency. The assumption is that only under perfect competition is equilibrium achieved, consumer welfare maximized, deadweight loss prevented, and resources allocated in the most efficient manner. Both the notions of efficiency and perfect competition, considered pillars of the global economy, are ingrained in our understanding of how the global and thereby the local economy and its markets should be organized.

[4] IINT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER AND STATE CREATED MONOPOLIES 9, 18 (2007) [herein after ICN Report], available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf (thirty of thirty-three countries identified consumer welfare as an antitrust objective).

The ideal was thereby set: a market structure encouraging perfect competition to guarantee allocative efficiency. The countries in the Global South were persuaded to follow the motto of "the more competition the merrier." Their historically protected monopolies, often dominated by local elite or the government, originally only considered responsible for the ills of their political economy, were now considered additionally as the reason these countries did not grow, develop or catch up. This led to active adoption of competition laws, setting up of competition authorities and using foreign experts to advice on the implementation and the policy necessary to achieve the set goals of perfect competition and allocative efficiency.

Although the goals of competition laws cover a wide range of choices, each leading to a different outcome and enforcement objective,[5] the most widespread *modern* or *mainstream* goal of competition enforcement is allocative efficiency, which is also termed consumer welfare. It is a static goal and in economic terms, it is called consumer surplus- which measures the difference between what consumers were willing to pay for a good and what they actually paid (also known as wealth-maximization). The ideal that is desired, namely a maximization of consumer welfare, is achieved when market prices are equal to the marginal cost of production; a situation that prevails under perfect competition. As soon as we move away from the perfect competition ideal, prices increase and consumer welfare decreases. A monopolist charging monopoly prices will result in reducing consumer welfare and creating a dead weight loss to society, namely wasted resources that could have been employed but are not.

Although the terms (allocative efficiency and consumer welfares), in strict economic sense are the same referring to consumer surplus maximization,[6] one can discern two different motivations in the application of these different terms.

[5] See Dina I. Waked, Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices, 38 SEATTLE U. L. REV. 945 (2015) (for an overview of possible goals to guide antitrust enforcement and competition policy).
[6] Id. at 953 - 955 and Figure A.1. and A.2. (providing the economic explanation).

On the one hand, those concerned with consumer welfare or surplus seem to be interested in an application of competition law that is mainly occupied with protecting consumer property from being stolen by firms with market power.[7] According to scholars in this camp, antitrust enforcement should prohibit any conduct that would lead to a reduction of consumer surplus as this would amount to exploitation “that unfairly transfers [the wealth of consumers] to firms with market power.”[8] What is important to this line of argument is the prevention of wealth transfer, which is considered theft[9] and takes place when “consumers [are forced] to pay supracompetitive prices.”[10] According to this approach, a consumer surplus for welfare standard better reflects society’s judgments about the appropriate distribution of economic welfare.[11]

On the other hand, those who direct their attention towards allocative efficiency focus their competition law application on the prevention of the deadweight loss (DWL) triangle from emerging, i.e. a desire for the economy to produce without any inefficient allocation of resources.[12] The advocates of allocative efficiency as the goal of antitrust argue that consumer welfare is

[7] John B. Kirkwood & Robert H. Lande, The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency, 84 NOTRE DAME L. REV. 191, 242 (2008).
[8] Id. at 196 (“The primary goal of antitrust is to protect consumers from paying higher prices to firms that have unfairly gained or maintained market power. The antitrust laws, in other words, can be explained as a congressional declaration that the property right we today call “consumers’ surplus” belongs to consumers, not to cartels.”).
[9] Id. at 202.
[10] Robert H. Lande, Chicago’s False Foundation: Wealth Transfer (Not Efficiency) Should Guide Antitrust, 58 ANTITRUST L. J. 631, 637 (1989-1990).
[11] Joseph Farrell and Michael Katz, The Economics of Welfare Standards in Antitrust, 2(2) COMPETITION POL’Y INT’L.1, 9 (Autumn, 2006) (“Perhaps the leading philosophical claim made in favor of a consumer surplus standard is that it better reflects society’s judgments about the appropriate distribution of economic welfare than does a total surplus standard.”).
[12] Frank H. Easterbrook, When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct? COLUM. BUS. L. REV. 345, 347 (2003) (“A person concerned about consumers' welfare (a convenient shorthand for the allocative efficiency costs of monopoly) must be exceedingly suspicious of claims that new products or low prices injure consumers by excluding rivals.” [emphasis added]); F. M. Scherer, Antitrust, Efficiency, And Progress, 62 N.Y.U. L. REV. 998, 998 (1987)(“From the standpoint of those who stress the desirability of allocative efficiency, [the deadweight loss] triangle is what antitrust is all about.”).

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maximized through the efficient allocation of resources.[13] This is achieved when "the existing stock of goods and productive output are allocated through the price system to those buyers who value them most, in terms of willingness to pay or willingness to forgo other consumption."[14]

The pursuits of both versions of consumer welfare are realized when markets are perfectly competitive. Perfect competition forces prices down to the marginal cost of production and assures that societies resources are allocated in the most efficiency way possible. Such a market structure entails that markets are pushed to accept an ever increasing number of competitors with the desire to force prices downwards to ultimately be equal to the marginal cost of production. The economic theory suggests that prices above marginal cost signal the profitability of market entry. Thereby enticing new players - local, foreign, small and large - to enter the market. No intervention, whatsoever, is needed; except to assure that prices are set freely. In other words protections of the free functioning of the market. This is guaranteed through the legal apparatus that assures the protection of the freedom of contractual arrangements and the sacredness of private property. All actors are then simply interpreting pricing signals to enter or exit, to buy or sell, etc. And their interactions, their buying and selling, determine the prices that then signal the next round of actions.

Based on this neoclassical economic rhetoric the ideal of allocative efficiency in perfectly competitive markets, regardless for why it is considered desirable, has guided modern antitrust enforcement in the North and South alike. Despite several critiques levied against it,[15] it remains the most cited goal of competition enforcement.[16]

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[13] Herbert Hovenkamp, Distributive Justice and the Antitrust Laws, 51 GEO. WASH. L. REV. 1, 4 (1982-1983) (quoting Phillip Areeda and Donald F. Turner, ANTITRUST LAW 103 (1978)).
[14] Joseph F. Brodley, The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress, 62 N.Y.U. L. REV. 1020, 1025 (1987).
[15] See Dina I. Waked, Development Studies through the Lens of Critical Law and Economics: Efficiency and Redistribution Revisited in Market Structure Analyses in the South, 5(4) Transnational Legal Theory 649 (2014) (for an in-depth critique of static efficiency in mainstream law and economics).
[16] See ICN Report, supra note 3.

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Tracing how allocative efficiency and perfect competition came to be put on such a pedestal sheds light on the moves that accompanied this transformation. How the *allocative efficiency- perfect competition* nexus came to dominate all antitrust discourse on goals and objectives is particularly intriguing. A historic approach shows how the evolution of these notions and measurements for market failure, competition and efficiency mirror significant changes in the dominant economic thought. Every move - replacing a dominant paradigm with another - was one that was consciously chosen to sideline the then dominant, or at least widespread, alternatives. The motives of these moves were not purely economic.[17]

III. An alternative pursuit to the allocative efficiency-perfect competition nexus

Despite the predominance of perfect competition as the ideal necessary for the pursuit of allocative efficiency or consumer welfare, an alternative goal seems more desirable and suitable to guide antitrust enforcement in the Global South. This alternative pursues a mix of competition and concentration, instead of perfect competition, to realize dynamic efficiency, innovation and growth instead of static allocative efficiency goals. Dynamic efficiency is broadly defined in terms of productivity growth realized through innovation efficiency[18] and technological progress.[19] The proposal pairs these goals with a redistributive agenda that assures that the gains of the newly pursued goals are divided in a way that takes equity and social justice into consideration. How and why these goals should be attained is discussed next.

[17] See Duncan Kennedy, The Role of Law in Economic Thought: Essays on the Fetishism of Commodities, 34 AM. U. L. REV. 939 (1985); Herbert J. Hovenkamp, The First Great Law & Economics Movement, 42 STANFORD L. R. 993 (1990); Peritz, supra note 1.

[18] F. M. Scherer, Antitrust, Efficiency and Progress, 62 N.Y.U. L. REV. 998, 1001 (1987) ("[T]he rate of technological progress, as manifested for example in labor productivity growth rates.").

[19] Alice H. Amsden and Ajit Singh, The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea, 38 EUR. ECON. REV. 941, 941 (1994).

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III.1. Dynamic efficiency, innovation and growth

Breaking away from the mainstream goal of antitrust in pursuit of an alternative, that targets dynamic efficiency and productivity growth, is particularly important in the context of developing or transition economies in the Global South. Alice Amsden and Ajit Singh have argued that the goal of antitrust in semi-industrial and transition economies should be to promote industrialization and economic growth.[20] Michael Porter has also "rejected the Chicago School's commitment to efficiency in favor of growth and innovation."[21] He argues that "[the] new thinking [about the goals of antitrust] sets forth productivity growth as the basic goal of antitrust policy."[22] Porter argues that productivity growth should be the new standard for antitrust for all countries, not just developing ones.[23]

What the recent growth models, as developed by Aghion and Howitt, have shown is the centrality of technological change and innovation to growth.[24] This has also been backed up by empirical studies, which have found that innovation is

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[20] Id. at 941.

[21] Albert A. Foer, The Goals of Antitrust: Thoughts on Consumer Welfare in the US (Am. Antitrust Inst., Working Paper No. 05-09, Aug. 2005),13 available at: http://ssrn.com/abstract=1103510.

[22] Michael E. Porter, Competition and Antitrust: Towards a Productivity-based Approach to Evaluating Mergers and Joint Ventures, 46 ANTITRUST BULL. 919, 920 (2001).

[23] Innovation, Rivalry, and Competitive Advantage: Interview with Professor Michael E. Porter, 5 ANTITRUST 5, 5 (1990-1991) [hereinafter Porter Interview] ("It is well established in economics that progressiveness or innovativeness is by far the most important source of economic growth and welfare, greatly outweighing price/cost margins (allocative efficiency), or even static efficiency. The central focus of antitrust policy in my view, ought to be on fostering progressiveness, defined broadly to include not only technological innovation but new ways of competing in product, marketing, service, and so on.").

[24] See Philippe Aghion & Peter Howitt, The Economics of Growth 12 - 16 (2008); see also id. at 47 (Endogenous growth theories incorporate technological change into their models. It no longer treats the rate of technological change as being determined exogenously by noneconomic forces. Instead, in endogenous growth models technological change depends on economic decisions as it comes from industrial innovations made by profit seeking firms. Technology is therefore an endogenous variable, determined within the economic system. Growth theories that take this endogeneity into account acknowledge that the rate of technological progress is what determines the long-run growth rate.); Paul S. Segerstrom, T. C. A. Anant & Elias Dinopoulos, A Schumpeterian Model of the Product Life Cycle, 80 AM. ECON. REV. 1077 (1990); Philippe Aghion & Peter Howitt, A Model of Growth Through Creative Destruction, 60 ECONOMETRICA 323 (1992); see also PHILIPPE AGHION & PETER HOWITT, ENDOGENOUS GROWTH THEORY (1998).

the most important factor for real output.[25] Innovation is not only credited for its crucial role in generating economic growth, but is also responsible for expanding the domestic economy by helping introduce new products that consumers desire and lowering the costs of existing products.[26] This reduction in cost has a direct benefit, freeing resources that can be used elsewhere in the economy and thereby increasing economic welfare if it results in lower prices and greater output.[27]

Once innovation enters as an endogenous economic phenomenon in growth theories, the first fundamental welfare theorem holding that perfect competition generates optimal allocation of resources could be challenged.[28] This is because of the possibility that monopolistic structures could be found to be necessary for innovation to occur.[29] This position still prevails in industrial economics and intellectual property law. It has its origins in Joseph Schumpeter's seminal work on creative destruction.[30] According to Schumpeter, monopoly

[25] See Robert M. Solow, Technical Change and the Aggregate Production Function, 39 REV. ECON. & STAT. 312 (1957).
[26] Richard J. Gilbert and Steven C. Sunshine, Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets, 63 ANTITRUST L.J. 569, 573 (1994-1995).
[27] Id.
[28] Bart Verspagen, Endogenous Innovation in Neo- Classical Growth Models: A Survey, 14(4) J. MACROECON. 631, 635 (Fall 1992) ("Both the presence of increasing return and monopoly power are important novelties in neo-classical growth theory. These features of the model shed a wholly different light upon the concept of perfect competition as a means to achieve a socially optimal growth path."); id. at 657 ("The […] assumption […] of monopoly power [which] is needed to generate innovation sheds new light upon the conclusion reached by general equilibrium models and welfare analysis that perfect competition in all markets generates an optimal result (in the sense of allocation of goods). New neo-classical growth models explicitly assume that a monopolistic market structure is necessary for innovation and therefore for economic growth. The role of competitive market as a means of generating efficient prices is thus no longer obvious. Anti-trust policy as a form of government intervention is no longer obviously related to a better (compared to the monopolistic market) allocation of goods. This is not to say that anti-trust policy may not be necessary. The point is merely that it is no longer obvious to make the point for perfect competition irrespective of what happens in the technological field.").
[29] Joseph A. Schumpeter, CAPITALISM, SOCIALISM AND DEMOCRACY 84 (3ed. Harper Prennial, 1984) ("Economists are at long last emerging from the stage in which price competition was all they saw. […] it is not that kind of competition which counts but the competition from the new commodity, the new technology, the new source of supply, the new type of organization (the largest-scale unit of control for instance) - competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives. This kind of competition is as much more effective than the other as a bombardment is in comparison with forcing a door.").
[30] Id.

profits are necessary for firms to pursue R&D and innovation.[31] Schumpeter's claims are: (1) only large businesses are able to achieve scale economies and bear the risks of investing in innovation;[32] (2) monopoly rents are an ideal source of funds to support industrial research and innovation;[33] (3) a monopoly position is a security that makes investments in innovation seem worthwhile.[34] The assumption is also that monopoly rents are invested in lowering cost functions and thereby, in the long run, might result in lower prices and higher output than what would result under perfect competition.[35]

Some empirical studies have backed up these theories. For example, models by Salop[36] and Dixit and Siglitz[37] predict that more intense product market competition reduces rents of firms that have entered into the market and hence discourages other firms from entering in the first place. Scherer's early empirical

[31] Id. at 106 ("What we have got to accept is that [the large-scale establishment or unit of control] has come be the most powerful engine of [economic] progress and in particular of the long-run expansion of total output not in only in spite of, but to a considerable extent through, this strategy which looks so restrictive when viewed in the individual case and form the individual point in time. In this respect, perfect competition is not only impossible but inferior, and has no title to being set up as model of ideal efficiency.").

[32] Id. at 89 ("[L]rage-scale plans could in many cases not materialize at all if it were not known from the outset that competition will be discouraged by heavy capital requirements or lack of experience, or that means are available to discourage or checkmate it so as to gain the time and space for further developments.").

[33] Id. at 89-90 ("[E]enterprise would in most cases be impossible if were not known form the outset that exceptionally favorable situations are likely to arise which if exploited by price, quality and quantity manipulation will produce profits adequate to tide over exceptionally unfavorable situations provided these are similarly managed.").

[34] Id. at 88 ("Practically any investment entails, as a necessary complement of entrepreneurial action, certain safeguarding activities such as insuring or hedging. […] Hence it becomes necessary to resort to such protecting devices as patents or temporary secrecy of process or, in some cases, long-period contracts secured in advance. […] [I]f a patent cannot be secured or would not, if secured, effectively protect, other means may have to be used in order to justify the investment."); id. at 102 ("Thus it is true that there is or may be an element of genuine monopoly gain in those entrepreneurial profits which are the prizes offered b capitalist society to the successful innovator.")

[35] See Dina I. Waked, Competition Law in the Developing World: The Why and How of Adoption and its Implications for International Competition Law, 1 GLOBAL ANTITRUST REV. 69, 87 (2008).

[36] Steven Salop, The Noisy Monopolist: Imperfect Information, Price Dispersion, and Price Discrimination, 44 REV. ECON. STUD. 393 (1977).

[37] Avinash K. Dixit and Joseph E. Stiglitz, Monopolistic Competition and Optimum Product Diversity, 67(3) AM. ECON. REV. 297 (1977).

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work showed that the number of patents filed was related to firm size.[38] He also argued that the incidence of plants operating at sizes too small to realize economies of scale was greater the less concentrated an industry was.[39] Scherer has also argued that when "duplication of research and development yields only meager benefits […] and if the number of R&D projects rises to bring the "market for innovations" to a zero-expected profit equilibrium, the case for high seller concentration, and in extreme cases monopoly, is strengthened."[40]

This literature and empirical support have resulted in drastic policy shifts that challenge the conventional wisdom about the absolute benefit of perfect competition. Given this background, a proposed alternative is based on the need to introduce a mix of competition and concentration. The reason for that, is that developing countries need to formulate a competition policy that strives at realizing dynamic efficiencies instead of static ones. Dynamic efficiencies will only be realized when such a mix of market structures is possible.

Scholars have already been calling for developing countries to pursue dynamic efficiency given its developmental impact.[41] The competition policies adopted by developed countries are not often suitable for the developing world due to the fact that "the attention to allocative efficiency and lower prices that underlies competition policy in developed countries may be too narrow and static from a development perspective."[42]

It is usually understood that dynamic efficiency can have a far more dramatic effect on the economy than static efficiency, and this can be visualized by

[38] F. M. Scherer, Corporate Inventive Output, Profits and Growth, 73(3) J. POL. ECON. 290 (1965); F.M. Scherer, Firm Size, Market Structure, Opportunity and the Output of Patented Inventions, 55(5) AM. ECON. REV. 1097 (1965).
[39] F. M. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 469-70 (2nd ed., 1980).
[40] F. M. Scherer, Antitrust, Efficiency and Progress, 62 N.Y.U. L. REV. 998, 1012 (1987).
[41] J S Metcalfe, R Ramlogan and E Uyarra, Economic Development and the Competitive Process, 36 Center on Regulation and Competition Working Paper Series, 24 (December 2002).
[42] Id.

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comparing the overall impact of improving the manufacturing process of a buggy whip with inventing the reciprocating engine.[43]

Joseph Brodley has argued that "[a]ntitrust law has always permitted some degree of social conduct that is not in the immediate interest of consumers in order to sustain innovation and production efficiencies."[44] This is through accepting the right of lawful monopolies to exist through the patent law.[45] Bordley further argues that, "whatever future benefits accrue to consumers generally through innovation and production efficiencies, the need to maintain producer incentives may require the consumers of a particular product to pay higher prices in the short run."[46] Consumer interest may be temporarily subordinated to the general welfare if (1) the activity may increase total social wealth by realizing significant production or innovation efficiencies; (2) the activity must be necessary to achieve such efficiencies; (3) the activity must not permanently suppress interfirm rivalry.[47] Michael Porter has also argued that,

> [A]ntitrust must move away from a narrow conception of welfare - that is, whether a consumer has to pay more for a particular product at a particular point in time - to a broader conception of national welfare that encompasses the productivity of industry, including the wages paid to employees.[48]

This policy alternative - seeking dynamic efficiency and growth - needs to be coupled with redistribution. Pursuing dynamic efficiency and growth without thinking about how the accrued benefits will be partitioned is akin to the belief in the working of *trickle-down economics*.[49] Since the latter has on numerous

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[43] Foer, supra note 20, at 21.
[44] Brodley, supra note 13, at 1036.
[45] Id. at 1037.
[46] Id.
[47] Id. at 1037-1038.
[48] Porter Interview, supra note 22, at 5.
[49] H. W. Arendt, The "Trickle-Down" Myth, 32(1) ECON. DEV. & CULTURAL CHANGE 1, 1 (1983) quoting . M. P. Todaro, ECONOMIC DEVELOPMENT IN THE THIRD WORLD (London and New York: Longman, 1977), p. 439 ("[trickle-down] development was seen as purely an 'economic' phenomenon in rapid gains from the

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occasions failed, promoting growth needs to take into account that the benefits of the growing economies often fall onto the *haves* while leaving the *have-nots* even more impoverished.[50] Most countries in the Global South - following the mainstream neoliberal approach to market structure and failure - have not developed, but have only plunged into more poverty, inequality, dependency and debt. Even the economies that saw high levels of growth witnessed rampant income disparity as trickle-down economics failed. And entrenched local elites and multinationals have captured most of the surplus value generated through higher growth rates.

This has led many to argue against growth as a goal suitable for countries in the South; instead some have advocated the benefits of *sustainable* growth, or even the importance of de-growth. What I am arguing here is different: I am interested in plain-old manufacturing and technological growth that is essential for the countries in the Global South to come close to the world technological frontier.[51] Thereby, they can increase their self-sustainability, reduce their debt, and generate income to build necessary infrastructure and tackle their poverty epidemics with. I argue that any other discourse is preventing countries in the South to benefit from the same chances todays developed countries enjoyed when they were at the same developmental level. For the West to be more concerned with de-growth today is a luxury the South cannot afford. Forcing such a luxury onto the countries in the South is denying them a fair chance to compete - using the same techniques and policies the developed counties have used decades earlier - and is asking of the developing countries to carry the burden the growth of the North has caused, such as environmental degradation and pollution.

over- all growth of GNP and per capita income would automatically bring benefits (i.e. 'trickle down') to the masses in the form of jobs and other economic opportunities.”).

[50] Id.

[51] See generally Alexander Gerschenkron, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE (1962); Daron Acemoglu,
Philippe Aghion & Fabrizio Zilibotti, Distance to Frontier, Selection, and Economic Growth, 4 J. EU. ECON. ASS’N. 37 (2006); Rachel Griffith, Stephen Redding & John Van Reenen, Mapping the Two Faces of R&D: Productivity Growth in a Panel of OECD Industries, 86 REV. ECON & STAT. 883 (2004) (for more on catching up with global technological frontier).

III.2. Redistribution

Growth and dynamic efficiency are central to this proposed alternatives but cannot be addressed without redistribution being equally targeted. Otherwise, this would be another proposal to make the rich richer and the poor poorer. How redistribution factors into the realization of this alternative is as follows: to integrate redistribution into the market structuring legal rules and regulations themselves and not count on redistribution through the tax and transfer system.

Following the proposed alternative market structure introduced above more dominant or even monopolistic structures will emerge. The challenge is that the government assures that these newly dominant firms, private and state-owned, are those that channel the highest possible growth, such as firms in the manufacturing sectors. Only these firms shall be allowed to have the power to raise their economic rents thanks to their acquired position of dominance. The aim of the proposed redistribution plan is to curb the power of these firms and to force them to redistribute part of the surplus value or rents back to the consumers instead of prohibiting them from acquiring a dominant position, especially if this position is necessary for industrialization, innovation, technological catchup and growth.[52] This can be done through the requirement that these firms fund, for example, a consumer trust from their surplus values that can in turn be selectively used to lower the prices paid by consumers.[53]

The proposal here is to first allow these firms – the ones that positively contribute to industrialization, innovation, catchup and growth - to achieve dominance, through mergers, collaborations, or various protections such as not granting competing licenses, or prohibiting foreign competition. Second, one

[52] It can also be worked out to apply to workers, who are then funded out of a similar 'worker trust' that is used to effectuate a raise in actual salaries, shorten working hours, or continue salaries for those who, for example, lose their jobs following a merger.

[53] See Einer Elhauge and Damien Geradin, GLOBAL COMPETITION LAW AND ECONOMICS (Hart Publishing, 2nd end 2011) 1004–5 (for a detailed explanation of how such a consumer trust might work in merger analyses).

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would have to require that the emerging dominant firm fund this trust through fixed cost efficiencies realized when they acquire market power. The idea is to translate fixed cost efficiencies into marginal cost reductions that directly benefit the consumers. This is of particular interest in developing countries if the cost efficiencies are generated through innovative improvements yet would have made consumers suffer. This model changes the background rules of competition law to take into account actual redistribution.[54] Here, all parties benefit.

Firms and producers can go ahead with their innovation-generating dominant positions, through mergers, collaborations or protectionism; their novel market powers and higher prices are used to fund a consumer trust; and that is then redistributed back to the consumers, once their cost functions are indeed reduced. In the long run, the aim is that prices set by these firms would ultimately decline when they had realized more fixed cost savings through, for example, technological innovations made possible only through their post-dominance collaborative efforts. This underlines possible benefits that can accrue to buyers in concentrated markets. This is a further challenge to the mainstream positions regarding the absolute virtues of perfect competition.

Allowing firms to maintain their dominant position is sometimes a necessary development goal as part of an industrial policy[55] or simply a reality of many developing countries today.[56] Therefore, their ability to charge high prices, which is often a powerful tool they will exploit, can be conditioned on these

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[54] Duncan Kennedy, Legal Economics of US Low Income Housing Markets in Light of "Informality" Analysis 4 J. OF L. IN SOCIETY 71, 80 (2002); see also Duncan Kennedy, The Stakes of Law, or Hale and Foucault!' in SEXY DRESSING ETC. ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 87-89 (Harvard University Press, 1993).

[55] Amsden and Singh, supra note 18 (show how the Japanese and South Korean experiences offer a clear exemplification of the implementation of such intertwined competition and industrial policies).

[56] Michal S Gal, Size Does Matter: The Effect of Market Size on Optimal Competition Policy, 74 SOUTH CALIFORNIA LAW REVIEW 1437, 1445 (2000–1)(the author argues that because of the low demand and the need for firms to achieve minimum efficient scale of production (MES) to be able to operate efficiently (at lowest cost), the market will not be able to support more than a few number of firms); Paul Cook, Competition Policy, Market Power and Collusion in Developing Countries' 3(33) Center on Regulation and Competition Working Paper Series 1, 16 (2002) ("Concentration levels are higher in developing countries than in industrialized countries.").

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compulsory duties of funding the trust that will be selectively enforced to benefit buyers. The difference between the price the buyer paid and the but-for price (ie the fair price without the overcharge) of the good in question could be considered a loan the overcharging seller owes the buyer. Through the compulsory duty of funding the trust, the seller translates this loan to an investment benefiting the buyer in the trust. The buyer thereby becomes a stakeholder in the designed trust. This investment in the trust could also generate, for example, interest, dividends and other benefits to the buyers.[57]

In a way the buyer becomes a stakeholder who is owed more than just compensation for the higher price they paid. Duncan Kennedy analyses a similar situation when talking about economic actors in the South making large profits when they are allowed to demolish the existing housing in poor neighborhoods and appropriate the land for other uses, such as middle- or upper-income housing or commercial development.[58] He argues that the developers could be required 'to make a lump sum compensation to everyone who has suffered a loss through development, whether or not the loss would be cognizable under takings law'.[59] He goes on to argue that a further step along the spectrum would be to measure the compensation not by loss to residents but as a share of the benefits of developments, that is, of the surplus. Why settle for mere compensation of losses

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[57] See Waked, supra note 34 (for an elaboration of this idea: "[The competition] authority will allow the merged entity to raise the prices only if every purchaser of the product sold will be given a coupon with the difference between the current price and the but-for price … The consumers can only cash in their coupons after a certain time … The idea is that the merged firm may be allowed to harm consumers in the short run, only to achieve their promised efficiencies in terms of lowering their cost-curves in a pre-set time frame, and then be required to give back to the consumers the realised efficiencies to offset their harms … This mechanism can be understood to function as follows. Through the consumer trust, consumers become de facto shareholders who are owed dividends at a certain time. Or, they become creditors who are owed their loans back at a certain time. The mechanism can also be devised to allow for interest payable on every coupon received. If the firm fails to pay back its so-to-speak debts to the consumers, then the competition authority may liquidate the firm and use the sold assets to repay the consumers. This will be a driving force for the merged entity to achieve the promised efficiencies.").
[58] Duncan Kennedy, Commentary on Anti-Eviction and Development in the Global South, in Lucie White and Jeremy Perelman (eds), STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 41 (Stanford University Press, 2010).
[59] Ibid, 46.

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when the community's organized resistance has put it in the position of a stakeholder? Then it will be necessary to decide how to parcel out the surplus, beyond the compensation of downside losses.[60]

Another way to perceive this plan is that the dominant enterprises that are allowed to exist in order to generate innovation, industrialization and growth are being socialized and embedded within a wider network that comprises consumers/citizens. These firms' ownership is expanded to include the consumer/citizen as a stakeholder earning part of the surplus or rent generated by the firm.

These distributive objectives are achievable through the change in these background rules that organize these relationships between buyers/tenants and sellers/landlords. They assure that equity is one of the issues considered and redistribution becomes an integral part of the economic analysis undertaken. This has serious ramifications for a competition policy that aims to work out alternatives that include the impoverished segments of society and can be used to alleviate poverty and raise equality and social justice.

IV. In Support of the Alternative

In this section, arguments in support of this proposed alternative - pursing dynamic efficiency, growth and redistribution through a mix of competition and concentration - is supported through evidence from three different areas. The first arguments in support of this alternative are drawn from other countries that have pursued policies similar to the proposed alternative. The second arguments rely on empirical evidence in support of the alternative. And finally, the third arguments rely on ideas from progressive era economic history. They are each addressed in turn.

[60] Ibid.

IV.1. Evidence from Elsewhere

To lend support to pursuing an alternative to allocative efficiency and market power, evidence from other countries is presented here.

Until relatively recently, the traditional economic theory's answer to the question of optimal degree of competition was simple: maximum competition … However, in the last fifteen years, new developments in the theories of industrial organization and international trade have resurrected …heterodox ideas. There now exists considerable literature which points out the shortcomings of unfettered competition, whether internal or external, even for static efficiency let alone in its dynamic form … [T]he competition policy record of the exemplar East Asian economies which have purposefully desisted from either extreme … assumes special significance.[61]

Alice Amsden and Ajit Singh, among others, have shown that developing countries that have chosen to follow, what they call, *heterodox growth theory* have outperformed those that remained stuck in the perfect-competition deadlock.[62] The authors mention the Japanese and Korean experiences to show that during the years of their most rapid growth they 'have deliberately restricted [competition] in many directions in order to increase their investment rate and to accelerate their technological development.'[63]

In East Asian economies, the government did not shield local firms to the same extent. For example, during Japan's years of rapid growth (1950-1973), the Ministry of International Trade and Industry (MITI) encouraged cartels in a wide

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[61] Amsden and Singh, supra note 18, at 942–3.
[62] Id.
[63] Id., at 949.

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range of industries,[64] mergers between leading firms in key industries,[65] *and* vigorous domestic rivalry and international competitiveness.[66]

Importantly, no Japanese industry was totally shielded from competition. MITI provided a "crucial coordinating role and orchestrated the dynamic of collusion and competition which characterizes Japanese industrial policy."[67] Young industries in the development phase remained protected from competition only until they matured technologically. At that point, the government allowed competition until the industries in question would face a competitive decline; then, the government again would discourage competition.[68] MITI facilitated this 'life-cycle' process by organizing an investment race, setting exports and international market shares as significant performance targets.[69]

Crucially, MITI made sure to install strict performance standards for protected industries to assure that the import ban would not result in technological backwardness and inferior performance.[70] To illustrate this approach taken by Japan, Amsden and Singh write:

> The emphasis on exports and maintaining oligopolistic rivalry – instead of concentrating resources and subsidies on a single 'national champion', which many governments in their industrial policies are prone to do – are the key factors which distinguished Japanese policies from those of other dirigiste countries.[71]

The paradox of the Japanese economy is that despite the weakening of the anti-monopoly laws and the anti-competitive bias of many MITI policies,

[64] Id. at 944 (These cartels included "export and import cartels, cartels to combat depression or excessive competition, rationalization cartels, etc.").
[65] Id.
[66] Id. at 945.
[67] Id.
[68] Id.
[69] Id.
[70] Id. ("To illustrate, Japan's machine tool industry was given selective tariff protection specially for those machine tools with potentially high income elasticities of demand and high productivity growth rates. But machine tool builders benefiting from protection were required to produce at least 50% of their output in the form of computer numerically controlled machine tools by a certain date.").
[71] Id. at 946.

competition actually grew in Japan during the years studied.[72] That is, concentration ratios declined.[73] The reason market concentration declined was not because of the effectiveness of competition policy but because of the rapid growth of the economy.[74] This economic growth was manifested by both increasing investments, and, more importantly, new entry or expansion of smaller firms.[75] Alice Amsden and Ajit Singh argue that the approach taken by the Japanese government,

> [Is] more pragmatic […] to antitrust enforcement, one that makes allowances for national goals such as industrial catch-up. It takes into account other collective values and extenuating circumstances in weighing enforcement decisions against the letter and spirit of antitrust laws. Included here are such considerations as economies of scale, enhanced efficiency, optimal use of scarce resources, international competitiveness, heightened productivity, business cycle stabilization, industrial orderliness, price stabilization and economic security.[76]

Despite the success of East Asian economies, many scholars caution against prioritizing industrial policy over competition policy. The problem is that such industrial policy was often used to continue protecting mature industries, against local and foreign competition, in a way that hampered economic development beyond the early industrialization.[77] Michael Porter's critically summarizes many such concerns:

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[72] Id. (explaining that competition was measured by conventional industry concentration ratios).
[73] Id. ("The average (unweighted) three-firm concentration ratio was 57.6 in 1937, 53.5 in 1950, and 44.1 in 1962. Between 1950 and 1962, concentration increased in only three of 20 industries, stayed roughly the same in two, and fell in all the rest.").
[74] Id.
[75] Id.
[76] Id. at 944 (quoting D. I. Okimoto, BETWEEN THE MITI AND THE MARKET 12-13 (1989)).
[77] Claudio R. Frischtak, Bita Hadjimichael and Ulrich Zachau, Competition Policies For Industrializing Countries, 7 World Bank Policy and Research Series, 5 (1989) ("In many cases policies designed initially to provide temporary incubation for infant industries hardened into policies protecting mature industries from both domestic and international competition. As a result competitive markets did not develop.").

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> When local rivalry is muted, a nation pays a double price. Not only will companies face less pressure to be productive, but the business environment for all local companies in the industry, their suppliers, and firms in related industries will become less productive. This demonstrates in particular the danger in arguments about the creation of "national champions" in an industry in the home country in order to gain the scale to compete internationally. Unless a firm is forced to compete at home, it will usually quickly lose its competitiveness abroad.[78]

Some measures of protective antitrust policies might be necessary so that countries in the Global South overcome the industrial and development gap between them and more advanced nations. Selectively enforcing antitrust laws, together with industrial policy, to grant certain protective measures might help developing countries counter balance some of the adopted neoliberal policies. The latter have forced many of the developing countries to give up other protectionist measures necessary for industrial catch-up and international competitiveness. It is, however, important to advocate for the more successful protectionist approach, such as the one followed by Japan and South Korea, where protection is conditional, temporary, and does not shield the protected industry or firm from all forms of competition.

Other than the Asian economies that have grown thanks to a nuanced market structure view -never holding perfect competition as the ideal - evidence from Germany, France, Great Britain, Australia the United States, among others, is not short of the same. The dominant policy, at many moments in the development of the West, was that of protectionism over competitive markets.[79]

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[78] Porter, supra note 21, at 931-932.; see also Eleanor M. Fox, "Antitrust Welfare" - The Brodley Synthesis, 90 B. U. L. REV. 1375, 1379 (2010) (quoting Joseph F. Brodley, Antitrust and Competitive Advantage in World Markets, 5 ANTITRUST 40 (1990); see also Michael E. Porter, THE COMPETITIVE ADVANTAGE OF NATIONS (1990)) ("[l]oss of domestic rivalry is a dry rot that slowly undermines competitive advance by slowing the pace of innovation and dynamism.")).
[79] Tony A. Freyer, ANTITRUST AND GLOBAL CAPITALISM 1930-2004 60-101 (Cabridge University Press, 2006).

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Decisions of French courts from the 1890s show their position as one accepting of defensive combinations or cartel.[80] This position changes only by 1986 when France adopts a modern and more comprehensive competition law.[81] The same trend reigns in Britain: during the Depression of the 1930s where the state endorses cartelization.[82] Despite the Monopolies and Restrictives Practices Act being adopted in 1948, it remained largely ineffective and serious antimonopoly and anti-cartel conduct was only ushered in with the Restrictive Practices Act of 1956.[83] As for the German state, it strongly supported cartels and enforced their agreements during the late 19th and early 20th century.[84] A ruling by the highest court in the country in 1897 declared cartels as legal formations.[85] From the First World World onwards, cartels were widespread and means by which the German state planned economic activities.[86] Despite several attempts at curbing cartelization they prevailed throughout Germany's industrialization.

Support for cartelization was not unique to several European countries, at one point in the development of European competition law and policy in the 1980s, the European Commission itself approved a 'crises cartels' to protect local production and shield it against foreign imports.[87]

Now looking at the American jurisdiction we find several genealogical readings to American antitrust jurisprudence.[88] In one version the U.S. Supreme Court was held to have interpreted the antitrust statutes to protect small businesses.[89] Protecting rivals, albeit smaller ones, was often at the expense of efficiency. A quote from Judge Learned Hand attests to this intention:

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[80] Ha-Joo Chan, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 91 (Anthem Press, 2003).
[81] Id.
[82] Id. at 92
[83] Id.
[84] Id.
[85] Id.
[86] Id.
[87] European Commission Decision 84/380/EEC of 4 July 1984, Synthetic fibres, OJ 1984, L 207/17.
[88] See e.g. Peritz counter history
[89] Hovenkamp, Antitrust Protected Classes, 88 MICH L. REV. 1, 30 (1989-1990) ("Senator Sherman was not speaking for consumers of refined petroleum products, but rather for the small producers and

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> [O]ne of [the] purposes of [the antitrust statutes] 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.[90]

The Warren Court identified small business as a protected class under the antitrust laws.[91] Warren-era decisions were more inclined to favor small business and condemn practices that reduced cost or generate more desirable products.[92] These practices were condemned because they harmed rivals who were unable to match them, despite benefiting consumers at large.[93] In many cases, the Court ended up condemning mergers because of, rather than in spite of, efficiencies.[94] What is certain, regardless of the historical version one reads, is that price theory and allocative efficiency have not always been the pursued goals in American antitrust enforcement and policy.[95]

These are but some of the examples showing how today's developed countries have used either selective enforcement or radically different competition policies, often in support of cartels or weaker rivals, to foster their industrialization and development. Looking at the historical development of their competition enforcement and policies, we get to see how they arrived at price theory and efficiency-driven competition law only after having exploited other alternatives more lenient towards concentration. These alternatives have helped them develop and grow. Once they have achieved industrialization, development

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refiners whom Standard Oil had driven to ruin."); see id. at 29 ("The principal victims of the trust movement of the 1880s - certainly of the trusts that appeared most frequently on Congress' hit list - were inefficient small firms, rather than consumers. Competitors were the principal protected class of the Sherman Act.").

[90] United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945).

[91] Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 1 (2005).

[92] Id. at 2 ("E.g. […] Brown Show Co. v. United States, 370 U.S. 294 (1962), which condemned a horizontal merger in a highly competitive market with easy entry in part because the resulting firm would be able to undersell its rivals; and FTC v. Procter & Gamble, 386 U.S. 586 (1967), which condemned a conglomerate merger for creating efficiencies that rivals were unable to match.").

[93] Id.

[94] Brown Show Co v. United States, 370 U.S. 294, 344 (1962).

[95] Peritz, supra note 1.

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and growth were they able to let go of their more protectionist heterodox market structure positions and embrace pure price theory and efficiency analysis to guide their competition enforcement goals. It seems - among other things - quite hypocritical to ask of today's developing countries first, to follow the approach the developed countries have only started following after they have attained development and second, to forbid them to use the same policies that have allowed the developed countries to develop in the first place.

IV. 2. Empirical Evidence

The results of the following empirical studies present further evidence in support of a competition policy seeking a mix of competition and concentration driven by dynamic efficiency, rather than perfect competition driven by allocative efficiency.

Extending the work of Aghion et al., finding that the relationship between competition and growth or innovation is following an inverted U-shaped graph,[96] I conducted an empirical study testing the relationship between competitive structures and growth in the manufacturing industries of 50 developing countries in the South since the 1960s up to 2010.[97]

In this empirical study, the relationship between competition and growth is investigated using industry level data available from the UNIDO Industrial Statistics database. This is used to calculate labour productivity growth rates in developing countries' manufacturing industries, which is used as a measure of technological progress, dynamic efficiency and overall growth. The degree of product market competition in these industries was calculated using a proxy of the

[96] Philippe Aghion et al., Competition and Innovation: An Inverted-U Relationship, 120(2) Quarterly Journal of Economics, 701 (2005); Philippe Aghion, Matias Braun and Johannes Fedderke, Competition and Productivity Growth in South Africa, 16(4) Economic Transition 741, 748 (2008).

[97] See Dina Waked, Antitrust Laws in Developing Countries: An Empirical Analysis of the Reasons and Effects of
Enforcement and Non-Enforcement (SJD dissertation, Harvard University (2012)).

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Lerner index, namely price cost margins (PCM). Measuring pricing power, as a way to measure competitive pressure, is provided by the size of the markup of price over marginal cost of production. Price cost margins would be equal to zero under perfect competition.[98] The relationship between product market competition and labour productivity growth in developing countries' manufacturing industries was investigated using a fixed effects panel data estimation model. The results show that an increase in product market competition (a reduction in price-cost margins) is associated with higher labour productivity growth rates at initial low levels of competition. However, in testing for a non-linear relationship between markups and growth, i.e. testing for the inverted U-shaped relationship predicted by Aghion et al.[99], the results confirm that a further increase in competition, specifically if it goes beyond a certain threshold, will have a negative impact on growth.

What this means is that at low levels of competition, some rivalry is beneficial to growth—corresponding to the diffusion of means of production usually clustered in the hands of few local elites or the government. This growth trajectory is, however, maximized at a predeterminable point, where further competition negatively impacts growth. This inverted U-shaped relationship is a clear contradiction to prescriptions of perfect competition and the alleged benefits of maximum competition. This shows that allocative efficiency achieved through maximum competition is not desirable, in the sense that it does not promote growth. It thereby gives way to the choice of non-efficiency based goals, or simply goals other than static allocative-efficiency, that are more suitable to address actual needs in the South. It thus allows for policy alternatives embracing higher levels of market concentrations or oligopolistic markets.[100] By doing so the results break away from the liberal approach of mainstream competition law and economics as it relaxes the 1st theorem of welfare economics, according to which

[98] In actual calculations it can be negative when the firms are loss making.
[99] See Aghion, supra note 95.
[100] Verspagen, supra note 27 and accompanying text.

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the market at competitive equilibrium will lead to Pareto efficient allocations of resources.[101] Joseph Schumpeter has long ago argued that:

> Economists are at long last emerging from the stage in which price competition was all they saw. […] it is not that kind of competition which counts but the competition from the new commodity, the new technology, the new source of supply, the new type of organization (the largest-scale unit of control for instance)—competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives. This kind of competition is as much more effective than the other as a bombardment is in comparison with forcing a door.[102]

Given these empirical results, the policy recommendation made here, namely to replace allocative efficiency as the desired maximand and perfect competition as the means to realize this maximand, gains further support. A mix of competition and concentration becomes the more desirable market structure and what is maximized becomes something more pertinent to countries in the Global South, namely growth. This is particularly important when combined with redistribution as presented above.

IV.3. Progressive Economic Thought

Progressive economists around the turn of the century have held similar views on some of the issues giving rise to the alternative proposed here: fostering a mix of

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[101] Jean Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 20–21(MIT Press, 1988) ("Weak assumptions about preferences and technological possibilities yield general results on competitive equilibrium. The best-known of these may be the two fundamental welfare theorems. Roughly stated, the first says that a competitive equilibrium is Pareto optimal (that is, a benevolent and fully informed social planner could not replace the competitive allocation of goods with another feasible allocation that would increase all the consumers' welfare) and the second asserts that, under convexity assumptions (which rule out increasing returns to scale), any Pareto-optimal allocation can be decentralized (implemented by a market organization) by a choice of the right prices and an appropriate redistribution of income among consumers.").

[102] Schumpeter, supra note 28, at 84.

competition and concentration, pursuing dynamic efficiency, growth and redistribution. Two economists in particular are worth mentioning in this context. The first, is Henry Carter Adams who wrote in critique of laissez-faire and in support of monopolies for industrial progress back in 1887.[103] Adams' ideas were shared amongst other economists of the time, generally grouped together as the progressive-era institutional economists.[104] But his account of the virtue of monopolies for industrial progress is particularly appealing. He distinguishes between three classes of industries: those of constant returns, those of diminishing return and those of increasing returns.[105] According to Adams, the first two classes of industries are adequately controlled by competitive action, whereas the third class requires the superior control of state power.[106] He argues,

> There are many other lines of business [other than railroalds] which conform to the principle of increasing returns, and for that reason come under the rule of centralized control. Such business are by nature monopolies. We certainly deceive ourselves in believing that competition can secure for the public fair treatment in such cases, or that laws compelling competition can ever be enforced.[107]

What is particularly appealing in his version of promoting monopolies is not only the assertion that the competitive market alternative will fail at bringing into existence these industries but also his insistence on the necessary role to be played by the state in selecting these to-be monopolistic structures. Hovenkamp has read into Adams's critique of laissez-faire the following proposition, "[protagonists of laissez-faire] have failed to recognize that although some monopolies are bad, others are good and must be tolerated or even encouraged.

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[103] Henry C. Adams, Relation of the State to Industrial Action, 1(6) PUBLICATIONS OF THE AMERICAN ECONOMIC ASSOCIATION 7 (1887).

[104] Other influential institutional and progressive economists writing between 1880 and 1930 about economics and law were Thorstein Veblen, Robert Hale, Charles Francis Adams, Richard T Ely, John R Commons, Edwin R Seligman and Simon Patten.

[105] Adams, supra note 102, at 519.

[106] Id.

[107] Id. at 528.

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But only an economically active state could separate the sheep from the goats."[108] Adams insists that the benefits of monopoly could be conferred upon society rather than the monopoly businesses themselves.[109] He delves into the particular benefits when the state is the owner of the monopolistic enterprise. His analysis, however, can be widened to reach the benefits that society can accrue when monopolistic structures are allowed to exist with state control and regulation. Here the work of the second economists I want to draw attention to is particularly relevant. Namely, the work of Edwin R. A. Seligman on the shifting of taxation.[110]

Seligman's work points us to the ramification of taxation on competitive and monopolistic enterprises. His economic analysis illustrates how "the degree to which a tax will be shifted on the consumer will vary inversely as the elasticity of the demand, and directly as the ratio of product to cost."[111] Taxes on the profits of monopolistic enterprises will be born by the monopolists, whereas taxes on competitive firms - in specific market conditions - will be shifted onto the consumers.[112] The reason is that the monopolist will always be charging the highest price at which he can sell the greatest number of products.[113]

If the tax is imposed on every article produced, the monopolist may prefer to restrict his production and raise his price. Although he will sell less than before, because of the increased price, yet his net profits may be larger because he pays a smaller tax than he would if he proceeded more extensively. Although his gross receipts diminish, his expenses diminish still more. If the tax is small and the

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[108] Hovenkamp, supra note 16, at 998 referring to Henry C. Adams.

[109] Adams, supra note 102, at 502 ("The application of the rule of non-interference renders it impossible for men to realize the benefits that arise, in certain lines of business, from organization in the form of a monopoly.").

[110] Edwin R. A. Seligman, On the Shifting and Incidence of Taxation, 7(2/3) PUBLICATIONS OF THE AMERICAN ECONOMIC ASSOCIATION 7 (1892).

[111] Id. at 152.

[112] Seligman p. 282-283 "A tax on the profits [int eh case of competitive net receipts] … must in the long run, be shifted to the consumer; provided that the commodity continue to be produced at all; for if the tax rested not eh particular profits, the producer would be put at a disadvantage as compared with those engaged in other industries. There would be a gradual migration of capital to find the most profitable level, and the original industry would gradually be deserted. In the long run, therefore, either the tax will be shifted to the consumer, or it will lead to a cessation of production."

[113] Id. at 160.

demand apt to fall off a great deal with increased price, the monopolist will be likely to find it more profitable to bear the tax himself.[114]

This is however not the case with taxes on gross products, where the monopolist will shift the tax to the consumer.[115] Yet, a tax on monopoly profits is guaranteed to be born by the monopolist himself. If the consumers were willing to pay more, then the monopolist would have increased the price before the tax, given that monopoly price is always at the point of the greatest monopoly profits.[116] Thus, a tax on these profits can never increase prices, because such increased price would not be consistent with the maximum monopoly revenue.[117] In a way this assures that a tax on monopoly profits must therefore fall wholly on the monopolist.[118]

Extending Seligman's work allows monopolies to render even more benefits to society than the ones Adams talked about. Monopolies are now not only the necessary engine to drive industrialization in industries with increasing return to scale, a la Adams, but thanks to Seligman's work can also contribute to an increased income funded by taxing these monopolistic structures. This tax is guaranteed to be born by the monopolist and thus will not increase prices further. The income gathered through taxing monopoly profits can now be redistributed back to the consumers who paid the monopoly price as illustrated above in the application of the Consumer Trust. Thereby, assuring that the proposed redistributive mechanism is workable, feasible and offsets the harm caused by allowing monopolistic and concentrated market structures to exist. The offsetting of the harm consumer suffer is also financed by the monopolies/dominant firms themselves. In a way this allows for two desirable outcomes to be simultaneously reached: (1) monopolistic structures exist to further industrialization, innovation, and growth; (2) taxes on monopolistic profits, which are born by the monopolist

[114] Id. at 160-161.
[115] Id. at 162 - 164.
[116] Id. at 164.
[117] Id.
[118] Id.

himself, will offset the higher prices consumers pay until in the long run cost efficiencies push prices down to competition levels or lower. Also, these taxes collected by the state can be used to fun infrastructure projects and social welfare programs.

V. Conclusion

Looking at competition law and policy from a historic and comparative angle, we get to see that today's orthodoxy of the pursuit of allocative efficiency and perfect competition was not always the one pursued. With the rise of this orthodoxy, alternatives were put aside and deemed economically unsound. These alternatives not only make sound policies but were strategies pursued to achieve industrialization, growth and development in the West before being branded as policies rooted in bad economics. Ignoring these alternatives of how markets could have been, and indeed were, organized differently, leads to a substantial omission from our analyses regarding market structure in the Global South.

This article presented an alternative market structure and competition goals arguably more suitable to the Global South. This alternative aims at realizing dynamic efficiency, innovation, growth and redistribution. In doing so it proposes a mix of competition and concentration to achieve these ends. It draws on evidence from Western countries that once pursued these same goals before replacing them with the orthodoxy of allocative efficiency and perfect competition. It also draws on empirical support to show how such an alternative would be more resilient towards achieving the needs of the Global South. Moreover, it relies on ideas of progressive era economic thought to support this alternative further. What is important to note, is that policies similar to this alternative proposed here played an integral role in Western economic development and their conceptions of what constituted market failure. These supporting arguments may amounts to a disenchantment with the current imposed paradigm of allocative efficiency and perfect competition. In the least, they help signal how alternatives were once successfully followed.

The South can break free from the strict paradigm of allocative efficiency and perfect competition nexus and overtly seek the alternative that incorporates industrialization and redistributive ends. This approach can be supported through an internal and an external critique of that paradigm and by revisiting and exposing the industrial policies of the post-war era in Britain, France, Germany or Japan or looking at Korea and Taiwan in the 1960s.

Countries in the South could also try to strategically use the strict paradigm of efficiency-competition to pursue the alternative goals presented here. This strategic use could be sought under a somewhat disguised market-based approach of selective enforcement. An example of such disguised selective enforcement would be to enforce the competition laws to promote local firm's competition in global markets by underenforcing the laws on exporting local firms or cartels and overenforcing it on foreign imports. Also, selective enforcement could be used to protect industries deemed essential to national technological advancement. This amounts to strategically using antitrust laws to circumvent prohibition on protectionism as per WTO rules. Other manifestations of disguised selective enforcement should include as a basic premise the promotion of the interests of the Global South.

Overtly pursuing alternatives to the mainstream orthodoxy or disguising these alternatives through selective enforcement is paramount to reconfiguring the position of the Global South within the global economy. These options give countries in the South possibilities to pursue heterodox competition policies. These in turn can empower the Global South to break the confines of the rigid mainstream policies imposed onto them and adamantly seek purposeful alternatives, such as the one presented in this article.

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