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Citation
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The Politics of Delegation: Constitutional Structure, Bureaucratic Discretion, and the Development of Competition Policy in the United States and the European Union, 1890-2017

A dissertation presented

by

Chase Michael Foster

to

The Department of Government

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

in the subject of

Government

Harvard University

Cambridge, Massachusetts

January 2019

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The Politics of Delegation: Constitutional Structure, Bureaucratic Discretion, and the Development of Competition Policy in the United States and the European Union, 1890-2017

Abstract

Over the last three decades, European competition enforcement has become both more intensive and extensive. Meanwhile, American antitrust enforcement has stagnated. Why has the European Union, a supranational organization created by governments with long histories of organized cartels and state direction of the economy become the world's competition policy leader? And why is the United States, the birthplace of antitrust, and a polity with less of a cartel and industrial policy tradition, now a competition policy laggard?

I argue that the divergent pattern has depended on differences in the construction of administrative power in each system. In Europe, a broad zone of bureaucratic discretion allowed the European Commission to intensify competition policy enforcement following the diffusion of neoliberal economic ideas during the final decades of the 20th century. In the United States, antitrust regulators had similar policy preferences but were comparatively constrained: by their narrow legislative mandate, the adversarial legal enforcement system, and extensive ongoing political controls that limited bureaucratic autonomy.

Drawing from archival material, comprehensive enforcement data, and an extensive secondary literature in history, economics, sociology, and law, I use systematic process analysis to demonstrate that the dissimilarity in the design of bureaucratic discretion in the competition policy field is rooted in the distinct political origins of each regulatory regime, and the way in which bureaucratic delegation was shaped by the constitutional organization of power within each political system. The agrarian populist origins of the American antitrust laws, together with the congressional dominance of lawmaking under the U.S. Constitution, led to the establishment of a regulatory regime characterized by a narrow zone of bureaucratic discretion and a judicial system of enforcement. In Europe, by

contrast, the integrationist origins of competition law, combined with the executive-dominated organization of political power under the European Treaties, led to the creation of a comparatively broad zone of bureaucratic discretion, including the establishment of an administrative system of enforcement, and the delegation of significant policymaking and enforcement autonomy to the European Commission. A close analysis of institutional design choices over more than a century of political development, points to some of the ways that the organization of powers within each political system has systematically conditioned subsequent reforms, leading to the maintenance and reinforcement of the core institutional features of each regulatory regime.

Through a comparative analysis of the pattern of competition enforcement within key sectors from 1975 to 2017, I highlight also some of the consequences of the design of bureaucratic discretion for regulatory capacity. With little risk of political intervention or judicial sanction, the Commission has been able to use competition law to systematically reform economic development policy, promote regulatory liberalization, and restructure the behavior of dominant firms—in the process, creating a more integrated and competitive European economy. By contrast, the more limited discretionary authority possessed by U.S. regulators has tied antitrust enforcement to electoral outcomes and judicial opinion, limiting the ability of federal regulators to use antitrust law to support liberalization and public subsidy reform, and thereby allowing dominant firms and subnational governments to maintain significant barriers to competition in the American economy.

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Acknowledgments

This project began with a simple puzzle. I wanted to understand why European competition law seemed to constrain the anti-competitive behavior of global multi-national companies more than American antitrust. The predominant view, particularly within the legal literature, was that the divergence related to law and economics: American antitrust was more narrowly concerned with consumer welfare than European competition law, which was also infused with political goals—thus, the reason European and American enforcement differed.

My research demonstrated that this could not be the entire explanation since, within many areas of competition policy, the economic analysis was similar across the two systems. I concluded that an institutionalist theory was needed to explain the distinct trajectories. Further, to understand the design of regulatory institutions, it was necessary to analyze the political origins of each regulatory regime, and the political coalitions that shaped their establishment and institutionalization. Thus, my journey down more than a century of history, exploring periods and places as varied as the populist agrarian movements in the 19th century United States, and the birth of the European Coal and Steel Community in postwar Europe. And thus, my efforts, some more successful than others, to trace the links between these foundational moments and the practices of regulators today.

As the project progressed, I realized that, to understand these historical developments, I also needed to grasp the technical details of competition law. This meant turning to lawyers and law review articles to learn the intricacies of American antitrust and European competition law, as well as the rules governing enforcement and judicial review within each legal system. Understanding competition policy also necessitated engaging with economics—to understand the theories and methodologies that inform enforcement. So, what started out as a political science project, became increasingly interdisciplinary, incorporating the work of historians, legal scholars, and economists as much as political scientists and economic sociologists.

Completing such a project has required extensive support from family, friends, and colleagues. Thank you first to my dissertation committee members: Peter Hall, Jeff Frieden, Dan Carpenter, and Kathy Thelen. My thinking about the relationship between political coalitions and economic institutions, and the historical threads between the institutions of the past and the present, has been deeply influenced by Kathy's scholarship and advice. Dan's course on bureaucratic politics, which I took my first semester of graduate school, set me on a path dependent process of studying the regulatory state. Ever since, his research and recommendations have been fundamental to my understanding of its political development. As a teacher, collaborator and mentor, Jeff taught me how to develop theoretically-motivated research questions and explanations, and to articulate clear arguments in article-length form. This project has benefited tremendously from his incisive critiques and tireless effort to find the economic interests lurking behind every regulatory enforcement action.

Very little of this dissertation would have been possible without Peter Hall. As my dissertation supervisor, he has read multiple drafts of this project, providing pages of written comments that sometimes appeared more carefully constructed than the chapters to which he was responding. My understanding of social scientific theory, research methodology, and comparative political economy, among many other things, has been profoundly influenced by our many long conversations. And Peter's deep commitment to mentorship and intellectual collaboration will serve as a lasting model for how I relate to colleagues and students during my academic career.

Harvard University, particularly the Minda de Gunzberg Center for European Studies and the Harvard Kennedy School, provided a rich community in which to think and work. Peter and Kathy's course on "Varieties of Capitalism", which I took the year before beginning doctoral studies, shaped my research interests and defined my graduate school community. Muriel Rouyer's course on the European Union was what sparked by interest in studying the development of the European institutions. Sheila Jasanoff gave helpful feedback on my prospectus, and her work served as an influential model for how to study European and American regulation in comparative perspective. Without Jane Mansbridge, my adviser and mentor at the Kennedy School, I likely would not have pursued doctoral studies. Her abiding generosity and encouragement, indefatigable energy, and intellectual rigor have been sources of continuous inspiration during my time as a graduate student. Finally, Thom Wall, Pam Metz, Aida Vidan, and Elizabeth Johnson provided helpful administrative and logistical support as I went through the doctoral program.

On the invitation of Cornelia Woll, I had the opportunity to spend time at Sciences Po in Paris, which proved to be an intellectually stimulating environment as I began to conduct dissertation research. While there, conversations with Olivier Godechot, Jens Beckert, Neil Fligstein, Jenny Andersson, Bruno Pallier, and Emiliano Grossman, contributed to the project's development. In Berlin, Dieter Plehwe helped me understand the historical links between Chicago and Freiburg school liberals, while Heike Schweitzer provided insight on the early years of European competition law. At the University of British Columbia, Alan Jacobs, Kurt Huebner, Antje Ellermann, and Richard Johnston offered helpful feedback during the project's final stages.

I also want to recognize the many institutions that have supported this project, providing, at various times, funding, office space, or a place to present my work. A Krupp Foundation Graduate Dissertation Research Fellowship from Harvard's Center for European Studies made it possible to spend an extended period of time doing field work in Europe, while a fellowship from Harvard's Multidisciplinary Program on Inequality and Social Policy gave me two semesters where I could write exclusively. A number of institutions also provided office space and intellectual community, including the Max Planck Sciences Po Institute for Coping with Instability in Market Socieities in Paris; the Center for European Policy Studies in Brussels; and the Institute for European Studies at UBC. I want to thank Cornelia Woll, Olivier Godechot, Karel Lannoo, Jutta Allmendinger, and Antje Ellermann for offering opportunities to visit, as well as the many program administrators who helped coordinate these stays, especially Mariana Abelskaïa-Graziani at Max Po, Reinhild Wagner, Marion Obermaier, and Martin Mann at the WZB, and Jennifer Trieu at UBC's Institute for European Studies.

The dissertation also benefited from feedback I received at numerous workshops, especially Harvard's Comparative Politics Research Workshop, Max Po's Doctoral Research Workshop, and the Research Colloquium at the Institute for European Studies at UBC. Particularly helpful was a conference on regulatory capitalism organized by David Levi-Faur and Mattia Guidi, through the European Consortium for Political Research, and a weeklong summer school on the European crisis, led by Gareth Davies, at the Vrije Universiteit in Amsterdam.

Myriad practitioners, policymakers and other experts in Europe and the United States agreed to be interviewed for this project. Of the officials I interviewed, I was continually impressed with their public service motivation –to protect consumers and promote competition in markets, as far as their authority allowed. While I will not mention specific names out of respect for anonymity,

without the willingness of public servants to walk me through the complexities of competition policy, this research would have almost certainly been less precise and well-informed.

Over the years, I have been fortunate to find interlocutors and friends at multiple institutions across several different countries. Michele Chang, Martino Comelli, James Conran, Andreas Eisl, Sanem Guvenc-Salgirli, Nils Hagerdal, Alex Hertel-Fernandez, Troels Krarup, Dominika Kruszewska, Matto Mildenberger, Francesco Nicoli, Sara Pavan, Isabel Perera, Willem Pieter De Groen, Cassandra Robertson, Daniel Schulz, Leah Stokes, Yeling Tan, Kai Thaler, Julie Weaver, and Peter Volberding deserve mention for their camaraderie, conversation, and intellectual inspiration. The hospitality and companionship of Mathilde Hiesse, Joanna Kaminska, Ivan Keller, Rémi Pierot, and Megan Richards, made long stays in Europe much more enjoyable. I also want to thank Patrick Baker, Fiona Barnett, Laura Grattan, Liz Mason-Deese, Elizabeth Ouzts, Robin Sinhababu, Justin Smith, Louisa Warren, Ann and Kevin Webb, and Amanda Wilson, for providing needed R&R and encouragement at key moments.

Most of all, I want to thank my family: my siblings, Blaire, Kendall, and Drew; my parents, Macon and Jennie, and their respective spouses, Jennifer and Lynn. Each of you, in your own way, has offered support that has been a source of strength as I have navigated this journey.

Finally, I want to dedicate the dissertation to Ignacio, my partner-in-life. As my perpetual sounding board, you have graciously listened to more monologues about regulatory policy than any person deserves. Without your humor, wisdom, and, wit, love, affection, and excellent cooking, I would never have been able to complete this project.

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Introduction

In 1998, the US Justice Department (DOJ), nineteen states, and the District of Columbia sued Microsoft in federal court for monopolizing the market for personal computer operating systems. The case was the result of nearly a decade of antitrust investigations into the company's bundling of proprietary software with Microsoft Windows, a practice which was seen as shutting out competing software makers from a substantial part of the consumer marketplace. It would take another decade, and involve nearly 150 different judicial opinions, but the case was ultimately a legal victory for the DOJ: courts found Microsoft guilty on nearly all of the government's charges, and the company paid billions in damages from follow-on lawsuits.

But if the government won the lawsuit, it only partially succeeded in ending Microsoft's restrictive practices. Appeals courts refused to grant the government's request for structural remedies. In the early 2000's, after George W. Bush became president, the DOJ ended most of its efforts to monitor the company's compliance with the ordered conduct remedies, refusing to initiate additional legal action or investigate new complaints.[1] As a result, Microsoft largely continued the business practices deemed by American regulators and federal courts to be anti-competitive, and the DOJ's multi-decade effort had only a marginal effect on the structure of the marketplace for personal computing and information technology.

In 2002, the European Commission launched its own antitrust investigation into Microsoft's business practices that paralleled, in many ways, the DOJ's prosecution. As in the U.S., the European competition authority scrutinized Microsoft's software bundling practices, and concluded that the company had undermined competition by including proprietary applications with its operating system and refusing to provide interoperability information to third-party software

[1] For an overview of the extensive antitrust litigation against Microsoft see Page and Lopatka 2009. Many of the litigation documents can be found here: https://cyber.harvard.edu/msdoj/. For a sociological perspective on the case, see Fligstein 2009.

producers.[2] As with the DOJ case, Microsoft was found to have violated antitrust rules, ordered to pay hefty fines and to change its business practices.[3] But in contrast to the American prosecution, the European enforcement efforts resulted in highly specific conduct remedies that demanded concrete changes to how the software developer ran certain parts of its business. And unlike in the United States, where government efforts to ensure compliance faltered, the European remedies were aggressively enforced.[4] Over the following nine years, Microsoft would pay three additional large penalties for failing to comply fully with Commission orders, paying out €2.2B in total.[5] All the while, the Commission would continue to investigate the company, extending its inquiry to the interoperability of its Office suite and its server products, as well as the tying of internet browsers to its software—the latter investigation resulting in a formal settlement that required Microsoft to offer European consumers the choice of 12 different internet browsers. Given the fast-paced nature of technological change, many competition law experts question whether the Microsoft antitrust cases were justified. But one thing is clear: the European Commission proved more adept than the US

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[2] During the first investigation, the software of concern was Windows Media Player. Later, Microsoft's other proprietary software was investigated, notably Internet Explorer.

[3] In Feb. 2000, the European Commission's competition Directorate-General initiated an investigation of Microsoft's software bundling practices, covering many of the same issues that had been examined by the US DOJ over the previous decade. After sending three statement of objections, and holding an administrative hearing in Nov. 2003, the Commission ruled that Microsoft had violated the EU's prohibition of the abuse of dominant market position. The company was fined nearly €500M and ordered to commit to a major overhaul of its business practices. The remedies included offering consumers, within 90 days, a version of Microsoft Windows without bundled software, as well as making available, within 120 days, the intellectual property competitors needed to make their products compatible with Windows. For a summary of the major regulatory decisions in the Commission's first Microsoft investigation see < http://ec.europa.eu/competition/sectors/ICT/microsoft/investigation.html>.

[4] For instance, the Commission market-tested Microsoft's new software, appointing a trustee to monitor compliance, and requiring the company to undertake specific remedies such as providing inter-operability information to competitors. See http://europa.eu/rapid/press-release_IP-07-1567_en.htm?locale=en.

[5] In 2006, when the Commission found Microsoft had failed to report certain required information in a timely manner, the company was fined €280M; in 2008, Microsoft paid an additional €860M for non-compliance with the original remedy. See< http://europa.eu/rapid/press-release_IP-08-318_en.htm?locale=en>. The third fine related to the 2009 browser settlement. See < http://europa.eu/rapid/press-release_IP-13-196_en.htm>.

DOJ at enforcing antitrust law in this particular case, with European enforcement leading to more lasting changes in the business practices of one of the world's most powerful companies.

The outcomes in the two Microsoft cases are puzzling in many respects. Both regulators charged Microsoft with similar antitrust violations drawing from the same body of post-Chicago economic theory.[6] The DOJ and Commission pursued Microsoft under broadly similar market abuse laws, and Microsoft lost both cases on the merits. Why, then, were the initial remedies and ultimate outcomes so different? As the home regulator for the company, with a greater share of Microsoft's business, and with access to the vast resources of the Department of Justice, American antitrust officials should have been better positioned to secure structural changes. Why, then, is the US prosecution seen, at best, as a mixed success, and, at worst, an utter failure? Conversely, why was a case put together by the European Commission, a relatively small supranational organization, more successful at securing compliance from a company with such global reach and power?

The two cases point to a number of broader empirical questions and explanatory problems that should be of great interest, not only to students of regulatory capitalism, but also to a wide range of political scientists, economic sociologists, historians, public administration scholars, and practitioners. As the enforcement of competition and other regulatory policies increasingly becomes a question that can be performed by any number of regulators, how do the patterns of regulatory policy and enforcement compare across jurisdictions? To what extent is the promotion of competition becoming a core goal of governments, and through which kinds of institutions has competition policy been organized? [7]Are the two Microsoft cases exceptional? Or, do they reflect

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[6] Both sets of Microsoft cases relied on post-Chicago economic theory developed by U.S. academics in the context of American antitrust law. These theories have sought to empirically show that, in industries marked by partially path dependent network effects, short-run consumer welfare is undermined by refusals to deal, bundling, restrictive licensing, and other aggressive business practices. Importantly, in the absence of network effects, the same business practices would generally not be considered to have a negative effect on consumer welfare. See Page and Lopatka 2007.

[7] Throughout the dissertation, competition policy and competition law are used as general terms that encompass both European competition law and American antitrust law.

systematic differences in the way that competition and other business conduct rules are regulated in Europe and the United States? Moreover, how do the cases fit into the longitudinal trends of competition enforcement within each jurisdiction, as competition policy has developed over time? Finally, what concrete real-world consequences can we attribute to competition policy and its enforcement—for the structure of the economy, the liberalization of regulated network industries, and the character of economic development policy?

More theoretically, what *explains* variation in competition policy, both in terms of the "law in books", or the formal authority that is possessed by regulators, and the "law in action"—that is, the way authority is used in practice?[8] How have differences in ideas about competition, economic efficiency, or the appropriate role of the state in the economy shaped enforcement priorities and the broader development of the law? To what extent have the constellation of interests supportive and opposed to competition policy influenced each regulatory trajectory? Finally, how have the political origins of each regulatory regime, and the organization of powers within each political system, shaped the clash of interests and ideas?

In this dissertation, I answer each of these questions. Empirically, I provide a close analysis of the differences in enforcement patterns during the recent period, offering a comparative, longitudinal analysis of competition policy development in the EU and US that is surprisingly absent in regulatory policy literatures that tend to focus on one regime or the other. In addition to the contemporary analysis, I conduct an empirical examination of institutional developments and enforcement patterns that spans the origins of each regime to the present. The historical analysis emphasizes the continuities within each regulatory regime's institutional design and enforcement practices, even as the interest group environment and predominant economic paradigms have

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[8] Commonly used by sociologists of law, the distinction between "law in books" and "law in action" stems from the early 20th century legal realist movement, which emphasized the importance of examining the real-world impact of law. For a foundational explication of this distinction, see Pound 1910.

dramatically changed, and even as globalization and the development of distinctive 'epistemic' communities in the competition policy field, has generated pressures on each regime to converge toward a common set of international practices.

Theoretically, I develop a framework that, not only explains why the European case against Microsoft proved more robust than the American prosecution, but accounts also for the broader comparative and longitudinal pattern of competition enforcement in each system. Through an empirical analysis of competition policy enforcement over the last four decades, I point to some of the ways that the organization of each regulatory regime—both in terms of the discretionary authority delegated to regulatory bureaucracies and the orientation of courts toward bureaucratic power—has shaped the capacity of regulators to enforce competition rules in the economy. Specifically, I show that much of the difference in the pattern of competition enforcement in recent decades can be explained by differences in the discretionary authority possessed by regulatory bureaucracies. In terms of the scope of the law's coverage, the organization of enforcement, and insulation form political interference, the European Commission has been delegated much broader discretionary authority in the competition policy field than American regulators, where legal authority is more narrowly circumscribed, enforcement decisions subject to more extensive judicial review, and regulatory bureaucracies reined in by political controls. And I argue that these differences are rooted in the distinct constitutions of each regime—in terms of the both the original purposes and constructions of competition law itself, and the larger distribution of institutional power within each political system.

The argument is developed through historical case studies that trace the origins and evolution of each regulatory regime since its founding to the present. All in all, I examine more than a dozen important episodes that shaped the political design and institutional evolution of each competition system. Additionally, I examine the overall enforcement pattern across multiple political

epochs and as applied to a number of different economic sectors. By closely examining the institutionalization of each competition regime over a long period of time, I show that many aspects of competition policy today are rooted in delegation choices made in the past, often under quite different political circumstances. In the process, I highlight the institutional regularities within each regulatory regime, even as the affected interests and economic ideas governing competition policy have dramatically changed.

The Comparative Pattern of Competition Enforcement

As will be shown in great detail in the next chapter, the different outcomes in the Microsoft cases are hardly exceptional. Across multiple dimensions of regulatory output, as measured by competition policy's scope, scale, and the level of enforcement resources, European competition enforcement is now more intensively and extensively applied than American antitrust. In Europe, the Microsoft case was just one of more than 100 market abuse cases, and 80 final judgments, that have been successfully waged against some of the most powerful companies in the world over the last three decades. These include cases against well-known companies such as Michelin, Volkswagen, British Airways, Mercedes Benz, major European manufacturing and infrastructure powerhouses like Gaz de France, EDF, Deutsche Bahn, Teléfonica, Gazprom, and Siemens, as well as American technology companies such as Microsoft, Intel, Google, and Apple with substantial operations in Europe. Many of the EU's investigations, as we will see, have buttressed the liberalization of highly regulated industries, including telecommunications energy, transportation and banking sectors, resulting in major changes to industrial structures and business practices in ways that have also bolstered the process of European integration.

In the US, on the other hand, Microsoft was among the last major monopolization case pursued by the federal government. While the US government continues to actively enforce rules

limiting horizontal cartels, bringing scores of cases per year, the enforcement of market abuse cases has reached historical lows. From 2001-2008, just five non-cartel cases were won in court, and from 2009-2016, just eight—all mostly involving small companies or peripheral markets. In areas such as single firm monopolization, vertical restraints, and predatory pricing cases, there have been almost no prosecutions of significance over the past two decades

The divergent pattern is perhaps most stark when it comes to public subsidy reform, an area where the Commission possesses the authority to establish rules, and American antitrust officials almost no authority at all. To ensure that they comply with the EU's extensive state aid rules, member states must report all subsidies, tax breaks, or other benefits provided to individual companies. And the European Commission reviews thousands of tax policies, public expenditures, and economic development programs, covering areas from infrastructure to green energy, to ensure they are in line with the EU's state aid framework. In the US, by contrast, the role of antitrust officials is relegated to advocacy. Even as American states and localities have provided tens of billions in tax expenditures and direct subsidies, often to maintain employment in the face of deindustrialization and globalization, the federal government has done little to rationalize economic development policy and prevent subnational jurisdictions from engaging in a 'race to the bottom' in economic incentives to attract investment and jobs.

The Political Economy Puzzle

That there has been such a dramatic 'trading of places' in competition policy, with European regulators now implementing competition rules in ways that are both more extensive and intensive than the United States, is surprising from a number of different standpoints. Historically, the US is the birthplace of antitrust, the first place in the world where a government made the promotion of market competition a central component of economic policy. Outside of Germany, Europe does not

have a tradition of using state power to force domestic firms to abide by competition rules. From the standpoint of political economy scholarship, the divergent trends are even more puzzling. The US is often characterized as having a liberal market economy (e.g. Hall and Soskice 2001), an organization of capitalism that is reinforced by antitrust (Djelic 2001). The original six members of the EEC, on the other hand, have more statist and corporatist economic traditions marked by higher degrees of economic coordination and the restriction of competition (e.g. Schmidt 2003; Jackson 2001; Zysman 1983). As recently as the 1980's, many European broadcasters, railroads, airlines, telecommunications companies, and energy companies, and some banks, were either fully or partly publicly owned. Additionally, most European governments have long histories of active industrial policies, as well as the acceptance if not encouragement of cartelization. The United States, on the other hand, has much less of a tradition of public ownership and explicit industrial policy.

Why has Europe, a continent historically defined by large public enterprises and coordinated models of production, become the 21st century's leader in promoting competition in markets? And why is the United States, the birthplace of antitrust and the leader of global liberalization during the last few decades of the 20th century, now a competition policy laggard?

The Institutional Puzzle

The pattern also presents a number of institutional puzzles. The US federal government employs two million civilian workers who can draw upon the substantial coercive resources of the American state to enforce federal law. Moreover, there is a two-century long tradition of the federal government imposing obligations and limitations on U.S. states and local governments. The European Commission, on the other hand, is a supranational organization with 32,000 permanent staff and more limited coercive authority. While the European Commission, Court, and Central Bank do possess direct enforcement powers, most European law is enforced indirectly through

member states. Given these broad differences in the construction of state power and capacity, we would expect it to be easier for US federal regulators than the European Commission to secure compliance from multi-national corporations. Similarly, it is surprising that the economic development policies of Texas and New Jersey appear more resistant to reform than those of France and the UK, ostensibly 'sovereign' nations that once colonized much of the world, and viewed industry, in many respects, as a direct extension of state power.

The Consequences of Competition Enforcement

In addition to being puzzling, a growing body of evidence suggests that the divergent competition policy trajectories have been consequential for the structures of the American and European economies. A number of recent studies have found that the growth of corporate monopsonies has reduced labor bargaining power below the optimal rate, undercutting worker wage growth (Wilmers 2018; Naidu et al. 2018). Additionally, some economists are now concluding that the growing level of concentration in airlines, finance, hospitals, grocery stores, and industrial chemicals may be undermining economic efficiency. For instance, Grullon et al. (2017) find that US firms in the most concentrated industries produce greater returns to assets, and that their higher profitability is driven more by larger operating margins than improved efficiency. They note further that these firms hold a disproportionate share of patents, an indicator that barriers to entry may be driving the high profit rates. This concern has been echoed by Peter Orszag and Jason Furman, who have suggested that economic rents may be playing a role in the rapid growth of profit rates in the top decile in the United States.[9]

[9] See "A Firm-Level Perspective on the Role of Rents in the Rise in Inequality," Oct. 16, 2015. Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University. Accessible at < http://goodtimesweb.org/industrial-policy/2015/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf>.

Notably, recent studies indicate that these trends in the United States cannot be observed to the same extent in Europe. While in all countries, globalization has resulted in an increase in industrial concentration and a reduction in labor's share of economic surplus, the division of income between capital and labor has been more stable in Europe. For instance, Gutiérrez and Philippon (2017) find that while profit rates and concentration ratios have grown in the United States, they have remained steady in Europe.[10] Examining 12 different sectors, the authors demonstrate that concentration ratios are lower in the EU as a whole across all but one sector, a finding that remains true for the average European country-level ratio in 7 of 12 sectors.[11] Insofar as competition policy (or the lack thereof) has played a role in these trends, we need to understand *why* such differences are observed.

Economic data also suggests that, despite having started with public ownership structures that presented comparatively greater barriers to competition, a number of industries are now more liberalized in Europe than in the United States. According to the OECD, EU countries generally have below average trade restrictiveness in many important economic sectors including the accounting, legal, telecommunications, construction, electricity, air transport, maritime transport, and rail freight sectors.[12] Additionally, in sectors such as aviation and telecommunications, US consumers now pay more than Europeans. Faccio and Zingales (2017) find that American consumers paid more than twice the rate of Germans, and four times the rate of Danes, for a standard basket of phone and SMS messaging ($35.62 in the US versus $17.47 in Germany and

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[10] See "Figure 1: Profit Rates and Concentration Ratios: US vs. EU" in Gutiérrez and Philippon 2018: 3. See http://www.nber.org/papers/w23583.

[11] See "Figure 3: Mean 8-firm CR by sector: EU vs. US," in Gutiérrez and Philippon 2017: 8.

[12] According to the trade restrictiveness index, EU countries as a whole are at or below the OECD average in accounting, legal, telecommunications, construction, electricity, air transport, maritime transport, and rail freight. In a separate survey on OECD product markets, the EU was below the average in energy, transport, and communications regulation. See https://www.oecd.org/eco/surveys/european-union-2016-overview.pdf. Last accessed Nov. 2017.

$7.50 in Denmark) (4). Another industry study notes that US consumers paid $66.17 on average for monthly broadband, while consumers in France and Germany paid $38.10 and $35.71, respectively.[13] Whereas in the EU, competition rules have been frequently updated, and competition law actively applied in each of these sectors, in the United States, competition policy and its enforcement has not been actively applied in these sectors. Although there are certainly many factors that may have contributed to these differences in prices, competition enforcement (or the lack thereof) appears to have played a contributing role.

Just as consequential has been the differential effects of each competition system on the level of industrial subsidies. In part because of EU state aid rules, and the intensification of their enforcement since the 1980's, the role of European states in promoting particular industries and subsidizing specific companies has been curtailed over the past three decades, while the character of economic development policies has qualitatively changed. During the early 1980's, industrial subsidies constituted more than 3% of GDP in the EU-10, well exceeding the 2.3% of revenue that came from the direct taxation of industry (Commission 1988).[14] In countries such as France, Ireland, West Germany, and Belgium, industrial aid constituted more than 10% of the government budget. But with the gradual expansion of the scope of state aid soft law, and the intensification of its enforcement, aid levels began to fall in the late 1980's, declining to 1% of GDP in the 1990's.[15] Since

[13] The study was conducted by BDRC Continental and Cable.co.uk between Aug. 18 – Oct. 12, 2017. See https://www.cable.co.uk/about/media-centre/releases/new-worldwide-broadband-price-league-unveiled/. Cited in Gutiérrez and Philippon 2017.

[14] In a comprehensive survey of state aid over the period from 1981-1986, the European Commission estimated the ten European member states spent an average of 100B ECU per year on industrial subsidies, equivalent to 3.0% of GDP, the overwhelming majority of which came from national expenditures. In Italy, Luxembourg, and Ireland, the total exceeded 5%, while in Denmark, the Netherlands, and the United Kingdom, the figure was less than 2%. But in all countries, the total was substantial. See Table 1: Total volume of aid in billion ECU and Table 2: Total aid was % of GDP in "First Survey on State Aids in the European Community", Commission of the European Communities, 1988. Accessible at < http://aei.pitt.edu/3100/>.

[15] Data comes from Eurostat and DG Competition. Extensive state aid statistics are available at < http://ec.europa.eu/competition/state_aid/studies_reports/expenditure.html>.

the early 2000's, overall state aid has hovered around one half of one percent of GDP, with only a fraction of these expenditures or tax benefits used for incentives that pay companies to invest or create jobs. The vast majority of state aid now goes to research and development, environmental protection and energy, training aid, and aid for disadvantaged and disabled workers— all "horizontal objectives" endorsed by the European Commission, and which are seen as contributing to the wider Community interest. Just €12.5B – or one tenth of one percent of GDP—is now spent on economic incentives to induce investment or subsidize industrial operations.[16] And almost all of this support has been targeted to enterprises in underdeveloped regions of the EU. This is not to say that governments still find creative ways to provide support to favored industries under the auspices of horizontal objectives. But it is to say that they must now target such support toward projects and programs that do not leave their neighbors worse off, using programs that are reviewed by independent bodies.

Without rules to prohibit it, government subsidies to industry have ballooned in the United States over the past few decades. Researchers estimate that federal and state governments now spend hundreds of billions of dollars per year on various subsidies, tax credits, or rebates ostensibly designed to promote industrial development, job creation, renewable energy, and research, among other things. And a significant portion takes the form of subsidies or tax expenditures by provided by state and local governments to individual companies (Mattera et al. 2013). Standards for accounting and reporting aid significantly differ across states, and the federal government does not possess the authority to regulate these expenditures, no comprehensive data on these tax expenditures and grants exist. But from what researchers can deduce, states now spend between

[16] Figures represent average for 2007-2016, as calculated by DG Competition. Data accessible at https://webgate.ec.europa.eu/comp/redisstat/databrowser/view/COMP_SA_X$COMP_SA_01/default/table?category=COMP_MAIN.

$45B to $90B each year on economic incentives alone (Bartik 2017; Story 2012; Thomas 2010).[17] Moreover, the size of these programs has expanded dramatically since the 1980's, as the competition for jobs and investment intensified in the face of globalization, and as corporations became savvier at leveraging investment decisions over cities and states to extract cash and benefits (Bartik 2017).

In recent years, nearly two dozen corporations have received incentives packages worth more than $1B since, and another 300 deals valued at $100M or more.[18] Beneficiaries include information technology firms such as Amazon, Google, and Apple; financial services institutions such as Citigroup and Goldman Sachs; computer manufacturers such as FoxConn and Intel; all of the major domestic and foreign auto producers, and several of the major oil companies (Mattera et al. 2013). Since the vast majority of these investments would have occurred with or without subsidies, even where a specific deal might be net beneficial in the short-term, the competition for investment comes at the expense of overall public investments in infrastructure, education, health care, and other public goods.

Theoretical Perspectives

What explains the dramatic change in competition enforcement in the US and EU? Despite the multiple puzzles presented by these divergent patterns, and the tremendous importance of understanding them, few political scientists have systematically compared competition policy developments in the US and EU. While there is an immense literature on both US antitrust and European competition law, most of this scholarship is not explicitly comparative. The comparative

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[17] After spending ten months investigating economic incentives, Louise Story of the *New York Times* estimates the aggregate level to be around $80B in 2012 dollars or around $90B in 2017 dollars. Thomas (2011) estimates that in 2005, incentives from subnational governments were likely around $65B. Examining just a portion of economic development programs, Bartik (2017) estimates their value to be at least $45B in 2017 dollars.

[18] An analysis of the incentives data provided by Good Jobs First, 21 companies have received incentives deals valued at $1B or more, and another 300 have received deals worth $100M. See < https://www.goodjobsfirst.org/subsidy-tracker>.

studies that do exist are usually in law, history, or economics, and therefore not as concerned with how competition policy fits into broader political developments and questions of political institutional design (e.g. Kudrle and Gifford 2015; Harding and Joshua 2010; Fox 1997).[19] Few scholars have systematically examined how and why competition rules have been applied more intensely in Europe than in the United States in recent decades, or why state economic development policies face more limitations under European than American competition law.

That said, existing scholarship and commentary does point to a number of potential explanations for the divergent trajectories, which can help us understand some important pieces of the overall puzzle. In what follows, I consider the predominant explanations, note their limitations, and then present a theoretical framework that can account more fully for the divergent patterns of competition policy and enforcement.

Ideational Theories

Any analysis of the change in antitrust enforcement over time must begin with a consideration of ideas. Most of the existing social scientific scholarship on competition policy emphasizes the role of changing economic paradigms in spurring the transformation of European and American competition policy. A number of scholars of American antitrust have explained the dramatic *decrease* in antitrust enforcement as stemming from the shift in authority from lawyers to economists at the antitrust agencies (Eisner 1991). Others have emphasized the institutionalization of Chicago School-inspired economic ideas within antitrust jurisprudence (Ergen and Kohl 2017; Davies 2010; Pitofsky 2008). Both of these sets of accounts capture an important component of the shift. As theories of economic efficiency changed in the US academy during the 1960's and 1970's,

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[19] Gutiérrez and Philippon 2017 do consider the role of institutional design. However, as economists, their interest lies more in developing precise estimations of economic structures than examining the distinctive paths of historical institutional development.

much of the postwar enforcement program was delegitimized. Beginning in the early 1970's, both the prevailing judicial opinion on antitrust and the enforcement program of the antitrust agencies dramatically shift, leading to a precipitous drop in enforcement output, especially in areas such as vertical restraints, monopolies, and exclusionary practices.

The *increase* in the intensity of European enforcement has also been explained as the result of ideational change. Some EU scholars have argued that the institutionalization of neoliberal economic ideas in European regulatory law has led to the intensification of regulatory enforcement (Thatcher 2013; Buch-Hansen and Wigger 2010; Wigger 2008). Concomitant to the Single European Act, the European competition directorate began to more intensely apply competition rules, and to shift its enforcement focus to state aid, publicly-owned companies, and the promotion of competition in previously protected network industries (Quack and Djelic 2005). During the late 1990's, competition law modernization led to a more neoliberal approach to the evaluation of market competition, while also expanding the breadth and intensity of enforcement (Wigger and Nolke 2007).

While each of these accounts points to some of the real ways that ideational change affected competition policy in each system, there are problems with explaining opposite trends as the result of the same paradigm shift. An ideas-only approach leaves us in the awkward position of explaining both the *increase* in the intensity of competition enforcement in the EU and the *decrease* in antitrust enforcement in the US as resulting from the same (or similar) neoliberal policy paradigm. While any analysis of competition policy developments must account for ideational change, we need to understand *why* the same set of ideas has produced different patterns of enforcement in Europe and the United States.

Additionally, there are empirical gaps in the ideational explanation. Certainly, the influence of the Chicago School cannot account for why US regulators have failed to follow much of the

neoliberal prescription for liberalization and industrial policy. Chicago School economists, after all, have long supported the application of antitrust in these areas (Van Horn 2015; McChesney 1986; Bork 1978). Moreover, there is no shortage of classically-trained economists in the European competition system.

One plausible possibility is that Europeans simply have institutionalized a distinctive system of neoliberalism. Legal scholars of EU competition law have argued that the European Commission has enforced market abuse rules more strictly, in part, because the ideological roots of European competition law lie in German ordoliberalism, a 20th century liberal movement centered around the Freiburg school (Ptak 2015; Gerber 1998). The first to use the term neoliberalism, ordoliberals supported a liberal market economy anchored by an 'economic constitution' that included an expansive competition law. To be administered by politically-independent courts and regulators, the competition law was envisioned as limiting the accumulation of concentrated private and governmental power, thereby preserving the conditions of competition and, by extension, economic freedom (Gerber 1994: 39). Thus, the ordoliberal roots of European competition policy may partly explain why European competition officials have more aggressively prosecuted market abuse cases in recent years.

However, as we will see through an analysis of the ordoliberal thesis in Chapter Five, ordo-liberalism cannot explain much of the comparative difference between European and American competition policy today. As many scholars have noted, the trend in the economic analysis of competition policy is toward a common 'epistemic community', made up of economists specializing in competition issues who generally conceive of market efficiency in similar ways (Gerber 2010; Buch-Hansen and Wigger 2010; Djelic and Kleiner 2006; Van Waarden and Drahos 2002; Haas 1992). As we will see, many of the cases pursued by European regulators would be wholly supported by Chicago School economists, not least the Commission's programmatic focus in recent years on

public monopolies, industrial aid, and public constraints on competition (Buch-Hansen and Wigger 2010). Insofar as different concepts of market efficiency matter, the mechanism is not the views of economists at each competition agency, where a consumer welfare standard to evaluate cases is now institutionalized in both systems. Rather, it is differences in institutions – in the original design and construction of each law, and its development through jurisprudence over time.

All of this suggests that the divergent trajectories do not boil down simply to a question of distinct economic beliefs by contemporary regulators. To understand the role of ideas, we need to also understand how and why the state institutions involved in antitrust responded to these ideas in different ways. Specifically, we need to understand why the embrace of consumer welfare analysis by American antitrust agencies led to such a drop off in enforcement, while the integration of similar standards of economic analysis into case selection at the European competition directorate did not. And we need to understand why calls to reform the state's role in the economy is associated with an increase in the EU's enforcement of competition rules and an expansion of the reach of European competition law, while in the US it is associated with a further narrowing of antitrust authority.

Interest-Based Theories

Differences in economic interests might help fill in the explanatory gap left by ideational theories. In the US, efforts to limit subnational competition restrictions have been blocked at various times by state and local governments wielding their influence in the US Congress. Similarly, regulated industries have consistently campaigned to maintain their exemptions and to keep antitrust enforcement under the jurisdiction of sectoral regulators such as the FCC and DOT, which can more easily be controlled. Perhaps European member states have simply been more supportive of state aid enforcement efforts? And European companies more supportive of rigorous competition enforcement by independent regulators?

Yet, as we will see in the empirical chapters, European stakeholders have hardly been universally supportive of the Commission's enforcement program. On numerous occasions, member states have sought to limit the Commission's enforcement of state aid rules. Needless to say, European companies have not been cheerleaders for robust competition policy enforcement. Much like American companies, they have resisted competition enforcement when feasible. Consequently, while interest dynamics must certainly be factored into the overall analysis, it must be explained *why* organized interests and governments in the United States have been more successful at limiting competition policy than organized interests and governments in Europe.

A number of observers have also explained the divergent pattern in American and European market abuse cases as related to European industrial policy. The shared perspective of many American policymakers is that the intensification of European competition enforcement is reflective of a concerted effort by European officials to undercut the US competitive advantage in information technology and other leading industries. As President Barack Obama argued in a 2015 interview with *Recode*, the EU's investigations of American companies were "more commercially driven than anything else". He then went on to characterize European competition enforcement actions as "essentially trying to set up some roadblocks for our companies to operate effectively there."[20] A number of legal academics and antitrust officials have echoed this sentiment, arguing that European competition law "protects competitors, not competition" (Fox 2003). From this perspective, US antitrust enforcement follows the appropriate and economically efficient course of action, and the upsurge in European competition enforcement in recent years is motivated by protectionism—designed to hurt leading US technology companies and promote European economic champions.

[20] Obama continued, characterizing protectionism as the key motivator: "We have owned the Internet. Our companies have created it, expanded it, perfected it in ways that they can't compete. And oftentimes what is portrayed [by Europeans] as high-minded positions on issues sometimes is just designed to carve out some of their commercial interests. See https://www.recode.net/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher.

Table 1.1: Cartel Penalties, European Commission and US DOJ, 2000-2016

	Proportion of Total Fines on Domestic Companies	Proportion of Total Fines on Foreign Companies	Average Domestic Penalty	Average Foreign Penalty	Median Domestic Penalty	Median Foreign Penalty
USA	35%	65%	$34.60M	$73.07M	$2.20M	$19.25M
Europe	73%	27%	€36.45M	€38.01M	€8.86M	€9.00M

Source: European Commission; US DOJ.

The promotion of economic competitiveness and growth has certainly been a driving force behind the establishment of the European Communities and its subsequent expansions. But inasmuch as European competition enforcement is related to industrial policy, it is of a qualitatively different character than the raw mercantilism suggested by American politicians. Far from seeking to promote economic advantage by harming foreign companies, the focus of European competition enforcement has been to facilitate internal structural adjustment: forcing European companies to be more competitive and economies more integrated and efficient (Lawton 1999). By far the biggest target of competition enforcement actions are European companies and EU member states.

Table 1.1 reports the cartel penalties assessed by the DOJ and European Commission from 2000-2016, broken down by foreign and domestic companies. Nearly three quarters of companies fined by the Commission were domestic, and there is no significant difference in the average or median fine enacted on European or non-European companies.[21] While cases against them have been more likely to hit the headlines, American companies have hardly been the primary focus of European enforcement, representing just 7% of the total number of cartel fines. The vast majority of enforcement actions initiated by the Commission have involved European companies. The domestic emphasis is even more the case for national-level competition enforcement. Among the

[21] Data collected from the websites of competition authorities. Location reflects the registered headquarters of a company. Where a company is a subsidiary, the parent company is used. If not listed on the Commission website, the identification of company headquarters was based on searches on Bloomberg.com.

firms found guilty of cartel violations by ECN competition regulators from 2000-2016, 99% were based in Europe—4,718 of 4,785 (Connor 2017).

To be sure, American companies have faced a greater proportion of European fines overall, including some of the biggest ones in recent years. The three largest market fines have fallen on American companies: Google, Intel, and Microsoft. Even so, U.S. companies make up just 12% of the total number of market abuse penalties assessed from 2000-2016. And while they were large in terms of dollars, each of these penalties fell within the norm of sanction sizes, when controlled for company revenue. Moreover, few of the cases have the imprimatur of protectionism. None have forced divestiture, broken up companies, or blocked business operations. Most have instead involved highly specific and closely monitored conduct remedies designed to maintain an open, competitive market.

Indeed, if any jurisdiction appears to systematically target its highest penalties at foreign companies, it is the United States. Unlike the European Commission, foreign companies make up a majority of the US Dept. of Justice's total enforcement output, and they are subjected to higher monetary penalties on average. Of the 232 companies fined for illegal cartel activities between 2000 and 2016, only 35% of the total (81) had their headquarters in the United States. Even more strikingly, the average foreign penalty is twice the size of domestic ones, while the median foreign penalty is nearly ten times higher.

This gap remains even after adjusting the penalties for differences in the size of companies.[22] For 66 entirely domestic cartels that were prosecuted by US authorities over the period, the mean penalty was 9% of the combined revenues of companies engaged in cartel activity. For the 15 cartels consisting entirely of foreign companies, the mean penalty was equal to 21% of company revenue—

[22] The revenue data is calculated as "the revenues of the cartels during the collusive period" as measured by John Connor based on market data and press releases from regulators. Sales are converted to millions of U.S. dollars in nominal terms. Most of the data is from court or commission decisions (See Connor 2016).

more than twice as severe. In the EU, we observe the opposite pattern. The Commission assessed mean penalties equal to 24.6% of company revenues on the 348 cartels made up entirely by EU-based companies, while enacting penalties equal to just 14.5% of revenues on the 34 cartels composed only of foreign companies.[23]

The Argument in Brief

To explain the broader pattern of enforcement, the role of ideas and interests must be integrated into a broader institutionalist framework. That is to say, we need to consider how political institutions have structured the global shift in economic paradigm, and the ongoing demands of interests. And we need to evaluate how these interactions have affected the overall trajectory of competition policy and its enforcement. In what follows, I develop a theoretical framework that combines insights from both rational choice and historical institutionalism that can help explain the divergent transformation of competition policy in each system. Specifically, I argue that differences in discretionary authority possessed by each set of regulators is rooted in the *constitution* of each regime. The word constitution is used in two senses. First, to refer to the constitutional organization of political power within each multi-level polity, as defined by either the US Constitution or the European Treaties. By this, I mean which sets of actors possess legislative, executive, and judicial powers, and how the relationship between these actors has been institutionalized over time. Second, the word constitution is used to refer to the foundational design of each set of regulatory institutions—and the ways these initial choices have been *constitutive* for how economic policymaking has been organized within each central government, producing policy feedback effects that have rendered a major deviation from each institutional design more difficult.

[23] Calculations by author. Comparing median penalties, the pattern is slightly different, but the US still appears to target foreign firms more harshly than the EU. In the EU, the median penalty on foreign and domestic cartels was 3.32% and 1.67%, respectively. In the US, the median penalty was 3.5% of the revenue of foreign cartels, but just 0.62% for domestic cartels.

Constitutional differences at both the level of the political system and the level of the regulatory regime have profoundly influenced the development of competition policy in each system in ways that help account for the divergent trends in enforcement during the recent period, even as both sets of regulators have faced many of the same political pressures and been influenced by similar economic ideas. Specifically, the constitutional structure of each system has influenced the organization of *bureaucratic discretion*, understood as the degree of formal independent decision-making authority provided to bureaucrats (Sweet and Thatcher 2002). By establishing the boundaries of state regulatory power and creating incentives for political principals to establish particular delegation structures, the constitutional organization of powers has affected to what extent bureaucrats possess independent decision-making authority, or a *zone of discretion*, defined as the scope of *ex ante* authority minus the number of ongoing political controls (Ibid). The structure of bureaucratic discretion, in turn, has influenced the *capacity* of regulators to robustly apply competition rules in the economy. It has also affected their political *autonomy*: to convince political principals to support new delegations of authority, or more generally, to pursue policy or enforcement goals that are distinct from the preferences of political principals and organized interests (Skocpol 1985). While in practice, no bureaucracy is fully autonomous, the design of discretionary authority can influence the capacity of regulatory bureaucracies to form distinct preferences, a pre-requisite of autonomy (Carpenter 2001). More directly, it also influences an agency's external constraints, as well as the resources they have to develop relationships with external constituencies, to foster a reputation for expertise, and to shape the preferences and strategies of political principals and the organized public, other key attributes of bureaucratic autonomy (Carpenter 2001: 14-28).

Comparing the American and European Constitutions

Because both systems are characterized by the vertical and horizontal separation of powers, the boundaries of which are adjudicated by an independent, superordinate central judiciary, scholars often emphasize the similarities in the constitutional organization of powers in the EU and US (Kelemen 2011; Franchino 2007; Streeck and Schmitter 1991). However, as we will see in more detail in Chapter Three, the two constitutional systems are organized around different logics in important respects. Particularly in the economic realm, the American constitution decentralizes power, subjecting the executive to a strong legislature and independent court and limiting the reach of the federal government's authority vis-à-vis the states. Moreover, within this system, the US Congress, a legislative institution composed of two bodies of elected representatives who are highly influenced by organized interests, is the chief architect of legislation.

While sharing some similarities with the United States, the structure of the European Treaties places more decision-making within executive bodies: (1) the European Council, representing member state governments; and (2) the European Commission, an unelected supranational bureaucracy that holds broad agenda setting powers (Jabko 2006; Schmidt 2000). As in the US, a central court holds supreme authority over the reach of European law (Stone Sweet 2004). However, there are fewer 'constitutional' limits on the application of European law to member states, whose bureaucracies and courts can be 'commandeered' to enforce the law (Schütze 2009; Halberstram 2001).

These differences have profoundly affected the organization of bureaucratic discretion in the competition field. In the US, the dominance of Congress over lawmaking, incentivizes elected officials to limit bureaucratic autonomy by placing decision-making in courts and empowering private actors to monitor regulators. By contrast, in the EU, the dominance of policymaking by the Commission and Council reduces incentives to impose political control, while simultaneously

making it easier for principals to delegate discretionary authority to bureaucratic actors. And whereas American courts have tended to limit bureaucratic discretion in the antitrust field, in Europe, the Court of Justice of the European Union has more often expanded the Commission's zone of discretion in the competition field, reflecting the court's integrationist preferences (Conant 2007).

Comparing Political Origins

In the United States, the antitrust laws stem from the demands of the radical agrarian movements at the end of 19th century, and an effort by the Congress and the courts to balance their concerns about monopoly power with the imperatives of industrial development. Because the federal bureaucracy lacked significant capacity and independence at the end of the 19th century, agrarians and other reformers sought a regulatory solution marked by a narrow zone of bureaucratic discretion: a judicial enforcement system that provided private actors with ample opportunity and incentives to enforce the law directly. This system, marked at once by punitive statutes enforceable in federal court by private and public actors alike, judicially determined standards of reasonable and unreasonable restraints of trade, and the delegation of narrow enforcement authority to the US Justice Department, was the compromise legislation that emerged between contending economic interests and political institutions.

While this arrangement was broadly seen as inefficient, policy feedback effects led most features of the initial institutional design to be maintained and reinforced over time. After more than a century of reform, the capacities of American regulators have substantially increased, and the dominant industries and policy paradigms have dramatically changed, but the institutional organization of antitrust still reflects its founding as a public-private litigation system, governed by judge created interpretive rules, and subject to ongoing political interventions by Congress and the President.

In the European Union, the origins were quite different. Competition law was established, not in response to the demands of social movements seeking economic justice in a rapidly changing economy, but by six governments trying to make a credible commitment to economic cooperation in a postwar context marked by a high degree of distrust. The integrationist origins of competition law combined with the executive-dominated organization of political power led to the construction of a regulatory regime marked by a broad zone of discretionary authority and significant policymaking and enforcement autonomy for the European Commission. Even as the meaning and reach of European competition authority has changed, the original design of competition law as a credible commitment device, administered by a semi-autonomous supranational bureaucracy, has largely been maintained.

Institutional Design and Competition Enforcement

These differences in the organization of administrative power within each regulatory regime can help account for much of the divergent enforcement pattern detailed at the beginning of this chapter. In Europe, the discretionary authority possessed by the Commission created a set of institutional conditions that allowed it to gradually expand and repurpose competition law as a tool for neoliberal reform and structural adjustment. Generally speaking, the Commission's extraordinary independence in the competition field has allowed the body to apply the law in a way that reflected its own preferences—particularly, promoting the integration of the European market and encouraging economic growth—largely without facing political interference. Additionally, its extensive discretionary authority made it possible to update competition rules in response to new developments without seeking new authority, and to use the law to force some of the world's most powerful corporations to alter their business practices. Put a different way, the Commission's legislative powers and enforcement authority allowed it to expand and intensify its enforcement

program without receiving new delegations of authority from member states, while its agenda setting power made it easier to evade attempts by affected interests or member states to reverse its powers. As a result, European competition policy has successfully been used by EU leaders to bolster the liberalization of highly regulated network industries such as telecommunications energy, transportation and banking, to reform state expenditures and industrial policies, and to construct a more competitive and integrated European market.

In the United States, the antitrust agencies' narrow zone of discretion and lesser degree of independence has limited their ability to apply competition policy in ways that would support economic liberalization, state reform, or address new barriers to competition stemming from technological change and corporate structures. Even as their organizational capacity has steadily expanded, the independent decision-making authority of the US antitrust agencies has remained hemmed in by a judicial system of enforcement, statutory exemptions for a number of important economic sectors, and a variety of competing ongoing controls. So, while American antitrust officials remain as committed to liberalizing regulated markets, reforming state subsidies, and fostering competition in the economy as the European Commission, with a narrower scope of authority, and less influence over the policymaking process, American regulators simply have less capacity to pursue these goals. Consequently, the neoliberal shift in economic ideas has resulted in the reduction of enforcement in areas not deemed to benefit consumer welfare, with little corresponding increase in competition enforcement to achieve policy goals supported by the neoliberal policy paradigm such as industrial policy reform and regulatory liberalization.

Empirical Strategy

The primary methodological approach employed in the dissertation is "process tracing" (Collier 2011; Bennett and George 2005) or "systematic process analysis" (Hall 2007). To assess

both the effects of institutional design on enforcement outcomes, and the determinants of institutional design, I closely examine competition policy developments over time. Specifically, I use competition policy in the EU and US as "diagnostic evidence" that can be used to 'test' the effect of the political origins and constitutional structures on the design and practices of regulatory institutions (Collier 2011: 824). Several dozen mini-cases are drawn from the two larger cases that cover different delegation choices, successful and failed reform efforts, and enforcement episodes. Where possible, I assess my institutional theories against rival ideational and interest-based explanations. In contrast to multi-variate analysis, I am concerned not with identifying all of the variables shaping a singular delegation choice or enforcement outcome, but rather with identifying the most important set of factors explaining a category of outcomes—in this case, the overall design of regulatory institutions and the patterns of competition enforcement (Hall 2007: 3). Put a different way, my concern is to identify "regularities" in the causal chain over a long period of time, and to examine the extent to which these patterns persist across different historical epochs, and in the face of changing political and economic pressures (Ibid).

While most of the inferential work is based on within-case process tracing, the comparison is helpful for contextualizing developments within each system. The comparative framework brings into sharp relief some of the most salient features of American and European political developments. Perhaps more importantly, it also calls attention to the absence of certain political choices, institutional features, or enforcement efforts within each system, even in situations marked by similar economic imperatives or political pressures. For two political systems that are often studied in isolation and theorized as "sui generis", the comparative frame militates against viewing developments within each system as inevitable or necessary. This, in turn, compels a deeper interrogation into the political and policy developments, and the institutional organization of the American and European regulatory states.

In the pages ahead, one explanatory focus will be to identify the political factors and forces shaping the structure of delegation. A second focus will be to understand the consequences of delegation structures for enforcement outcomes. In both instances, my institutionalist argument is tested against cases drawn from more than a century of policy developments and regulatory practices. All in all, I closely examine 15 separate delegation choices—either where structures were altered, or where reform efforts failed. These include both major decisions such as the Sherman Act of 1890, or the enactment of the Treaty of Rome of 1957. It also includes more minor choices, such as the decision to exempt a particular group from antitrust or a decision to reject an agency's authority to move into a new area. Additionally, I examine the overall enforcement pattern within each system over a long period of time. While my main focus is to examine the broader pattern of enforcement in each period, at times I also examine specific cases. For each episode, I synthesize a secondary literature in history, law, economics, and political science, and then use this information to assess whether and how the broader constitutional system and earlier structures of delegation conditioned institutional choices or enforcement outcomes. Where possible, I assess institutionalist theories against the influence of economic ideas (Blyth 2002), the preferences of domestic social actors (Frieden 1999), and the pressures of international convergence (Simmons et al. 2006).

To conduct the empirical analysis, I draw from a number of different sources of data. A primary source of information is governmental reports on competition policy. From these, I have collected extensive enforcement data, as well as information on other regulatory policy developments such as investigations, legal changes, and bureaucratic resources. While most of these reports are available online on government websites, I have occasionally consulted the European Commission Archives in Brussels or requested information by email from government officials.

In addition to the primary source material, I have consulted extensively from the vast secondary literature on competition law, regulatory policy, and American and European political

development. The study draws from scores of full-length works in history, economic sociology, and political science, as well as many articles in economics, public policy, and law. More than 75 law review articles are cited in this study, and many more were consulted during the course of research. In addition to the data I have aggregated from governmental reports, I also use several data sets on competition enforcement that have been put together by competition policy experts or civil society organizations. Where relevant, I have verified the accuracy of this data against governmental reports.

A final source of information has been interviews. Through the course of this project, I have conducted more than three dozen interviews with politicians, government officials, law professors and various other experts on competition law. These have ranged from a former Commissioner of Competition, attorneys who have worked for the DOJ, members of the private antitrust bar, economists responsible for evaluating competition cases, bureaucrats who have helped design legislation, and law professors who are experts on antitrust. In addition to these interviews, I have also attended a number of competition law conferences or events that have provided further insight into the epistemic community that exists within this space. Both the interviews and competition policy events have been important for my understanding of the many complex details of competition law, and therefore crucial to the development of my argument. However, the explanatory analysis is mostly based on documentary evidence: enforcement statistics, governmental reports, archival material, economic studies, and the established historiography and secondary literature.

Organization of the Dissertation

The dissertation proceeds in the following fashion. The first three chapters develop the conceptual apparatus and theoretical perspectives that are employed throughout the dissertation. In **Chapter One**, I conduct an empirical analysis of competition enforcement in the United States and

Europe over the past three decades. Examining three different dimensions and several areas of competition policy, I demonstrate that EU competition laws are now more intensely and extensively applied than US antitrust. In **Chapter Two**, I use delegation theory to conceptualize the most important differences in bureaucratic discretion in the United States and Europe. In **Chapter Three,** I develop a theoretical framework to explain why there are differences in the design of bureaucratic delegation, drawing insights from both rational choice and historical institutionalism.

Three historical empirical chapters then analyze the origins, institutionalization and enforcement of competition law in each polity. In **Chapter Four**, I apply the theoretical framework to the US case. Examining the origins and evolution of the US antitrust regime from 1890 until the 1940's, I identify some of the ways that the design of the contemporary antitrust regime was influenced by its political origins at the end of the 19th century. I also highlight some of the ways these developments were conditioned by the organization of political power under the Madisonian constitution, and the opportunities this structure provided to economic interests, as well as the Congress, the President, and the courts, to shape the design and practices of regulatory institutions.

In **Chapter Five**, I examine the historical development of competition law in the European Union. Specifically, I show that the design of the European competition system was conditioned by both its origins in the postwar efforts by western European states—and the United States—to establish institutions of economic cooperation. I also detail some of the ways that the executive-heavy constitutional structure facilitated the transfer of significant independent policymaking authority to the European Commission, while limiting the ability of either the European Council or the European Parliament to reverse the Commission's independent enforcement authority.

In **Chapter Six**, I consider how differences in bureaucratic discretion have shaped the role of regulators in promoting a common set of goals: regulatory liberalization and public subsidy reform. The broad zone of discretion inherited from the formative period of European competition

law allowed the Commission to intensify competition enforcement as part of the liberalization process. However, in the United States, the narrower scope of *ex ante* authority, and the extensive opportunities for political control, limited the capacity of antitrust officials to systematically use antitrust law to support liberalization.

A **Conclusion** summarizes the main findings and contributions of the dissertation, identifies the scope conditions for the argument, and assesses some of its implications for competition policy reform and the design of bureaucratic discretion.

Chapter One

The Divergent Trajectories of European and American Competition Enforcement: An Empirical Analysis

Before proceeding with the theoretical argument, it is helpful first to provide an overview of the broader pattern of competition enforcement in the recent period. Given the variety of inputs and output that go into regulation, cross-jurisdictional comparisons of regulatory policy and enforcement are inherently difficult. However, past empirical studies of enforcement suggest that examining regulatory systems across several clusters of attributes can provide meaningful comparisons of regulatory effectiveness (e.g. Drahos and Van Waarden 2002; Jackson 2007; Jackson and Roe 2009). In the analysis that follows, I examine three different sets of factors that approximate regulatory intensity, with regulatory intensity defined as the degree to which a set of policy objectives is applied in law and practice. First, I look at differences in the substantive content of each system's competition law, focusing on the types of activities that are prohibited in each system. Second, I examine differences in the *scale* of enforcement of similar rules, measured by the number of enforcement actions, and the scale and type of penalties. Third, I look at the *resources* allocated to competition enforcement, measured by the number of full-time public officials employed by competition regulators. The information provided by combining these three measures is helpful, not only for characterizing cross-jurisdictional differences, but also for assessing the pace, extent, and the direction of longitudinal change within each jurisdiction.

1.1 Comparing European and American Competition Rules

A good departure point for the analysis is to compare the substantive content of competition law in each system. Specifically, we can compare the kinds of rules that are in place and the scope of their application – that is, to what extent competition policy does or does not apply to the full array of economic activity within each market.

Broadly speaking, the categories and purposes of European and American competition law are similar in important respects. Anti-cartel laws that limit restrictive practices and collusion between competitors exist in both systems (Sherman Act, Section 1; Article 85 of the Treaty of Rome). In both jurisdictions, dominant economic players also face limitations on behavior that could potentially undermine competition: in the US through a prohibition against monopolization or attempted monopolization (Sherman Act, Section 2), and a number of specific practices such as exclusive dealings, tying and price discrimination insofar as they limit competition (Clayton Act, Sections 2 and 3); in the EU, through a prohibition on companies using their economic power to lessen or eliminate competition, behavior that is considered an "abuse of a dominant position" under EU law (Article 86 of the Treaty of Rome). In Europe, as in the United States, corporations wishing to pursue a merger over a certain size must receive pre-authorization from regulators before proceeding, a determination that is made through the economic analysis of the proposed merger's effect on consumer prices.

State aid is the area where the two laws most starkly differ. In the EU, limitations on state aid forms a constitutive feature of competition law. European member states are required to report all state expenditures made on economic development or that is received by an industry. They are also required to follow an extensive body of law, developed from half a century of policymaking, enforcement, and jurisprudence in this area. The Commission has significant powers in the state aid field: to write governing rules, to establish block exemptions for certain kinds of aid, to launch sectoral inquiries and investigations, to direct countries to reverse certain state aid policies, and to legally recover expenditures from companies. Each year, the European Commission reviews thousands of member state economic policies, shaping economic policy and taking member states to court when they do not fully comply. From 1999-2015, the European Union issued 255 state aid

recovery orders, totaling € 11.3 billion.[1] In August 2016, the Commission finalized its biggest recovery order to date, requiring Ireland to recover €13B of tax benefits that had been provided to Apple, the American technology company.[2]

In the US, by contrast, state aid does not exist as a category of antitrust law. Although there have been substantial efforts to expand through judicial reinterpretation the remit of competition rules to include state activity, such efforts have been repeatedly blocked by the courts of the Congress. Consequently, states and cities have, since the 19th century, played an active role subsidizing industry through various guarantees, loans, subsidies, and tax incentives, with only a bare minimum of legal limitations.[3] Even as states and cities have provided an ever-increasing level of subsidies to maintain employment, the U.S. federal government has done little to rationalize economic development policy and prevent a 'race to the bottom' between subnational jurisdictions.

Historically, there were also substantial differences in the ideas governing the enforcement of antitrust. However, since the Chicago antitrust revolution in the United States during the 1970's (Hovenkamp 1985), and the adoption in Europe of a "more economic approach" in competition law during the late 1990's (Schweitzer and Patel 2013), enforcement decisions in both systems are now largely "effects-based", meaning that firms only face enforcement actions when their behavior demonstrably undermines consumer welfare, as calculated by economists. Although important differences remain, competition law experts have noted growing convergence in the use of

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[1] "State Aid Recovery Statistics". Accessible from < http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html>. Last accessed Nov. 4, 2016.

[2] "State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", European Commission, Press Release, Aug. 30, 2016. Accessible at http://europa.eu/rapid/press-release_IP-16-2923_en.htm. Last accessed Nov. 6, 2016.

[3] The 'dormant' interstate commerce clause precludes practices that directly discriminate against other US states. International trade law also places some limitations on subsidies that substantially distort international trade. However, since many state subsidies do not directly discriminate against other states or have substantial impacts on international trade, these are comparatively weak mechanisms. Furthermore, they must be enforced in courts primarily by private actors who have been demonstrably harmed by a subsidy. Consequently, these rules have not limited economic development incentives at the subnational level (Schaefer 1998).

economic efficiency analysis across most pillars of competition law (e.g. Gerber 2010).

Market abuse is the one area where this convergence in substantive policy is more limited. Legally speaking, the European prohibition against market abuse is constructed differently than the American prohibition against monopolization or attempted monopolization (Fox 2006). Consequently, European and American jurisprudence in this area have developed in distinctive direction. For this reason, legal observers continue to note important differences in the American and European enforcement of market abuse rules (Bartalevich 2017; Akman 2012; Gifford and Kudrle 2015). That said, European market abuse cases now involve extensive consumer welfare analysis, and the Commission almost always justifies its decisions in terms of allocative efficiency.

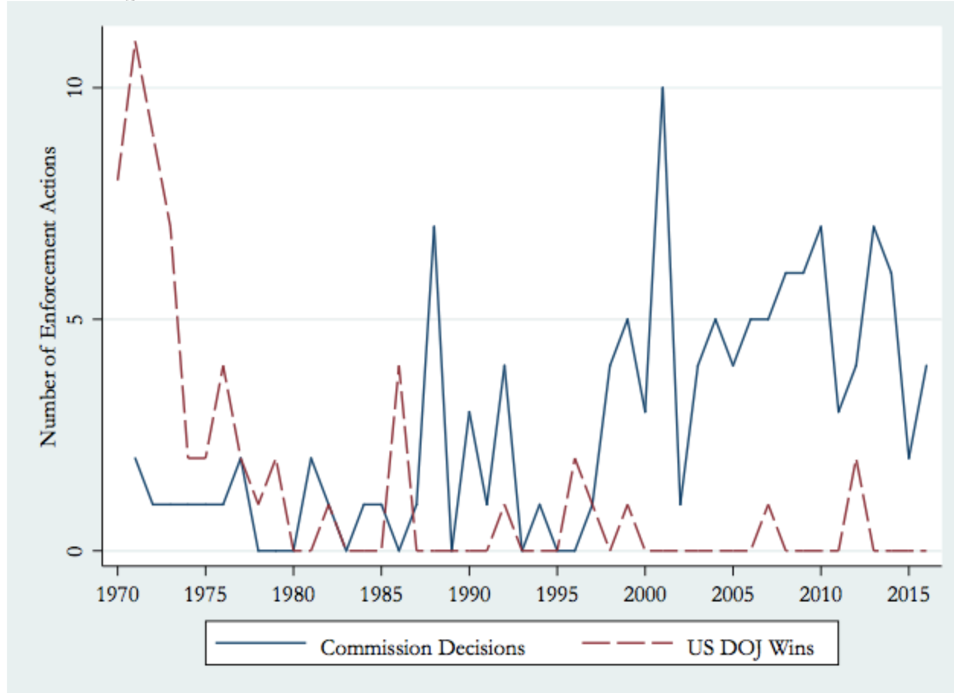
1.2 Comparing the Scale of Enforcement

The Enforcement of Market Abuse Rules

Figure 1.1 reports the number of enforcement actions related to market abuse in each system finalized by either the US DOJ or European Commission.[4] In the US, Microsoft was among the last major monopolization case pursued by the federal government. While the American government continues to use antitrust to pursue horizontal cartels, bringing scores of cases per year, the enforcement of market abuse cases has reached historical lows. From 2001-2008, just five non-cartel cases were won in court, and from 2009-2016, just eight—all mostly involving small companies or peripheral markets. In certain areas—such as single firm monopolization, vertical restraints, and predatory pricing—there have been almost no successful cases at all over the past four decades. These low numbers are not due to the complete absence of formal investigations by

[4] The numbers reported for the US cover all cases involving won by the US DOJ under Section 2 of the Sherman Act, the section containing the anti-monopoly provisions. The numbers reported for the EU include all cases finalized under Article 102[86] or the combination of Articles 101[85] and 102[86]. For the ease of reference and the sake of consistency, when the current article numbers in the Treaty on the Functioning of the European Union, these are accompanied by the original Treaty of Rome article numbers in brackets.

Figure 1.1: Number of Successful Enforcement Actions Related to Market Abuse, United States and European Union, 1970-2016



Source: US Department of Justice, European Commission.

antitrust regulators. During the Clinton Administration, the DOJ initiated more than 106 investigations under the monopolization provisions of the Sherman Antitrust Act (Section 2), while the Bush and Obama DOJ launched 69. However, these 175 investigations resulted in only ten new case filings. While comprehensive data is not available, anecdotal evidence suggests there is also a large gap between investigations and case filings in the FTC's enforcement program as well.

The European enforcement pattern is quite different. Since the end of the 1980's, the European Commission has produced a steady stream of decisions related to market abuse—an average of four formal decisions per year.[5] From 2001 to 2016, the European Commission initiated

[5] The numbers for the EU reflect the number of infringement decisions by the Commission under Article 102 of the Treaties (formerly Article 86 and 82) as well as legally enforceable commitment decisions and procedural fines. They do not include dozens of other cases where inquiries were resolved through voluntary behavioral change or informal commitments.

Table 1.2: Key Metrics of Antitrust (Monopoly/Market Abuse) Enforcement, 2004-2016

	Mean Annual Number of Monopoly/Market Abuse Investigations	**Mean Annual Number of Monopoly/ Market Abuse Decisions**	**Total Number of Penalties**	**Average Penalty Size**
US DOJ/FTC	3	<1	0	n/a
US AGs	Unknown	2	11	$3.6M
EU	9	5	49	€142M
EU NCAs	67	29	Unknown	Unknown

Source: Department of Justice, Federal Trade Commission, National Association of State Attorneys General, European Competition Network.

more than 100 formal proceedings and finalized more than 80 judgments.[6] Many of these cases have involved years of investigations and been assessed against some of the most powerful companies in the world over the last two decades, including Volkswagen, British Airways, Astra Zeneca, Gaz de France, Teléfonica, Siemens, Google, Intel, and Apple. Many of the EU's investigations, as we will see, have also buttressed the liberalization of highly regulated network industries, including telecommunications energy, transportation and banking sectors, resulting in major changes to industrial structures and business practices in ways that have bolstered the process of European integration.

In both systems, state regulators—member states in the EU, and states in the United States—also have the power to enforce the central government's competition rules.[7] Additionally, the FTC can pursue market abuse cases in the US. Table 1.2 details the enforcement output from 2004-2016 when state governments and the FTC are also included in the totals. Even when the

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[6] One might wonder if these differences merely reflect differences in the enforcement process. However, if anything, the European numbers are underestimated compared to American ones, for two reasons. First, dozens of cases resolved through informal negotiations have not been included in the European totals. Second, European cases are counted by case, with each case usually involving multiple companies, while in the United States, separate lawsuits are filed against each company involved, leading to higher totals.

[7] Since the 1970's, US state Attorneys General have been able to enforce federal antitrust rules on behalf of consumers through *parens patriae* lawsuits. For an overview of state antitrust enforcement, see Posner 2004.

broader universe of cases is included, there are still only a handful of successful market abuse cases in the U.S.: a total of just 14 cases since 2004, with even fewer penalties. Over the same period, the European Commission finalized 60 market cases with an average fine of €142M, while 32 national competition authorities finalized an estimated 381 judgments—an average of 29 judgments per year.[8] While aggregate monetary penalties are not readily available for all ECN jurisdictions, the examination of regulatory output in just a handful of national jurisdictions reveals that fines from these cases can also be quite substantial. From 2004-2015, the French competition regulator assessed €5.8B in penalties; the German regulator €3.6B; and the Italian regulator €2.3B.[9]

In terms of the types of cases and companies, the market abuse cases pursued by American and European regulators were also qualitatively different. The small number of non-cartel cases that have been pursued by the DOJ and FTC have mostly involved peripheral markets and small companies. One case pursued by the Bush administration, for instance, was against a roofing tile company, Ludowici-Celadon, for its monopolization of a narrow industry, the clay-roofing tile market.[10] The Obama administration prosecuted Direct TV for seeking to monopolize the broadcast of LA Dodger's games in one local market.[11]

The EU also initiates cases in local markets and narrow industries, but in addition to these, the EU's prohibition against the abuse of a dominant position has ensnared many of the EU's most important domestic companies, as well as some of the world's largest multinationals. These include

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[8] The estimate is based on the reported "envisaged decisions" from NCAs to the DG Competition, and the proportion of these cases that involve market abuse (i.e. Article 86[102] cases or Articles 85 [101]/86 [102] cases). Aggregated case-level data is not available for ECN cases.

[9] Data aggregated from annual reports of the French *Autorité de la concurrence*, German *Bundeskartellampt,* and the Italian *Autorità Garante della Concorrenza e del Mercato*.

[10] *U.S. v. Ludowici-Celadon Co. et al.* See https://www.justice.gov/atr/case-document/memorandum-united-states-response-motion-defendant-ludowici-roof-tile-inc.

[11] See U.S. v. DIRECTV GROUP HOLDINGS, LLC and AT&T, Inc. See https://www.justice.gov/atr/case-document/file/920486/download.

Table 1.3: Cartel Enforcement Penalties in the EU and US, 2000-2015

Country	Total Number of Firms Convicted	Public Penalties ($ million)	Private Penalties ($ million)
European Commission	722	31,380	1,081
ECN	4,063	22,626	2,259
US Total[12]	537	26,483	22,044

Source: Connor 2017.

household names such as Daimler AG, Michelin, Volkswagen, British Airways, Astra Zeneca, Mercedes Benz as well as major manufacturing and infrastructure powerhouses such as Gaz de France, EDF, Deutsche Bahn, Teléfonica, and Siemens. They also include major non-European companies with substantial operations in Europe including Microsoft, Intel, Google, Gazprom, Apple, Visa, and Yamaha.

The Enforcement of Anti-Cartel Rules

Even when it comes to horizontal cartels—an area where US enforcement has remained more active—the number of public enforcement actions by American regulators has trailed European totals in the recent period. Table 1.3 reports the number of cartel penalties and penalty size from 2000-2015 by major US competition regulators, the European Commission, and 32 European national competition authorities (NCAs) as well as private enforcement cases and settlement totals.[13]

[12] The first two columns include totals for all suits in the US, including those in collaboration with the EC, UK, Japan, California and Germany. Also includes cartels prosecuted by US AGs, the US FTC, the US CFTC. US AG's. The third and fourth columns cover only US DOJ cartel prosecutions.

[13] The data is taken from a near comprehensive database on cartel enforcement actions that has been used widely in government and academic reports (Connor 2017). The US totals include cartel cases pursued by the DOJ, FTC or financial regulators for illegal horizontal collusion under the securities laws by the SEC and the Foreign Corrupt Practices Act. The ECN totals include all 28 EU members plus Iceland, Liechtenstein, Norway, and Switzerland which comply with European competition law as part of the EEAS or EFTA. Each member state has a national competent authority charged with enforcing European law. See http://ec.europa.eu/competition/ecn/index_en.html.

Whether we examine the number of companies convicted or the size of monetary penalties, European enforcement was higher. Between 2000-2015, European regulators convicted 900% more companies: 4,785, compared to 537.[14] European jurisdictions also assessed higher penalties. As reported in Column 2 of Table 1.3, European authorities imposed an estimated $54B in cartel penalties over the time period, $31.38 by the European Commission and $22.629 by European NCAs. In the U.S., total public cartel penalties were about half the total at $26.483B. While as recently as the 1990's, the United States assessed higher monetary penalties and more punitive sanctions for regulatory violations than in other jurisdictions (Axelrad and Kagan 2000), this no longer appears to be the case in competition law.

1.3 Comparing Enforcement Resources

Since many different factors can weigh into a formal enforcement decision, some scholars of regulation caution against reading too much into enforcement output as a measure of intensity. As an alternative indicator, Jackson and Roe (2009) suggest using a resource-based measure that compares the number of staff or level of funding a jurisdiction allocates to enforcement, scaled for the size of the economy. The Global Competition Review collects annual staff totals from competition regulators, disaggregated by task, which allows me to identify the number of full-time employees at regulatory agencies focused on competition issues, as opposed to consumer protection or other concerns. Since GDP for the EU-28 and US were roughly the same in 2016 ($17.1T versus $18.6T), I do not provide adjusted numbers.

Table 1.4 reports the staffing totals. In 2016, the European Commission had 742 people working full time on competition issues, including 22 PhD economists. The 32 national members of

[14] Cartels pursued by both European and American regulators are excluded. ECN totals reflect national regulatory enforcement actions. In the few instances where the Commission and an ECN regulator pursued the same firm, the Commission is credited.

Table 1.4 Full-time Employees at Competition Agencies in 2016, US and EU

Jurisdiction	*Number of FTE Positions*	*Number of PhD Economists*
European Commission	742	24
European Competition Network	2,600	175
US DOJ -Division of Antitrust	697	51
Federal Trade Commission	352	81
State Attorneys General	200	0
EU Total	3,500	199
US Total	1,249	132

Source: Global Competition Review, Government Reports.

the European competition network employed an additional 2,600 full-time staff, including 175 PhD economists. Combined, European public authorities employed 3,500 people to enforce European competition law, including nearly 200 PhD economists.[15]

In 2016, an estimated 697 people working on competition issues were employed at the Antitrust Division of the DOJ, and 352 at the FTC.[16] Additionally, I estimate that around 200 people in state Attorneys General offices work full-time on antitrust issues.[17] This brings the estimated U.S. total to 1,249, including 132 PhD economists. The nearly three-fold difference between the number of full-time competition regulators in the EU versus the United States provides another indication that EU competition enforcement is more intensive.

Notably, the difference in resource allocation reflects a departure from historical trends in

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[15] Employment totals based on Global Competition Review 2017 survey of 2016 employment totals. Information provided by states, including an estimate of the total staff working on competition issues. For 20 countries and the Commission, a total of 3,016 staff was reported for 2016 including 176 economists. For 12 small EU countries, data was not reported to Global Competition Review, and estimates were made based on the annual reports of national regulators. The Global Competition Review is accessible with a subscription at http://globalcompetitionreview.com.

[16] The Global Competition Review excludes employees at the FTC primarily focused on consumer protection.

[17] While state Attorneys General are charged with enforcing federal competition law, few devote substantial resources to antitrust research and evaluation, and the overwhelming majority of cases pursued are follow-ons to government lawsuits. Studies report that while some large state AG's employ people to work full-time on antitrust issues, most do not (Posner 2004). For this reason, private firms are often consulted in antitrust cases. Consequently, I estimate that state AG offices have around four staff working full time antitrust, for a total of 250.

each jurisdiction. The more than 3,000 European competition regulators are a significant increase from the 1980's, when DG IV (now DG Competition), the directorate-general responsible for competition enforcement, employed just a few hundred employees, and when most national governments did not have their own competition regulators. In the US, the number of competition officials also is a significant change from the past, but in the opposite direction. Compared to the late 1970's, the total number of FTC staff working on competition issues has declined by 581 positions. The number of employees at the Division of Antitrust has stayed roughly the same, even as the American economy has tripled in size, and the number of merger reviews quintupled.

1.4. Conclusion

The empirical analysis above reveals two striking trends. First, there has been a clear, undisputed shift in the application of competition policy over time. In the EU, the enforcement of competition law has gradually intensified since the 1970's, as the number of competition regulators has grown, and the incidence and impact of enforcement actions increased. In the US, the opposite trend is observed. Outside of the prosecution of horizontal cartels, the number of investigations, enforcement actions, and competition regulators have all decreased since the 1970's.

Second, we observe in the 21st century a more intensive approach to competition enforcement in the EU compared to the US. Whether we examine the scope of the law, the number of market abuse and cartel cases prosecuted, the size of monetary penalties, or the level of staffing, all signs point to the EU applying competition rules more intensely. While each of these measures on their own should not be seen as conclusive, the examination of a variety of measures, each of which points in the same general direction, suggests that the EU has developed a more all-encompassing competition policy that is more intensively applied, than in the US, where competition rules are more narrowly circumscribed and less intensely enforced.

In the next chapter, we will consider more closely the relationship between these divergent competition trends and the institutional design of bureaucratic discretion. We will also examine some of the theoretical perspectives that can best account for these distinct constructions of administrative power.

Chapter Two

Bureaucratic Discretion and the Institutional Organization of American and European Competition Law

As detailed in the previous chapter, European competition enforcement is now more intensively and extensively applied than American antitrust, as measured by the scope and scale of enforcement output across multiple areas of policy, as well as the level of bureaucratic resources devoted to competition regulation. In this chapter, I develop a conceptual apparatus that can be used to understand why we have observed a divergent trajectory of enforcement. Specifically, I argue that part of the explanation has depended on differences in *bureaucratic discretion*, understood as the space of independent decision-making authority possessed by bureaucratic actors.

In the European Union, political principals have delegated to competition regulators wide policymaking and enforcement authority and subjected administrative decision-making to few ongoing political controls. In the United States, the decision-making authority delegated to bureaucratic actors is more circumscribed and subject to extensive opportunities for political intervention. This difference in delegated power, I argue, has given the European Commission significant autonomy in the competition policy arena. Specifically, it has allowed the supranational bureaucracy, with minimal risk of political intervention, to institute an extensive and intensive competition program that has helped to transform structure of the European economy and content of economic policy, leading to a more integrated and competitive marketplace. By contrast, in the United States, the more limited discretionary authority possessed by regulators has made antitrust enforcement highly tied to judicial opinion and electoral outcomes, limiting the ability of antitrust regulators to apply antitrust in a consistent, coherent fashion, and allowing firms and subnational governments to create significant barriers to competition in the US marketplace.

In the first part of the chapter, I provide an overview of theories of bureaucratic delegation, with *delegation* understood as the transfer of decision-making authority by political principals to bureaucratic agents. I note that much of the institutional variation in the organization of bureaucratic authority in the US and EU can be boiled down to differences in the *zone of discretion*, defined as a bureaucracy's *ex ante* authority minus the *ongoing* controls to which they are subjected (Sweet and Thatcher 2002).

In a second section, I use Sweet and Thatcher's framework to compare the delegated authority possessed by American and European competition regulators. I focus on four dimensions of differences: the scope of authority, the structure of enforcement, the role of judicial review, and the degree of political independence. The analysis of each area suggests that, all things considered, the European Commission has been delegated a broader zone of discretion in the competition field than US antitrust regulators.

2.1. Principal Agent Theory and the Zone of Discretion

One of the key contentions put forward in this dissertation is that the divergent trajectory of competition policy in Europe and the United States has deep institutional roots. In particular, I argue that the institutional organization of bureaucratic authority—and, in particular, the degree of independent, discretionary authority possessed by regulators—has conditioned developments in both systems. Consequently, before proceeding with the analysis of competition regulation, it is helpful to spend some time reviewing principal agent theory, which provides a parsimonious conceptualization of how and why bureaucratic power is organized in different ways. While simplifying the complex dynamics between politicians and bureaucracies, principal agent models help to boil down a complex stew to its most important ingredients. They facilitate also a comparison of delegated authority across different political systems and bureaucratic organizations.

In particular, principal agent models help clarify some of the strategic interactions that regularly occur between elected officials and bureaucratic agents.

Since the 1970's, principal agent models have frequently been used to conceptualize the delegation of decision-making authority to bureaucracies. Inspired by theories to explain the economics of organization developed for the business firm (e.g. Williamson 1979; Moe 1984), principal agent models conceive of the relationship between politicians and bureaucratic actors in hierarchical terms. Within democracies, *principals* are the elected officials who hold legitimate power by virtue of having been chosen by the electorate. *Agents* are the bureaucratic actors to whom some limited decision-making power has been delegated. Since these models are hierarchical, delegation is considered to be a deliberate act of transferring authority that reflects the goals or interests of political principals (Huber and Shipan 2002). As Epstein and O'Halloran (1996) summarize: "Executive agencies are created by Congress to make policy in areas where legislators have neither the time nor the expertise to do so themselves" (379).

One helpful insight from this scholarship is that, in order to achieve their goals, principals will often provide agents with some degree of *discretion*— defined as independent decision-making authority within certain bounds. Agents can hardly infuse expertise into regulatory decisions, or more efficiently enforce laws, if they are not provided some ability to make decisions about how the laws are applied, if only to adjust the application of rules in the light of new circumstances or information. Where problem solving requires ongoing research and adaptation, as is often the case in a wide array of policy areas ranging from public health to aviation safety to central banking, principals may delegate even broader decision-making authority, leaving it to bureaucrats to determine many of the substantive standards and policies that are instantiated to achieve a certain set of objectives mandated by political principals.

While necessary for effective regulation within modern economies and societies, delegation

also creates problems for political principals. By providing bureaucratic agents with significant resources and authority, principals undermine their ability to ensure agents follow their preferences. One problem is hidden action: principals don't always know what agents are doing. Another problem is hidden information: principals do not know everything agents know. Both relate to the more general problem of *information asymmetry*: principals do not possess the information needed to fully control agents. Consequently, bureaucrats will sometimes act in ways different from what would be preferred by politicians, an outcome that can be labeled *bureaucratic drift*.[1]

This brings us to a second helpful insight from principal agent theory: that principals will establish institutions that constrain as well as empower bureaucratic agents. A number of different kinds of constraints are available. Principals can make *ex ante* design choices that help ensure agents and future politicians follow their preferences. For instance, when delegating authority to an agency, a principal can define precisely the procedures and criteria to be used in decision-making (Epstein and O'Halloran 1994). They can also locate authority in different kinds of agencies, which are more or less insulated from political interference, and which rely to differing degrees on courts to implement the law (Mashaw 1990). In addition to *ex ante* constraints, principals can also guard against bureaucratic and political drift by establishing *ongoing controls,* defined as "those institutions or procedures that check agency actions on a regular basis (Epstein and O'Halloran 1994: 699). Such institutions can include "police patrols" that seek to apply authority through political appointments (Howell and Lewis 2002), monitoring, or budgetary threats (Calvert, McCubbins, and Weingast 1987). They can also take the form of "fire alarms"—delegating authority to private actors to ascertain information from bureaucrats, to challenge their authority, or enforce the law directly (McCubbins and Schwartz 1984). While the information asymmetry possessed by bureaucrats can

[1] Pollack 2003 makes a distinction between two types of bureaucratic drift: Bureaucratic slippage can occur when constraints or incentives lead agent to act in ways different from what principals intended. Bureaucratic shirking can occur when agents actively sabotage policy or subvert political control.

limit the efficacy of these controls, just the prospect of political intervention may prompt bureaucrats to comply with principals' preferences *ex ante* (Weingast 1984).[2]

Since controls can limit the capacity of agents to fulfill the purpose of their creation, if too many controls are imposed, regulatory effectiveness will be compromised (Pollack 2003: 27). Too many controls and agents may prove unable to fulfill their mandate; too few controls, and adverse selection and moral hazard problems may expand. Thus, in designing regulatory institutions, principals will seek to balance these two concerns, and create a combination of delegated authority and constraints that reflects the problem being pursued and the broader arrangement of institutional opportunities and constraints.

Following Thatcher and Sweet (2002), we can conceive of the mix of delegated *ex ante* authority and political constraints in terms of a *zone of discretion,* defined as the space in which bureaucratic actors can exercise independent authority. The first dimension is the *ex ante* scope of authority – that is, the breadth of market activities to which a set of regulatory rules can be applied, and the degree of flexibility that a regulator has in updating or defining its own authority. The second dimension is the number and type of *ongoing controls* – understood here as the authority provided to legislatures, executives, courts, and affected interests to influence regulatory processes through ongoing interventions. The sum of the delegated *ex ante* authority minus the number and type of ongoing controls equals the zone of discretion.

2.2 Bureaucratic Delegation and Competition Law

The concept of the zone of discretion provides analytical clarity to the institutional design choices that structure the independent decision-making capacity of European and American

[2] Additional clarity on the distinction between *ex ante* and *ongoing* controls can be found in Epstein and O'Halloran 1994 and Epstein and O'Halloran 1999.

regulators. In this section, I apply the conceptual framework to the case of competition policy. Drawing from a range of analyses of law and regulation, I provide a detailed comparative assessment of each regulatory regime's *ex ante* authority and *ongoing* controls, which helps clarify the key differences in independent decision-making authority possessed by each set of regulators.

Before beginning the analysis, it is helpful first to specify which actors, by virtue of possessing legitimate power, can be conceived as principals within each system. Following previous scholarship (e.g. Epstein and O'Halloran 1999), I consider the key principals in the US to be those institutions that possess lawmaking authority under the US Constitution: namely, the elected members of the US House and US Senate and the President, and the US Supreme Court. And I conceive of the key principals in the EU as the national governments that have established or subsequently become members of the European Union. Additionally, the actors delegated lawmaking authority under the Treaties can also be conceived as principals (Pollack 2003).[3] This would include the European Council composed of national governmental representatives; the European Parliament composed of representatives elected by European voters; the European Commission, made up of a permanent civil service, which is headed by Commissioners appointed by member states and approved by the European Parliament; and the European Court of Justice, a high court that is responsible for adjudicating inter-institutional disputes and ensuring no actors violate the Treaties and European law.

Ex Ante Scope of Authority

In terms of market coverage, European competition law is more extensive than American antitrust, applying to more economic sectors and types of economic activity. European competition

[3] See Pollack 2003 for a thorough explication of how the organization of powers within the EU can be conceived in principal agent terms.

law applies to the vast majority of economic activity that affects inter-state trade. In the increasingly integrated EU economy, this has become an expansive category that includes public and private sector activities, global corporations and SMEs, markets that are global in scope such as aviation or pharmaceuticals, as well as ostensibly local economies such as sports clubs or municipal waste collection. While special competition rules still apply to agriculture[4], fisheries, and some transportation sectors, the number of exceptions has declined with time. Moreover, even in areas still subject to special consideration, industry is still constrained by competition law. While this does not mean rules are always enforced robustly, it does mean that, in terms of law, no sector is fully exempt from considerations of competition.

In Europe, competition rules also apply to most public activities, which are regulated by four articles in the European Treaties.[5] From the design of public housing and environmental subsidies, to the practices of publicly owned companies, governments throughout Europe must comport with the European state aid regime. For public subsidies over €200,000, and which do not fall within exempted categories, member states must provide notification to the European Commission. If competition experts at the Commission determine that the aid is not appropriately tailored to address a horizontal objective, if it distorts the single market, or if it otherwise is found to be outside of the Community interest, the body can order the member state to revise its policy, and frequently does so. The Commission can also initiate its own cases against unreported state aid, launch sectoral inquiries involving multiple member states, and issue what is called a state aid recovery order, which compels a member state to collect money that has already been dispensed.[6]

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[4] For instance, see "An overview of European competition rules applying in the agricultural sector", June 2016, DG Comp. Accessible at < http://ec.europa.eu/competition/sectors/agriculture/overview_european_competition_rules_agricultural_sector.pdf>.

[5] For an overview of state aid rules see < http://ec.europa.eu/competition/state_aid/overview/index_en.html>.

[6] For an overview, see "State aid procedures", European Commission. Accessible at < http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html>.

American competition rules remain more narrowly tailored. Explicit exemptions or modifications of the application of U.S. antitrust have been enacted by Congress for a range of sectors, including insurance, healthcare, financial markets, banks, sporting activities, media, utilities, and many industries involved in defense procurement. Additionally, there is implied immunity in many highly regulated industries such as telecommunications and transportation, which limits the ability of antitrust regulators to bring cases within these sectors. The high number of derogations and exemptions in US competition policy has been noted widely by the OECD. In their assessment of the "scope of action" of competition policy in 48 countries, Alemani et al. (2013) rank the US ninth to last—below every country in the EU.

Additionally, US antitrust law provides no specific provisions addressing state owned companies, state regulation, or state aid. Under current jurisprudence, all state-sponsored activities, including most state-owned and state-regulated industries, are entirely exempt from federal antitrust liability (Garland 1987).[7] As noted by the Antitrust Bar of the American Bar Association in 2001, "[s]tate action immunity drives a large hole in the framework of the nation's competition laws" (42).[8] The exemption is quite wide, covering all government owned enterprises such as port authorities, electric power systems, and hospitals as well as thousands of state and local regulations that restrict and limit competition, including many laws regulating hospitals, transportation, insurance, retail distribution, utilities, rent for residential and commercial buildings, advertising, and a wide range of professional services, especially law, funerary services, engineering, medicine, dentistry, and real estate (OECD 1998). Generally speaking, states and municipalities can also enact industrial aid

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[7] In a 1941 case, *Parker v. Brown*, the U.S. Supreme Court established the Parker immunity doctrine, now called the *state action exemption doctrine*, for most governmental activities. See Parker v. Brown, 317 U.S. 341 (1943). Accessible at < https://supreme.justia.com/cases/federal/us/317/341/>.

[8] American Bar Association, Section of Antitrust Law. 2001. "A Report of the Task Force on the Federal Antitrust Agencies." Available at http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.

Table 2.1: Ex Ante and Ex Post Authority of Competition Regulators in the EU and the United States

	EU	**US**
Scope	Competition rules apply to *all* private and public activities.	❖ Exemption for public entities, including federal, state, and municipal governments. ❖ Statutory exclusions for agriculture, insurance, fishing, defense industries, healthcare, utilities, professional sports, newspapers. ❖ Implied immunity in telecommunications, energy, ports, and other regulated sectors.
Primary Enforcers	(1) European Commission; (2) National-level Independent Regulatory Agencies.	(1) Private Litigants; (2) Executive Department with politically appointed leadership; (3) Independent Regulatory Agency; (4) Elected Attorneys General.
Organization of Public Enforcement	❖ Centralized. ❖ Discrete Jurisdictions. ❖ Vertically-Coordinated Central and State Enforcement (ECN).	❖ Decentralized. ❖ Overlapping Jurisdictions. ❖ No required coordination between federal and state-level enforcement.
Political Channels of Influence	❖ Appointed Commissioners.	❖ Dozens of political appointments. ❖ Presidential "Police Patrols". ❖ Congressional "Fire Alarms".

schemes—including direct monetary subsidies—without concern about antitrust liability. The most important of these differences are summarized in Table 2.1.

Organization of Enforcement: Ex Ante and Ex Post Controls

American principals have delegated relatively narrow enforcement authority to antitrust regulators. The US DOJ and FTC enforce the law through a system of *judicial enforcement*, with the initial decision and remedy determined by judges, following an adversarial hearing. For the issuance of a new rule, or an administrative cease-and-desist order, an administrative law judge employed by the agency presides, while in the case of more serious enforcement actions, including injunctive relief, redress or damages, civil penalties, or criminal fines, petitioners must file a lawsuit in federal court. However, even in the case of administrative hearings, judges follow the rules of the adversary system. The American enforcement system has been described by Robert Kagan (2003) as *adversarial legalism,* a system of "policymaking, policy implementation and dispute resolution by means of lawyer-dominated litigation" (3). In addition to establishing a high standard of proof to prosecute a case, the system provides more opportunities for corporate defendants to contest a government prosecution.

European regulators possess greater discretion in the enforcement process. DG Competition, the EU's competition directorate, possesses the authority to initiate preliminary investigations, launch case proceedings, issue statements of objections to companies, conduct oral hearings, issue decisions, and impose fines directly, all without recourse to courts (See Hellwig et al. 2018: 2-4). This *administrative enforcement* system is governed by internal checks and balances that have been developed by the Commission and the ECJ, including peer review, requirements for economic and legal analysis, an independent hearing officer who arbitrates procedural matters during any oral hearings, and recommendations from an advisory committee composed of national competition authority officials.[9] However, the initial decision, including any remedy or monetary sanction, is

[9] See "Proceedings for the application of Articles 101 and 102 TFEU: Key actors and checks and balances," European Competition Commission. Accessible at < http://ec.europa.eu/competition/antitrust/key_actors_en.pdf. Also see

made by the College of Commissioners, following the recommendation of the Commissioner of Competition. Judges only become involved in the enforcement process if the sanctioned company chooses to appeal the case to the European General Court (EGC) or the European Court of Justice (ECJ). And even when a case is heard before the court, the Commission retains an authoritative position in the process, meaning that there are fewer opportunities for private parties to contest factual determinations or delay procedures.

Political principals in each system have also made different choices with regard to the authority of state-level and private actors to enforce antitrust law. In Europe, the enforcement of competition law by national regulators is organized through a hierarchically structured system that places the Commission in a superordinate position over other regulators (Wilks 2005). The Commission has the right to intervene in any case being pursued by national regulators, as well as the authority to request national and private cases to be put on hold while it is pursuing an investigation.[10] For this reason, national-level enforcement largely follows the priorities of the European Commission.

In the United States, there is less of an enforcement hierarchy. Due to their superior resources, federal regulators still pursue many of the most complex cases; however, legally speaking, no regulator possesses an authoritative position within the enforcement ecology. The DOJ has no formal authority to interfere in FTC enforcement decisions, much less to influence the enforcement behavior of state-level actors. While actors do voluntarily coordinate enforcement efforts, these efforts can break down in high-profile cases, as occurred between the DOJ and many state AG's

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"Hearing officers" Mission," Available at http://ec.europa.eu/competition/hearing_officers/index_en.html. Both accessed Aug. 17, 2017.

[10] For instance, in its 2000 *Masterfoods* decision, which noted national courts were obliged to avoid conflicting decisions, and that if there was any doubt they should seek consultation from the Commission or a preliminary ruling from the ECJ. Such a structure has allowed the Commission to delegate enforcement to other bodies while maintaining the primacy of its decisions (Kelemen 2011: 165).

during the extensive litigation against Microsoft during the 1990's and 2000's (Posner 2004). More importantly for our purposes, the choice by political principals to delegate overlapping enforcement authority to different public actors has limited the discretionary authority of any one of them.

US principals have also encouraged extensive private enforcement, narrowing further the zone of bureaucratic discretion. Through the inclusion of "fee shifts" that decrease the cost of pursuing a private case and "damages enhancements" that increase the potential reward from successful litigation, the US Congress has encouraged the private enforcement of public law in hundreds of policy areas (Farhang 2010). The result has been the proliferation of the private enforcement of antitrust and other regulatory laws. In most years, private antitrust cases constitute 90-95% of total enforcement actions, and the percentage of private cases has not been below 80% of the total since the 1970's (Gifford and Kudrle 2015).

By contrast, in most EU member states, private antitrust litigation is confined to the narrower role of providing compensation to affected private actors following a successful public case. In fact, the Council and Commission have avoided measures that would lead to the high level of private enforcement observed in the United States.[11] Nearly all studies indicate that private enforcement remains underdeveloped on the European continent.[12] The combination of limited private enforcement and hierarchically structured state-level enforcement maximizes the Commission's zone of discretionary authority.

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[11] In the 2014 Directive on Private Damages Actions, for instance, the Commission specifically rejected the inclusion of contingency fees, pre-trial discovery rights, multiplied damages, and opt-out clauses for class actions – legal tools that have been identified as pre-requisites for American adversarial legalism (Burbank et al., 2013). Indeed, the Commission has stated that it has sought to avoid the "excesses that we have seen in other legal systems", and to utilize instead measures that are rooted in "*European legal culture and traditions"*. White Paper on Damages Actions for Breach of EC Antitrust Rules. COM(2008) 165 final. 2 April.

[12] An influential 2004 study of competition damages actions in 25 EU states commissioned by the EU, could identify only 60 private cases across all countries, only 28 of which resulted in actual damages being awarded. The authors conclude that European damages actions is marked by "astonishing diversity and total underdevelopment." Ashurst 2004. "Study on the conditions of claims for damages in case of infringement of EC competition rules," Available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

Ongoing Controls: Judiciary

Extensive judicial review of competition and other regulatory decisions exists in both the United States and the European Union (Tobler 1999). However, in the area of competition law, there is a significant difference in the extent to which courts defer to administrative opinions in individual competition cases. Since the foundation of the American antitrust system, federal courts have developed most of the substantive doctrine and economic principles that guide its application. Over the last 125 years of antitrust jurisprudence, courts have frequently questioned the government's judgments in specific cases and made their own determinations on the applicability of the antitrust laws to specific cases. The 1911 'Rule of Reason," one of the foundational doctrines in antitrust, is a judicially created standard of economic efficiency that has been applied to the antitrust laws, and which continues to guide antitrust enforcement today. The court's authority in the antitrust field exceeds that of even other areas of law. As a federal judge noted in the 1950's: "In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law."[13]

Since the adoption of a strict 'consumer welfare' test in most areas of antitrust law in the 1970's, the judicial review of the economic justification of specific cases has intensified further as courts have demanded more economic evidence and justifications in antitrust prosecutions (Hovenkamp 1985). Outside of brief periods such as the 1950's and 1960's when the courts shown a partial willingness to defer to the government's judgments, the intensive nature of judicial review in the antitrust field represents another dimension in which the discretionary authority of government lawyers is comparatively limited.

[13] Quote from Judge Wyzanski in *United States v. United Shoe Machinery Corp.*, (D. Mass. 1953). Citation from Bork 1978: 409.

As with all areas of European law, the European Court of Justice is the ultimate, supreme authority on questions of European law. The Court of Justice of the European Union (CJEU), composed of the European Court of Justice and the General Court, scrutinizes competition decisions, considering both substantive and procedural factors. However, unlike the judiciary's 'Rule of Reason' in the United States, European review is focused more on questions of substantive law and procedure than economic efficiency.

For this reason, the ECJ rarely overturns the Commission's competition decisions because of concerns of economic analysis. Unlike in the US, where the judiciary has imposed strict economic efficiency requirements for prosecuting cases in most areas of antitrust, European courts have utterly refused to redefine the meaning of competition law in terms of the singular goal of consumer welfare. While occasionally, the court has rejected a case because of insufficient economic analysis, this has only occurred in areas where such analysis is explicitly required by law.[14] Indeed, in contrast to American judges, the European judiciary sees asserting its own judgment as a violation of the separation of powers in the EU.[15] For instance, in a 2002 judgment, the Court of First Instance noted that judicial review "must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of power. In particular, it is not for the Court of First

[14] In once recent merger case, the Court of First Instance, which hears most initial competition appeals, criticized the quality of economic analysis as "succinct", "superficial", and "purely formal". See *Impala v. Commission*, Case T-464/04, accessible at http://curia.europa.eu/juris/liste.jsf?language=en&num=T-464/04 . For a description of the case see Decker 2009: 6.

[15] This point was made explicitly by Bo Vesterdorf, the President of the European Court of First instance, who authored a law review article on the subject, noting: "Given these complexities and uncertainties, and by contrast to control of facts and law discussed above, judicial control of complex economic assessments by the Community is, and ought to be, restrained. It is based on the manifest error standard which respects the Commission's margin of appreciation and the division of powers between the Commission and the Community judicature" (Vesterdorf 2005).

Instance to substitute its own economic assessment for that of the Commission".[16]

The difference in judicial review is partially reflected in appeals statistics. From 1965-2004, appeals were made in 30% percent of the Commission's competition decisions. However, only 17% of appeals resulted in the Commission decision being quashed. Thus, in 95% of cases, the core of the administrative decision was effectively the final decision (Carree et al. 2010: 126). Moreover, in the 5% of cases where the Commission's decision was overturned, this was usually due to procedural errors by the Commission. By contrast, the U.S. DOJ's win record from 1955-1997 was 77% in antitrust civil law cases, and 83% in antitrust cases overall.[17] Moreover, many of these losses have stemmed from rejections of the government's economic determinations (Kovacic 1989b).

Ongoing Controls: Elected Officials

The organization of political control also differs in both systems, in ways that lead to the European Commission to enjoy a higher degree of political independence from elected officials than the U.S. antitrust agencies. The American system is rife with opportunities for political control. The President appoints more than 4,000 officials to the federal bureaucracy, 1,200 of whom require Senate confirmation (Davis and Greene 2017). In addition to leading many bureaucratic organizations and divisions to be headed by individuals lacking relevant experience and knowledge, such a system also creates significant opportunities for elected officials to influence the decision-making of regulatory bureaucracies.

Within the DOJ's Division of Antitrust, all of the leadership positions that influence enforcement decisions are filled by political appointees who serve at the pleasure of the President,

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[16] See *Petrolessence and SG2R v Commission* [2003], Case T–342/00, paragraph 101, accessible at http://curia.europa.eu/juris/showPdf.jsf;jsessionid=22733B6EF2B064695CAABAD0FEDE7D1F?text=&docid=48177&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4719407.

[17] See "Table XIV. DOJ's won-lost record cases and CCH cases," in Gallo et al. 2000: 113.

and therefore can be dismissed at any time. This includes the Attorney General, the Deputy Attorney General, the Associate Attorney General, and the Assistant Attorney General for the Antitrust Division. Additionally, there are a number of Deputy Assistant Attorneys General (DAAG) positions within the Division of Antitrust that are often filled by political appointees, including DAAG's for Criminal and Civil Operations, Civil Enforcement, Litigation, Criminal Enforcement, and Economic Analysis.[18]

As an independent agency run by Commissioners serving staggered eight-year terms, the organizational structure of the Federal Trade Commission looks ostensibly like that of the European College of Commissioners. However, even at the FTC, there are arguably more opportunities for political control than in Europe. This is because the President appoints the FTC Chair, and the Chair is charged with appointing the heads of each bureau within the FTC who have responsibility for determining enforcement priorities. Furthermore, the US Congress possesses substantial monitoring and budgetary powers that can influence the FTC's enforcement program. Partly for this reason, empirical studies have found policymaking and enforcement at the Federal Trade Commission to be tied to the preferences of congressional committees (Weingast and Moran 1983; cf. Moe 1987).

European principals have established comparatively fewer ongoing controls in their competition system. While the Commission's broad mandate has been determined by elected governments, and accountability to this mandate is ensured through monitoring by the Council and Parliament, public reason-giving requirements, and judicial review, political principals have few direct means to influence the Commission's enforcement program. To start, nearly all of the crucial

[18] Sometimes these positions are filled by career civil servants, but the it remains a discretionary choice of the president's appointees. See Antitrust Division Manual: Chapter 1, Organization and Functions of the Antitrust Division. Accessible at < https://www.justice.gov/atr/file/761126/download>.

decisions about investigations are made not by political appointees, as in the United States, but by permanent civil servants, most of whom have been employed at DG Competition for a long period of time and cannot be dismissed without cause.[19] Since in practice the College of Commissioners almost always follows the recommendations of the competition directorate-general, permanent civil servants are the primary actors shaping enforcement choices.

European principals do, of course, have broad tools that can be used to ensure accountability to the Commission as a whole. However, they possess few means to intervene in decision-making where the Commission has been delegated clear authority. The European Parliament possesses no means of effective political control. While the Parliament does approve the Commission President and votes up or down on the proposed panel of Commissioners, the Parliament cannot prevent the appointment of individual Commissioners. Furthermore, once appointed, the Parliament cannot force an individual member of the Commission to resign. To be sure, the Parliament can dissolve or threaten to dissolve the entire Commission, which famously occurred in 1999, with the mass resignation of the Santer Commission (Tomkins 1999). However, such a crude tool is ineffective as a means of influencing decision-making in a specific policy area—much less a specific competition case.

Arguably, member states possess more narrowly tailored tools of control. Collectively, the Council elects the Commission President, and each country appoints one Commissioner. Since each competition enforcement decision is approved by the College of Commissioners, member states could conceivably use their political ties to commissioners to influence enforcement outcomes. While taking a vow to represent the interests of the Community as a whole, Commissioners often have plans to serve in future national governments, creating a potential opportunity for influence.

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[19] A breakdown of the Commission staff in 2018 can be seen at < https://ec.europa.eu/info/sites/info/files/european-commission-hr-key-figures_2018_en.pdf>.

However, in practice it is quite difficult for member states to exercise control through these channels. While member states have the freedom to appoint any person to the Commission, it is the Commission President that chooses each Commissioner's assignment, creating an incentive for member states to appoint people who share the Commission's integrationist preferences, if only because this will better position them to protect national interests. Moreover, member states cannot dismiss an individual Commissioner once they have been appointed. Even if a few Commissioners were convinced to follow the preferences of their governments, the diversity of member state interests makes it unlikely that a majority of Commissioners would go along. As we will see in Chapters Five and Six, in the rare instances where member states have sought to mobilize Commissioners to overturn a competition decision, the effort has failed.

2.3 Political Independence and Enforcement Outcomes

The above analysis is based mostly on legal analysis. Since there can be significant gaps between the 'law in books' and 'the law in action', I also consider whether legal differences in discretionary authority appear to affect regulatory practices. Specifically, I examine whether enforcement behavior shifts across political administrations. In what follows, I use an analysis of enforcement actions, disaggregated by the partisan composition of government, to examine whether the pattern of regulatory behavior is correlated with the change in the partisan composition of political appointees.

Table 2.2 reports the average number of enforcement actions taken by US antitrust regulators across two areas, broken down by presidential administration. The first figure is the average number of monthly nonmerger civil filings initiated by the DOJ. Covering both cartel and market abuse cases, this measure provides a comparable indicator of enforcement intensity.[20] The

[20] The DOJ pursues many cartel cases through criminal proceedings, which are not included in the analysis.

Table 2.2: U.S. Antitrust Enforcement by Presidential Administration, 1976-2017

Presidential Administration	Party Affiliation	Civil Non-merger DOJ filings/month	Merger Investigations (Proportion Large Requests)
Carter	Democrat	1.20	n/a
Reagan	Republican	0.43	0.050
Bush I	Republican	0.25	0.089
Clinton	Democrat	0.98	0.142
Bush II	Republican	0.43	0.097
Obama	Democrat	0.42	0.120
Trump[21]	Republican	0	unknown
	Democratic Avg.	**0.80**	**0.131**
	Republican Avg.	**0.37**	**0.077**

Source: US DOJ, FTC, Calculations by the author.

second figure is the proportion of proposed mergers where the FTC or DOJ initiated second requests for information. I examine only proposed mergers where a second request could have been made, and mergers over a certain size. By assessing the extent to which mergers are scrutinized by regulators, this provides another useful measure of enforcement intensity.[22]

The overall pattern suggests that enforcement intensity does, in fact, shift from administration to administration, and that these changes do roughly correspond with the partisan affiliation of the President. Non-cartel civil filings are more than twice as high during Democratic compared to Republican administrations. Furthermore, in proposed mergers, the rate of requests for additional information is significantly higher under Democratic than Republican administrations. Where administrations have made a politicized decision to shift antitrust enforcement in response to the previous government's enforcement priorities, as occurred during the Reagan administration and

[21] Data only covers first nine months of Trump administration.

[22] This data stems from Appendix A: Summary of Transactions by Fiscal Year of the Hart-Scott Rodino Annual Report written jointly by the Federal Trade Commission and Dept. of Justice Antitrust Division. Reports can be found here https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports. The Carter administration is excluded since the program only came into operation in September 1978, and this Appendix is not included during the first few reports.

Table 2.3: European Enforcement by Competition Commissioner, 1977-2017

Commission President	**Party Affiliation**	**Civil Non-merger DOJ filings/month**	**Merger Investigations (Proportion Large Requests)**
Jenkins	Socialist	0.92	n/a
Thorn	ELDR	1.15	n/a
Delors	Socialist	1.45	0.101
Santer	EPP	1.08	0.097
Prodi	ELDR	1.56	0.099
Barroso	EPP	0.99	0.071
Juncker	EPP	1.02	0.060
	EPP Avg.	**1.00**	**0.079**
	ELDR Avg.	**1.36**	**0.099**
	Socialist Avg.	**1.26**	**0.101**

Source: European Commission, Carree et al. 2010. Calculations by the author

Clinton administrations, we observe an even starker shift in enforcement output.

Table 2.3 reports the proportion of merger interventions and the average number of monthly competition decisions taken by the European Commission, disaggregated by the Commission President, from 1977-2017. As indicated in the above analysis, if there is a plausible way for principals to influence competition enforcement, it is through the Commission President. This occupant of this office is not only chosen by member state governments but also has the power to shuffle around the assignment of Commissioners.

However, the pattern of enforcement suggests that enforcement output over the last forty years has not been systematically affected by who is serving as the Commission President. Unlike the United States, competition enforcement in the EU has been relatively stable over time, suggesting that permanent civil servants more than political appointees are making key enforcement decisions. Moreover, there appears to be little to no relationship between enforcement output and the party affiliation of the Commission President. If we run the analysis with the Commissioner of

Competition, a similarly steady enforcement pattern is observed across administrations.[23]

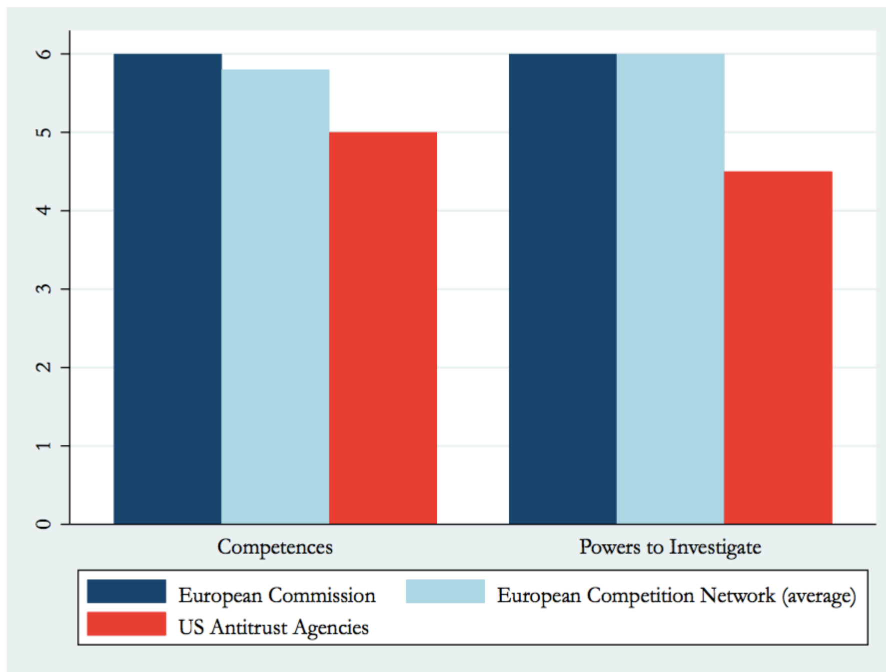
The above analysis is, of course, merely suggestive. As with the enforcement data examined in the last chapter, we have no way to control for differences in the universe of cases. Additionally, the analysis does not account for differences in the significance of cases or the types of companies involved. However, the consistency of differences across so many US administrations, combined with the lack of a similar pattern in Europe over the same period of time, provides another confirmation that regulatory enforcement is more independent in Europe than in the United States. To be clear, this does not mean that regulators' antitrust enforcement choices are *controlled* by political administrations. Rather than explicit political interventions, the primary channel of influence could very well be differences in the ideology of appointees. But in either case, the enforcement pattern suggests that US antitrust enforcement is highly tied to electoral politics, while the Commission's program is mostly unaffected by electoral outcomes.

2.4 Conclusion: Summarizing the Findings

Returning to the formula suggested by Sweet and Thatcher, it should be quite clear at this point that the European Commission possesses a broader zone of discretionary power than American antitrust regulators. The European Commission works with an expansive competition law punctured by few derogations or exemptions. It can enforce this law directly through administrative processes with little concern about rival enforcers. And it operates within a politically insulated institutional environment. By contrast, antitrust regulators in the US have a comparatively narrow space of independent decision-making authority: they have not been delegated the same *ex ante*

[23] Enforcement output remains quite stable across Competition Commissioners as well. The average number of decisions per month disaggregated by competition commissioner are the following: Vouel (0.92), Andriessen (1.15), Sutherland (1.6), Brittan (1.29), Van Miert (1.08), Monti (1.56), Kroes (0.97), Almunia (1.02), Vestager (0.89). The pattern of merger enforcement (defined by the proportion of interventions in proposed mergers) is also relatively stable across commissioners: Brittan (0.109), Van Miert (0.097), Monti (0.099), Kroes (0.078), Almunia (0.060), Vestager (0.089).

Figure 2.1 Competition Policy Indicators, 0-6, Least to Most Conducive to Competition



Source: OECD (Alemani et al. 2013)

authority in terms of the scope of the law or the powers of enforcement. Moreover, the use of their legal authority is subject to far more ongoing political controls.

This conclusion is generally supported by other analyses. A 2013 OECD study examining the authority and independence of competition regulators in 49 different jurisdictions concludes that the European Commission has been delegated extraordinarily expansive *ex ante* authority and significant political independence (Alemani et al. 2013). In the OECD study, the Commission received the highest possible assessment across multiple categories of having policies and structures conducive to competition. This includes the "probity of investigation" a category that measures, in part, the independence of competition regulators, as well as the "scope of action", a category which measures the coverage rate of the law and "the powers of the institutions enforcing the competition law to investigate and impose sanctions on antitrust infringements and to remedy or block

anticompetitive mergers" (12). The US, by contrast, was ranked 37th of 49 jurisdictions in terms of the "probity of investigation", and 41st with regard to its "scope of action".[24]

Figure 2.1 provides the rankings of each jurisdiction in terms of their powers to investigate competition violations and their general competences, using a composite index of 0-6, from least to most conducive to competition.[25] In both categories, the US is not only ranked lower than the European Commission, but also below nearly every European country.

As we will see in the empirical chapters to come, these differences in the authority delegated to regulators can explain much of the difference in the pattern of enforcement in recent decades. The fact that the European Commission has more authoritative say over the meaning of competition law meant has allowed the regulators to use competition law as a tool to achieve a range of market development goals. These have included using competition law as a tool to liberalize highly regulated industries, to reform state industrial policy, and to address competition concerns in the fast-changing information technology sector. Moreover, because economic analysis requirements have not been used by courts to limit antitrust enforcement, regulators have been able to expand enforcement even as they have intensified economic analysis. The story has been very different in the US, where narrower authority and more ongoing controls have limited enforcement in regulated sectors, of state-sponsored or sanctioned activity, and in complex information technology markets. At the same time, congressional resistance to delegating new administrative authority meant that antitrust officials were given no new substantive authority to address new antitrust challenges.

[24] See "Figure 3. CLP indicator on scope of action" at Alemani et al. 2013: 12, and "Figure 5. CLP indicator on the probity of investigation" in Alemani et al. 2013: 15.

[25] The data comes from "Table A1.14. CLP indicators – set 2" found in Alemani et al. 2013: 37-38. The study reports these measures on a scale of 0-6, from most to least conducive to competition. For ease of presentation, I have inverted this metric, so that zero represents least conducive to competition and six most conducive. The European Competition Network numbers reflect the average score of 28 EEA countries.

Chapter Three

Explaining Differences in Bureaucratic Discretion: Theoretical Perspectives

This chapter addresses *why* bureaucratic discretion has been structured differently in the US and EU. More concretely, I explain why European principals have delegated extensive discretionary authority to the European Commission, while American principals have delegated much narrower authority to US antitrust officials.

In contrast to the functionalist accounts found within most principal agent scholarship (e.g. Pollack 2003; Epstein and O'Halloran 1999), I argue that the current design of delegated authority reflects less the contemporary preferences of political principals than the goals of political coalitions in the past. The fact that the American antitrust system was established at a time when federal state capacities were low, and the US bureaucracy possessed little legitimacy, led to the establishment of a judicial system of antitrust enforcement that provided federal bureaucrats with limited control over the law's application. By contrast, the establishment of the European competition system during the postwar, at the height of state developmentalist economic policy, led to a more bureaucracy-centered enforcement system characterized by a broad zone of discretion and significant limitations on political intervention.

These initial delegation choices have cast a long shadow on institutional design, establishing a regulatory logic that has proven remarkably durable in the face of significant economic and political change. Not only did each initial structure create a baseline for how economic regulatory questions were addressed within each system, but it conditioned future delegation choices, thereby shaping the long-term institutionalization of each regime. Still today, the capacity of regulators to apply competition rules, whether against Google or telecommunications companies or local governments, depends, in part, on delegation choices made long in the past.

Before presenting my own theoretical frame, which combines insights from rational choice and historical institutionalist theory, I first review functionalist theories of institutional design, identifying some of the strengths and limitations of this approach.

In the first section, I consider some of the existing explanations for *why* delegation is structured differently in each system. Here, I highlight both the strengths and limitations of functionalist theories that assume the design of institutions reflects the interests of principals in a given moment of time. Specifically, I note that rational choice theories appropriately emphasize some of the regularities in delegation structures within particular policy areas and certain constitutional arrangements. At the same time, I point to some of the ways that functionalist theories over-estimate the ability of principals to update institutional designs to reflect their preferences, particularly within separation of powers systems.

In second section, I propose a constitutional theory of delegation that draws insights from both rational choice and historical institutionalism. First, I argue that the original design of competition policy within each system has had a lasting effect on the development of each regime, affecting how regulatory problems within each arena are conceived and conditioning future delegation choices. Second, I contend that the broader organization of policymaking, as defined by the US Constitution and European Treaties, has shaped institutional development. Consequently, to understand the construction of administrative power within each regulatory regime, we must first examine the distinctive political contexts in which each system was established—that is, the political coalitions that established them, the goals they were pursuing, and the opportunities and constraints they faced at the time. We then must trace how each regime was institutionalized over time within the cauldron of policymaking of each political system, as regulated by the constitutional organization of powers.

3.1 Functionalist Theories of Delegation

Rational choice theory offers a helpful starting point for explaining differences in the zone of discretion possessed by American and European regulators. As discussed in the previous section, the general assumption within principal agent theory is that the zone of discretion reflects the interests of principals. Or, to put the point more sharply, the mixture of delegation and constraints is seen as reflecting the *functional* needs of principals. As Pollack (2003) summarizes the approach: "institutional choices are explained in terms of the functions that a given institution is expected to perform, and the effects on policy outcomes it is expected to produce, subject to the uncertainty inherent in any institutional design" (20).

Functionalist assumptions have led to persuasive insights about the political determinants of bureaucratic design. A number of scholars have found evidence that the re-election interests of elected officials can partially account for delegation arrangements that deviate from technically-efficient designs. Epstein and O'Halloran (1999), for instance, explain a portion of the cross-policy variation in US delegation structures as a function of the re-election concerns of members of Congress. Since elected legislators have little to gain from controlling an information-intensive area such as aviation safety, and much to lose if planes crash and they are subsequently blamed, they delegate broad authority to regulators in complex, information-intensive policy areas such as aviation regulation. However, in policy areas that hold significant distributive implications, principals delegate narrower discretionary authority. In taxation, for instance, Congress has provided the Internal Revenue Service with minimal discretionary authority, since maintaining control over tax policy can be a boon for re-election efforts.

In another vein of scholarship, scholars have argued that, where principals desire to make a credible commitment to a long-term goal, they will sometimes purposefully limit their own ability to control bureaucratic agents. Usually these situations involve the problem of time inconsistency—

that is, a context where principals have a long-term interest, but from which they, and future principals, have incentives to deviate (Majone 2001; 2005). In such situations, principals can make their commitment to a particular goal more *credible* by purposefully limiting their own control over policymaking and enforcement in this area.

The most prominent example of the credible commitment logic shaping institutional design is in the area of central banking (e.g. Rogoff 1985). Over the last three decades, as the dominant paradigm for central banking came to center around the goals of price stability, institutions have been designed to enhance the credibility of governments' commitments to low inflation (Conti-Brown 2016). While variation exists across different systems, there has been a global trend toward restructuring the delegation relationship between political principals and central banks so that elected officials have little to no control over the day-to-day decisions of monetary policy. And while one can still observe a systematic effect on interest rates from the partisan composition of appointments (Adolph 2013), the avenues of political control have been substantially reduced.

As Miller (2005) notes, in these situations, the principal agent framework is turned on its head. While in traditional principal agent theory, principals have "the sole avowed purpose of finding incentives that align the agent's actions with the principal's preferences and eliminate shirking" (220), in policy areas involving credible commitment problems, principals want agents to have *distinct* preferences. Indeed, if agents develop similar preferences, this will "paradoxically destroy the agent's value to the principal" (Miller 2005: 220). While regulatory agencies will be subject to accountability mechanisms such as transparency requirements and judicial review that can prevent moral hazard, principals will delegate relatively broad *ex ante* authority that is delimited by relatively few ongoing controls. If the commitment involves a problem of *incomplete contracting*—where a goal is desired, but where there is uncertainty about how to achieve it—agents may be delegated the power to update their own authority. Sometimes, there may even be a permanent

transfer of political property rights, with delegated authority unable to be revoked without abolishing the entire constitutional setup (Majone 2001). As we will see in empirical chapters ahead, in the case of the European Union, credible commitments have played an important role in the design of delegated authority in competition policy.

Institutional Constraints

In addition to noting how institutional design is affected by the goals of principals, rational choice theory also calls attention to how institutional constraints condition the strategic behavior of principals in pursuit of their preferences (Frieden 1999). By enlarging the problem of political drift, the presence of more principals is generally seen as leading to narrower zones of discretion on average, as each principal competes for control over regulatory institutions. Comparative empirical scholarship on delegation shows that bureaucracies in separation of powers systems tend to have narrower zones of *ex ante* authority than in parliamentary regimes (e.g. Huber 2000). Additionally, where there is greater ideological distance between principals, such as during times of divided party government in the United States, principals will delegate narrower discretionary authority on average (Lewis 2010; Farhang 2010; Franchino 2004; Franchino 2001; Epstein and O'Halloran 1999).[1]

At the same time, the organizational capacity of principals may also affect how institutions are designed. Moe (1995; 1989), for instance, argues that legislatures and executives have distinct delegation preferences in separation of powers systems. More permeable to particularistic interests and separated from the executive branch, the US Congress often asserts control through "fire-alarm

[1] Analyzing 257 pieces of significant pieces of legislation, Epstein and O'Halloran (1999) find that Congress systematically "delegates less and constrains more under divided government". (11). Farhang finds that private enforcement provisions are also more likely during divided government. Examining the structure of EU delegation, Franchino (2004; 2001) also finds that European legislation is more likely to take the form of directives, which provide member states with substantial discretion in implementation, than more hard-wired regulations, when there is more disagreement between governments at the Council.

oversight"—establishing "a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions, to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself" (McCubbins and Schwartz 1984: 166). Such mechanisms of control are quite prominent in the American regulatory state, where private actors have been delegated broad rights to participate in the regulatory process and to contest the actions of regulators (e.g. Melnick 2010; Farhang 2010; Kagan 2003; Burke 2002; Epp 1998).

Executives, on the other hand, will be more likely to utilize "police-patrol oversight" – that is, "centralized, active, and direct" forms of control (McCubbins and Schwartz 1984: 166). Unlike legislatures, they do not have incentives to impose external constraints on discretion through transparency requirements, judicial review, or private enforcement (Kelemen 2002: 97-98). As the head officer of the bureaucracy, they also have access to traditional Weberian controls. As Moe (1995) explains: "Their ideal is a rational, coherent centrally directed bureaucracy that strongly resembles popular textbook notions of what an effective bureaucracy, public or private, ought to look like" (141). Comparative studies tend to support the contention that, where the writing of legislation is dominated by the executive branch, legislation is shorter, contain vaguer language, and provides fewer special accommodations for particularistic interests (Lijphart 1999; Ellermann 2005).

3.2 Limits of Principal-Agent Models

Functionalist explanations offer important insight into the design of institutions, pinpointing many of the factors that, on average, shape delegation structures. When establishing a regulatory agency, principals do seek to advance their own interests, at least as far as they are understood at the time. Consequently, the nature of the policy problem that is being addressed can be a factor in its design. Similarly, strategic dynamics between legislative and executive institutions within separation

of powers systems, shape the structure of delegation, often in quite important ways. As will be seen in the European case, the desire to foster a long-term commitment to a certain political goal can motivate the delegation of broad *ex ante* authority and the limitation of direct forms of political control.

However, functionalist explanations are less capable of accounting for the many aspects of delegation that are outside of the principal's control. Yet, the choices available to principals are almost always highly limited: by the rules of the political system in which they exist, the existing constellation of institutions, the preferences of the most powerful interests, and the available institutional blueprints or ideas about how the world works within a given moment.

Functionalist accounts also fail to account for how bureaucratic delegation and other aspects of institutional design may deviate from the interests or needs of principals. In fact, principal agent theories are usually conceived in static terms—that is, they tend to explain existing arrangements in terms of the interests of current principals. If a given set of institutions exists—be it constitutional, bureaucratic, judicial, or otherwise, it is sometimes assumed that these institutions *also* reflect the interests of principals. However, since institutions are rarely abolished and replaced from scratch, institutional arrangements do not always reflect the preferences of principals at a given moment. Regulatory institutions, like all institutions, can become important resources for political actors and a range of interests, creating vested interests that may raise the cost of altering an institutional arrangement even if it is no longer serving the interests of principals. Where institutional arrangements were established long in the past, the gap between the preferences of principals and existing institutional practices can be substantial.

Finally, functionalist theories incorrectly assume that most important aspects of the delegation relationship, including the contours of the zone of discretion, are seen as reflecting the goals, incentives, and constraints of the *principal* rather than the *agent*. But we know from studies of

policy development, that bureaucratic actors have often played a leading role in establishing and reforming regulatory institutions and public policy regimes (e.g. Jacobs 2011; Carpenter 2010; Carpenter 2001; Finegold and Skocpol 1995; Hall 1993; Derthick and Quirk 1985; Heclo 1974). Establishing a bureaucracy literally creates a new actor on the scene, one that can use its resources and information to maintain or expand certain practices and arrangements (Moe 2006). To differing degrees, bureaucracies develop autonomy, meaning that they can "formulate and pursue goals that are not simply reflective of the demands or interests of social groups, classes or society" and, in doing so, exert an important independent impact on public policy (Skocpol 1985: 9). Their possession of information asymmetry, unique organizational capacities, direct relationships with the public and interest groups, and political legitimacy based on outside reputations can be used to "change the agendas and preferences of politicians and the organized public" (Carpenter 2001: 15). At other times, bureaucracies may subvert political control and expand their effective authority beyond what principals would choose in the present (Höpner and Schäfer 2010; Schmidt 2000).

Even more fundamentally, initial design choices can be constitutive for how a certain set of problems is conceived and governing institutions designed. The existing arrangement of institutions can instantiate particular modes of economic rationality or contribute to "civic epistemologies" that lead policymakers to replicate a certain approach from one problem and epoch to another (Prasad 2012; Jasanoff 2011; Dobbin 1994). This dynamic is no less applicable to the question of delegation, where, within a given regime, the organization of dispute resolution tends to have a consistency across policy areas and time (e.g. Kagan 2003).

For all of these reasons, to understand the design of delegation, we must combine rational choice analyses of how delegation choices are shaped by principals' goals and institutional constraints, with historical institutionalist analyses that take seriously the ways in which institutions "emerge from and are embedded in concrete temporal processes" (Thelen 1999: 369). Principals do,

of course, design institutions to pursue their interests, as they are understood at the time. But these goals depend upon the reigning political and economic paradigms of the period, and the "political opportunity structure" presented by pre-existing institutional arrangements (Kitschelt 1986). A number of empirical studies have pointed to how the broader constitutional organization of powers—the organization of legislative and executive power, the degree of federalism, the design of courts etc. —has influenced the trajectory of state development (e.g. Farhang 2010; Ziblatt 2006; Kelemen 2004; Kagan 2003; Burke 2002). Other historical institutionalist studies have highlighted how the capacities of bureaucratic organizations have conditioned the way in which later delegations of authority are designed (e.g. Carpenter 2001; Finegold and Skocpol 1995; Skowronek 1982). Moreover, once a regulatory regime is established, later innovations will be dependent on the way in which a given set of institutions has been designed. "As politics creates policies" observes Theda Skocpol, "policies also remake politics" (1992: 58).

Consequently, the explanatory framework developed in the pages ahead takes seriously the contention that institutional design never occurs in a political vacuum and is almost always shaped by the pre-existing configuration of institutions. In the American case, we will see that the judicial enforcement system stemmed from the institutional context of the late 19th century, when the federal state was seen as illegitimate and ineffective and courts as comparatively competent agents of economic rationalization. Similarly, the decision to delegate broad authority in the European case depended on the broader postwar context that saw the delegation of broad authority to administrators as necessary to ensure economic cooperation and growth.

3.3: A Constitutional Theory of Bureaucratic Discretion

In the analysis that follows, I develop a constitutional theory of delegation that integrates insights from both rational choice and historical institutionalism. The framework emphasizes two

main elements: the political origins of each regulatory regime; and the larger organization of constitutional powers in each multi-level political system.

Since the foundational decisions made about the design of regulatory institutions have been remarkably durable, to understand institutional design in the present, we must examine the political coalitions and political contexts that shaped the design of institutions in the past. In this sense, I view the initial choices made about delegation as "constitutional." Not only have these institutions been partially constitutive for regulatory policy, establishing the baseline for how a certain set of policy problems is conceived, but they have also shaped institutional adaptation and evolution, as a variety of institutional actors and organized interests have become invested in maintaining a certain set of structures, making fundamental change more difficult.

Secondly, we must consider how the constitutional organization of policymaking shaped the strategies of economic interests. While constitutions can, of course, be altered, in the case of the EU and US constitutional revision has been rare and, when it has occurred, slow-moving. Consequently, I conceive of constitutional rules as exogenous to the choice of bureaucratic delegation.

In the case of the United States, the Madisonian constitution has been perhaps the central most important aspect of state development, profoundly shaping its development. From the extensive rights conferred to real and artificial persons, to the interstate commerce clause, the constitution has been a central limiting force in the reach and scope of federal regulatory power. Still today, the federal bureaucracy's authority is circumscribed compared to many other political systems, in large part because of the US constitution. Similarly, in Europe, the Treaties have profoundly shaped the choice set available to principals when designing and updating competition policy.

The Role of Political Origins

I argue that foundational choices of about delegation have cast a long shadow on economic policy and its subsequent development. Formally speaking, the delegation structure of each regime has remained remarkably consistent over a long span of time. In the US, antitrust law is still largely defined by the Sherman Antitrust Act of 1890, the Clayton Act of 1914, and the FTC Act of 1914. The court-based system of public and private enforcement established by these laws has governed the regime from its founding to the present. Similarly, in the European Union, the competition articles have not been materially altered since 1957, and an administrative enforcement system has been in place since 1962.

Given the durability of these early delegation choices, I spend significant time in the next two chapters (Chapters Four and Five) analyzing the political coalitions that established competition policy in each system, and the broader political context that conditioned their goals. I focus in particular on the factors that shaped the design of delegation. What political coalitions established competition policy within each system? What problems were they trying to solve? Finally, how did the established institutional environment condition their political strategy?

To understand the design of the US antitrust regime, I examine the tumultuous political context of the late 19th century, a period when technological change and market consolidation led to new political demands for federal regulation. I focus in particular on the roles played by the radical agrarian and progressive movements, both of which contributed to the design of antitrust and other regulatory institutions during the period.

To understand the design of the European regime, I examine the context of the postwar, a moment when economic growth and recovery was the foremost political imperative. Because European competition law emerged, not from social movements demanding economic justice in a time of rapid technological change, but from the efforts of bureaucratic negotiators to establish a

pan-European project of political and economic cooperation, I also spend some time analyzing the efforts of bureaucrats to establish the institutional foundations for peace and prosperity in the postwar, and the role competition law played in their designs.

In addition to political origins, I also spend significant time examining institutional change and evolution. As will be described in some detail in the empirical chapters ahead, in both systems, significant institutional innovations have been enacted that have altered the discretionary authority or the practices of regulators. However, I argue that the way in which these institutional innovations have been designed was conditioned by the choices made at each regime's founding. In this sense, my analysis is not dissimilar from the work of scholars who, in calling attention to institutional change, emphasize the ways in which institutional evolution is influenced by earlier political choices (e.g. Thelen 2004; Dobbin 1994).

For instance, on a number of occasions during the Progressive Era, New Era, and New Deal, reformers attempted to rationalize the US antitrust regime into a more flexible administrative system. But to the extent that these innovations were adopted, they usually replicated the foundational political logic of the antitrust regime. For instance, the establishment of the FTC in 1914, while significantly expanding administrative capacity, maintained the earlier judicial enforcement system, while establishing new mechanisms for political control that largely maintained and reinforced the established political logic of regulation. When reform efforts deviated too drastically from the initial structure—as occurred during the campaigns for industrial corporatism during the 1920's and 1930's—the reform efforts ultimately failed.

Similarly, in the EU, the initial experience of delegating discretionary authority to supranational bureaucrats, and the perception that this structure had benefited European cooperation, led to the expansion and reinforcement of the administrative competition system. Time and again, political principals have ultimately accepted bureaucratic entrepreneurship from the

Commission because of the ways this delegation structure was seen as essential to the success of the project of European integration.

The Role of Constitutional Structures

The constitutional design of the US and EU is sometimes viewed as similar. Both systems are separation of powers systems characterized by a high number of veto points, an institutional separation of executive from legislative power, and a dispersed lawmaking process (Fabbrini 2010; Tsebelis 2002). Independent judiciaries in each system possess powers of constitutional review and have developed a *de facto* policymaking role over time (Shapiro and Sweet 2002; Rosenfeld 2006; Shapiro 2006). Both are federal systems where the division of sovereignty between the central and state levels of government is a central question of politics (Sbragia 2006; Kelemen 2004; Goldstein 2001).[2] And both polities are marked by weak implementation capacity at the center, with most laws enforced by state-level or private actors (Kelemen 2011).

However, analyzing differences in veto points obscures a fundamental difference between the constitutional organization of the two systems. Frustrated by the standing armies, taxation, and administration power of an increasingly centralized, and penetrating British state, Americans explicitly rejected in the US constitution the modern forms of concentrated, centralized, penetrating state authority, which had developed in Europe during the 16th and 17th century (Nelson 2014; Huntington 1966). They put in place instead a system of "separated institutions sharing powers" (Neustadt 1980: 29), placing lawmaking in three interdependent branches of government and limiting the scope of federal authority to a narrow list of enumerated powers, while leaving most governing authority to the sovereign U.S. states.

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[2] Instructive comparisons of the federalist design of the United States and European Union can be found in the collected volumes edited by Nicolaidis and Howse (2001) and Menon and Schain (2006).

The fragmentation of regulatory authority, particularly in economic management, led state and federal courts to assert themselves as the primary rationalizers of the economy, reinterpreting common law to be in line with capitalist developments (Horwitz 1992; Skowronek 1982). Until the mid-20th century, federal courts placed deep constraints on the power of the federal and state governments to intervene in the market, often in the name of protecting corporate rights (Winkler 2018). Even in areas clearly involving interstate commerce, where federal power was accepted, courts limited the ability of Congress to delegate discretionary power to agencies (Horwitz 1992). Still today, courts subject administrators to more intensive standards of judicial review than most other political systems.

By contrast, in Europe, the European Treaties were signed in order to facilitate a *credible commitment* to economic cooperation between countries recently at war (Moravcsik 1998). Consequently, decision-making authority was tilted toward executive actors: The Council, representing member states, and the Commission, an unelected executive bureaucracy that possesses significant agenda setting, legislation writing, monitoring, and compliance powers (Curtin 2014; Jabko 2006; Pollack 2003; Majone 2001). While the European Parliament has steadily accumulated power since the Maastricht Treaty (Tsebelis and Garrett 2000), the institution still remains comparatively weak, lacking even the ability to introduce legislation (e.g. Follesdal and Hix 2006). Additionally, the federalist structure of the EU shares many features of "cooperative federal systems" (Schütze 2009). Sovereignty is shared, and enforced at both the supranational and national level, through an integrated legal system. Not only can the European Commission sanction states directly, but it can "commandeer" national judiciaries and bureaucracies to enforce European law (Halberstam 2001).

Like the US Supreme Court, the Court of Justice of the European Union has long possessed the procedural and substantive judicial review authority (Tobler 1999), using this power to interpret

European law according to its own preferences, often to overturn national law. However, unlike US courts, which have a long history of limiting bureaucratic delegation, the ECJ has been more supportive of providing independent decision-making authority to the European Commission and European agencies. This can be explained by the Court's strong integrationist preferences. As observed by numerous scholars of European law, since its landmark decisions in the early 1960's, the Court has consistently interpreted the law in ways that advance rather than contract the scope of EU law and bolster the political and economic integration of member states (See Vauchez 2012; Conant 2007; Stone 2004). Thus, insofar as the European Commission shares these preferences, the ECJ has supported and expanded the Commission's authority, not least in competition law.

Following McCubbins and Schwartz (1984), I conceive of political principals as having two main sets of tools to limit bureaucratic and political drift: centralized and directive "police patrols" that rely on monitoring and public sanctions to ensure control, or decentralized and indirect "fire alarms," that empower private actors to monitor and enforce the law. In the US, the congressionally-dominated lawmaking process creates incentives to limit bureaucratic discretion through "fire alarms": establishing overlapping systems of enforcement (Epstein and O'Halloran, 1999), empowering private groups to use courts to challenge administrative procedures and contest enforcement actions (Grisinger, 2012), and creating extensive incentives that encourage private actors to enforce regulatory rules in the courts (Farhang, 2010). Additionally, the centralized elected executive in the office of the US President, creates opportunities for "police patrols"—that is, traditional hierarchical controls imposed by an elected executive. By inspiring competition for control between rival branches, such a constitutional design creates further incentives to limit bureaucratic discretion.

In Europe, the executive-dominated system of policymaking is prone toward delegating more expansive authority to bureaucracies. The Council does possess incentives to control

regulators through police patrols, and for this reason, most legislation is implemented by national governments. But in areas such as competition policy, where regulatory delegation is structured as part of a credible commitment to economic cooperation, these incentives are reduced, and member states have a strong normative reason to avoid political interventions (Majone 2001). Even where they do desire to maintain control, as a fragmented executive that is reliant on the Commission to introduce European legislation, the Council does not have the same capacity as the US President to sanction the Commission.

Constitutions and Competition Enforcement

As we will see in the next two chapters, these differences in the organization of constitutional powers have systematically affected the design of regulatory delegation. In the US, the adversarial legal design of antitrust stems from the "state of courts and parties" that grew out of the 18th century Madisonian constitution (Skowronek 1982). Because the federal bureaucracy lacked significant capacity and independence at the end of the 19th century, agrarians and other reformers sought a regulatory solution marked by a narrow zone of bureaucratic discretion: a judicial enforcement system that provided private actors with ample opportunity and incentives to enforce the law directly. This system, marked at once by punitive statutes enforceable in federal court by private and public actors alike, judicially determined standards of reasonable and unreasonable restraints of trade, and the delegation of narrow enforcement authority to the US Justice Department, was the compromise legislation that emerged from contending economic interests operating within the American constitutional system.

Later, reform efforts in the first few decades of the 20th century to replace this system with a more flexible, administrative system repeatedly failed, in part, because of Congress' unwillingness to delegate broad authority to the executive branch. Finally, competing efforts by the President to

rationalize the system and the Congress to promote the interests of private interests, further narrowed the discretionary authority of antitrust regulators during the 20th century. The result is the system observed today: an adversarial legal system marked by a comparatively narrow zone of bureaucratic discretion, and a high degree of judicial control over the meaning of antitrust.

The EU's constitutional structure also affected the long-term institutionalization of the regulatory regime. The Council's internal division, the weakness of the European Parliament, and the Commission's independent policymaking powers each facilitated the maintenance and expansion of the Commission's expansive zone of discretion. By limiting the Council's capacity to assert controls on the Commission, the internal division of member states under the EU constitutional system has facilitated the maintenance of a broad zone of discretion. In Chapters Four and Five, I examine eight episodes where a member state sought to assert political control and limit the Commission's authority in competition policy. In every case, the effort ultimately failed—either because member states have revised their preferences, or because the Commission has been able to strategically divide and conquer member states to maintain its authority. Finally, without a strong legislature, one of the main institutional actors pushing for limited bureaucratic discretion in the US was absent from the EU context. Consequently, we observe far fewer "fire alarm" methods of control.

Even more consequentially, the European Commission's unique agenda setting and law writing powers has provided ample opportunity to bureaucrats to push the boundaries of their delegated authority. In areas such as state aid, the Commission has been able to enact unilateral directives without permission from member states. While the Commission has remained accountable to its mandate through judicial review and monitoring by other institutions, the Commission's unique constitutional powers has allowed it to steadily expand its effective power in the competition field, often without receiving new formal delegations of authority.

Chapter Four

Industrial Development and the Madisonian Constitution: The Origins and Institutionalization of American Antitrust, 1890-1950

This chapter traces the political origins and evolution of the American antitrust system from its founding in the Sherman Antitrust Act of 1890, to its institutionalization as a well-resourced regulatory regime during the Second New Deal. Drawing from archival material and a secondary literature in history, sociology, political science, economics, and law, I provide insight into the origins and evolution of some of the key factors that have limited the zone of bureaucratic discretion in the antitrust field. I argue that the separation of powers design of the US constitutional system—marked by a horizontal division between the Senate, House, and President, vertical division between central and state governments, and an independent court that often served a policymaking function—shaped the construction of the antitrust regime in ways that limited the administrative discretion of federal regulators and the scope of the antitrust regime. Specifically, the limited capacity and legitimacy of the 19th century federal state, and the pre-existing capacity and legitimacy of the courts, led Congress to delegate only limited implementation power to the executive branch and place control over the law's meaning and reach in the adversarial courts, where the prevailing interpretation of federal regulatory power left most police powers with the states. Later, competing efforts by Congress and the President to control the regime resulted in institutional innovations that further narrowed the zone of bureaucratic discretion. The contemporary antitrust system, marked at once by agencies wielding significant expertise and resources, but also by regulators operating within a narrow zone of bureaucratic discretion, emerges out of these competing efforts by Congress to direct the antitrust system toward particular concentrated and diffuse interests, the White House to expand administrative capacity, and the courts to rationalize the system into a rule-bound, and constitutional, economic policy.

One focus of the chapter is to examine how the political origins of American antitrust shaped the design and long-term institutionalization of the regime. I show how the Sherman law was a response to social demands from agrarian and other movements demanding political checks on the gigantic corporate formations that resulted from industrial and technological change, and court-led market integration, during the second half of the 19th century. I highlight also some of the ways that the 19th century "state of court and parties" (Skowronek 1982) conditioned the decision to establish a judicial system of antitrust rooted in common law and enforceable by a wide variety of parties in the courts. And I argue that these institutional design choices established a partially path dependent trajectory, setting a baseline for how competition problems were conceived and addressed during the 20th and 21st centuries.

Another focus of the chapter is on institutional innovations—how successful and failed reform efforts contributed to the structure of the US antitrust regime. Throughout the first four decades of the 20th century, powerful political coalitions, often led by the President, pushed to replace the Sherman law with more discretionary and cooperative systems of administrative or corporatist management that at the time were widely seen as less cumbersome and more rational approaches to regulating the economy. However, each of these reform attempts was blocked or severely undercut by Congress, where opposition to the delegation of discretionary power to federal bureaucracies remained strong. But at the same time, reform efforts resulted in institutional innovations that expanded the regulatory capacity of the federal government, while also reinforcing the 'logic' of US antitrust as a fragmented system of regulation, accountable to competing political principals and enforced through public and private litigation in the adversarial courts. Put a different way, ongoing political contestation over the nature of the antitrust regime within the separation of powers system led to the institutionalization of a system of adversarial legalism, a decentralized and horizontally structured system of policy making and implementation where parties utilize legal

procedures before a third-party judge to resolve disputes (Kagan 2003). In total, I examine five political episodes where questions of institutional design were considered by principals—two successes and three failures, spanning the period 1890-1940. The successful cases examined are the enactment of the Sherman Antitrust Act of 1890, and the Federal Trade Commission Act of 1914. The failed cases include the corporate licensing reform movement of the early 1900's, the experiment with associationalist corporatism in the 1920's, and the abandoned project of state industrial corporatism in the 1930's.

A final focus of the chapter is the relationship between institutional design and enforcement outcomes. The chapter shows that much of the pattern of American antitrust enforcement observed in the contemporary era was also present in the earlier period, including efforts to rationalize the law through general legal rules rooted in economic theory, an economic efficiency standard for prosecutions, judicial determination of the law's application in individual cases, and a politicized enforcement patterns that fluctuates from presidential administration to administration. By highlighting some of the continuities in the pattern of enforcement over more than a century, even as the predominant interests and ideas have radically changed, the analysis points to some of the ways that the antitrust system's political origins, and the constitutional organization of powers, have conditioned the pattern of antitrust enforcement.

4.1: Industrialization, the Agrarian Movement, and the Birth of Antitrust

The period from 1870 to 1917 was a time of great growth for American capitalism, with the economy expanding eight times in size and per capita income growing threefold (Hawley 1979: 3). New technologies such as the railroad, telegraph, refrigeration, electricity, and the internal combustion engine made possible a scale of production the world had never seen before. In the U.S., this technological revolution dovetailed with judicial activism that reoriented the common law

toward commercial capitalism, sweeping away thousands of restrictive state and local regulations, and establishing an integrated market regulated by a 'laissez-faire' court (Horwitz 1976). Together, these changes made possible an "organizational revolution" that resulted in larger and more bureaucratized business enterprises of a size the world had never seen before (Chandler 1990).

Such developments had profound implications for economic, social, and political life. Before 1850, economic power had been widely diffused in the United States, with most industry controlled by small entrepreneurs, and most commerce by small merchants operating in a limited geographic area. The largest employers had been the textile mills of New England, and even these firms usually employed just a few hundred workers (Wells 2002). By the end of the 19th century, a single corporate entity located in New Jersey could own dozens of factories, each of which employed thousands of workers.

While consolidation produced a more integrated and less parochial market, more efficient systems of production and distribution, and previously unimaginable economic surplus, it also intensified inequality, exacerbated regional political divisions, and produced new market externalities that destabilized the social order. In a matter of a few decades, hundreds of thousands of small producers had been put out of work by the new opportunities to centralize and streamline production. The accumulation by a few hundred families of unprecedented levels of wealth prompted wide concerns about the future of democracy within such an unequal economy. Furthermore, the emergence of corporate forms of capitalism exacerbated inequality *between* producer groups across regions and states, with economic output rising much faster in the manufacturing regions of the Northeast, the mid-Atlantic, and Great Lakes, than the South and Midwest, which remained largely agricultural (Sanders 1999). Each of these developments generated new demands—from family farmers, small businesses, industrial workers, a growing professional

class, and regionally divided capitalists—for new forms of governmental regulation to facilitate economic order.

In Europe, the disruptive processes of technological change and rapid industrialization had been mediated by bureaucratic institutions—either through new forms of state ownership or management, or state sanctioned systems of industrial self-management, often through formalized cartels. In Belgium, for instance, railroads were owned by the state, while in France, their affairs were intensely coordinated by state bureaucracies (Dobbin 1994). Similarly, the problem of exploitative business practices in these two countries was addressed through active state planning and regulation, run through centralized public bureaucracies (Ibid). In the UK and Germany, the state was less actively involved in directly managing economic affairs, but state control was asserted indirectly through systems of legally-enforceable industrial cartels. Since the 1870's, the British government had supported the creation of cartels in key industries as a hedge against international competition (Ibid: 205), and courts had accommodated these state imperatives by largely abandoning common law prohibitions against the restraint of trade (Keller 1990: 21). Cartels were even more important in Germany, where industrial organization had played a key role in achieving the country's rapid industrial growth at the end of the 19th century. By 1902, more than 12,000 German firms had formed 450 cartels, which controlled most of the major industrial activities of the country (Ibid: 22).[1]

Given the organization of its political institutions, the delegation to a bureaucracy of broad economic management authority was unlikely to be achieved in the late 19th century United States. Unlike the more centralized political systems of western Europe, lawmaking in the United States was decentralized across two legislative chambers and an independent executive. Moreover, lawmaking

[1] While the British and German cartels were legally independent of their respective states, they operated in the shadow of state authority and could be made to comport with state interests when deemed necessary. See Keller 1990.

was dominated by an elected Congress, that itself was divided between internal fiefdoms and permeated by a range of particularistic interests. Perhaps most decisively, the constitutional boundaries of federal regulatory power had been narrowly defined by the courts.

In his detailed study of the development of American administrative capacities, Skowronek (1982) shows how the dominance of lawmaking by a Congress preoccupied with parochial concerns combined with a strong independent judiciary that set strict boundaries on state power profoundly limited the development of a strong federal state on the national level. While the U.S. federal state could fight wars, expropriate land from indigenous communities, conduct foreign relations, and provide limited infrastructural goods, congressional control over legislation and judicial interpretation of it had prevented the development of many of the hallmark features of western European states—including the *concentration* of authority at the center, the *penetration* of controls throughout the territory, the *centralization* of authority within the national government, and the *specialization* of tasks within the government (19-20). In 1871, as the debates over federal economic regulation were beginning, just 51,020 civilians worked for the federal government, of whom 70% were employees of the US Postal Service, in a country of more than 40 million people (McGraw 1984: 67). The limited federal state apparatus that did exist was largely used as a tool of patronage by political party machines run through Congress, serving primarily as the distributional spoils which held together diverse, cross-regional party coalitions (Skocpol 1985: 24; Shefter 1993; Skocpol 1992). While Congress had proven willing to delegate narrow authority to address regulatory concerns within particular sectors such as the railroads, the legislature was unlikely to delegate discretionary regulatory authority to an independent bureaucracy to regulate the economy as a whole. And even if it did, courts might declare such authority

The second form of European rationalization – the industrial cartel – was also foreclosed by the 19th century system of US government. In the absence of a substantial bureaucratic apparatus,

courts had emerged as the primary institution of economic surveillance and order in the 19th century United States (Skowronek 1982). Courts established an integrated legal order, and determined how the competing, disjointed, and overlapping parts of the state were meant to interact. They also largely dictated the rules of the national market. Gradually over the course of the 19th century, courts had created the legal conditions necessary to facilitate the development of industrial capitalism, striking down thousands of local and state laws seen as impediments to a single market (Horwitz 1976). By the 1870's, courts had established "an oasis of private rights from state interference" that severely restricted the kinds and types of regulation that could be enacted by governments at the federal or state and local levels (Horwitz 1992: 11).[2]

At the same time, the common law provided a modicum of economic regulation that limited business behavior, including a prohibition against 'unreasonable' restraints of trade. Like European industry at the end of the 19th century, US manufacturers faced downward price pressures that resulted from overcapacity in industries such as textiles, iron, and hardware (Chandler 1990: 71). And like their European counterparts, they responded to this pressure by forming agreements about price and output with competitors (Ibid: 72).[3] However, unlike in Europe, common law left US cartel agreements largely unenforceable, creating an incentive for companies to renege on their agreements, by providing secret rebates to keep customers or falsifying their records with associations. The resulting instability of cartel arrangements meant that without legislative authorization or a change in the judicial interpretation of the common law, industrial self-organization could not provide the desired economic order.

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[2] Specifically, the new 14th amendment to the U.S. constitution, ratified in 1868, was interpreted by courts as establishing broad contract and establishment rights that superseded state and local law. Combined with the interstate commerce clause, this had the effect of sweeping away hundreds of local and state regulations that stood in the way of industrial integration.

[3] By the 1880's, for instance, 50 different US trade associations managed hardware manufacturing (Chandler: 72).

The Agrarian Movement, the Sherman Act, and the Birth of Antitrust

With neither the executive branch nor industrial associations able to take the lead in designing a solution to manage industrialization, the radical agrarian movement formed the vanguard of regulatory institution building, lobbying Congress to instantiate their regulatory ideas through legislation (Sanders 1999). Organized at various times as the Grange, the Southern and Northern Farmer's Alliances, and the Populist Party, the agrarian movements expressed the economic dissatisfaction of millions of farmers, largely in the South and Mid-West, who were trapped in seemingly perpetual cycles of debt, as a result of the deflationary, hard money policies of the Gold Standard.[4] The movements were among the most consequential political forces agitating for reform at the end of the 19th century, creating an important political impetus for the expansion of the federal government's active role in economic management and market regulation during the Progressive Era (Prasad 2012; Sanders 1999; Tindall 1966).[5] Beginning in the 1890's, agrarian movements formed one of the main political constituencies within the Democratic party, especially in the agriculture-dominated American South, West, and Upper Midwest.

Paramount to their political program was the regulation of large, industrial enterprises, which they viewed as engaging in behavior that undermined "free competition" in the market. Throughout the 1870's and 1880's, dozens of "antitrust" bills, intent on dissolving, discouraging, or limiting the behavior of large trusts, and enforcing 'competitive' practices were introduced by members of Congress representing agrarian strongholds. Like other diffuse interests that seek to prevent

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[4] The U.S. went on the Gold Standard beginning in 1873. From 1876-1879, the price level decreased each year by 5%, on average. Throughout the 1880's and 1890's, there was also significant deflation. Historical economic statistics from Neely 2010.

[5] Farmers movements led to the nomination of William Jennings Bryan, the radical populist politician, as the Democratic Party's candidate for president in 1896, 1900, and 1908.

administrators from watering down a given mandate (Burke 2002; Moe 1995), the agrarians sought enforcement systems that were as 'self-executing' as possible: through the 'independent' courts rather than the patronage bureaucracy, and by a mix of federal, state, and private actors to insulate their mandate from future political administrations. They also established sanctions with as much 'severity' and 'specificity' as feasible: punitive measures for individuals, steep monetary penalties, denials of tariff protection, and trust dissolutions—that is, fixed and rigid sanctions that did not rely on bureaucratic judgment (Sanders 1999: 269-270).

The Sherman Antitrust Act of 1890, the first of the nations' antitrust laws, and one of the first substantial federal economic regulations, channeled many of these agrarian demands. The law prohibited every "contract, combination in the form of trust or otherwise, or conspiracy [in restraint of trade]", as well as monopolization or "attempts to monopolize, combine or conspire" which affected interstate or foreign commerce.[6] At the same time, the conditionality of all of the provisions on the activity having an effect on "interstate commerce" reflected the narrow basis on which the federal government had the authority to regulate the economy under the U.S. constitution. Moreover, the provisions applied only to private firms, a design that would come to severely limit the reach of antitrust during the 20th century once the governmental sector became more developed.

While there are important differences in scholarly views about the origins of the Sherman law, scholars broadly agree that its construction reflected a mix of influences. Much of the law's design stemmed directly from the demands of agrarian movements. The law utilized specific statutory prohibitions, and could be enforced through punitive sanctions on individuals, and private litigation in the courts, encouraged through treble damages—all elements of the agrarian program (Sanders: 272). At the same time, a group of reformist Northern Republicans, with stronger ties to large industrial enterprise, succeeded in removing many of the more punitive and specific proposals,

[6] The text of the law can be found at < http://www.unclaw.com/chin/teaching/antitrust/statutory_supplement.pdf>.

including a dual state-federal system of enforcement, and a provision to exempt labor unions. Most consequentially, the business wing of Congress managed to change the wording of the law, conditioning the prohibitions on the term "restraint of trade" and using the word "monopolization"—both terms that, at common law, had come to exclude 'reasonable' activities determined to yield aggregate economic benefit (Sklar 1988).[7]

The mixed origins of the statute, and the vagueness of the text itself, provided small producer groups and corporate lawyers alike with reason to see the law as potentially beneficial. The inclusion of term "restraint of trade" suggested that the law might merely extend to federal statute the common law restrictions on market activity that corporate America with which corporate America was well accustomed. At the same time, the inclusion of the qualifier "every" as a condition for both the restraint of trade and monopoly provisions, and the stiff sanctions attached to their violations gave the agrarian movements some cause to celebrate.

A Judicial System of Enforcement

Why did Congress choose to delegate only a limited zone of discretion to the executive branch, and empower courts to determine the law's meaning and application? As would soon be found out, on account of its high degree of formality, strict procedural rules, and slow pace, courts were hardly an optimal forum to address complex industrial questions in a rapidly changing economy. To say the least, the decision to charge courts with adjudicating economic policy did not reflect the first preferences of economists and intellectuals of the day. Even leading jurists did not

[7] By the middle of the 19th century, American common law had established precedents of striking down contracts or agreements characterized by 'unreasonable' restraints of trade, including many cartel arrangements. However, corporations still maintained *freedom* of contract, which included the right to use contracts to restrain competition or to coerce competitors. Throughout the 1880's, courts had interpreted restraint of trade prohibitions more narrowly, upholding many agreements challenged by one of the involved parties, since they were deemed not to harm the public interest, and did not entirely prevent outsiders form competing (Sklar: 96-97). However, from 1888-1892, courts invalidated restrictive agreements in four cases where trusts had exceeded the mandates of their state charters, or attempted to monopolize an entire market (Sklar: 98-99).

think it a good idea to make courts the arbiters of complex competition questions. Oliver Wendell Holmes, who sat on the US Supreme Court, famously called the Sherman law "a humbug based on economic ignorance and incompetence".[8]

The decision to place antitrust enforcement in the courts reflected instead the organization of political power under the US constitution, and the way in which this structure had shaped the development of political institutions during the 19th century. As discussed earlier, the system's many veto points led to a small and permeated federal state apparatus that possessed few capacities for economic regulation and little legitimacy. Given the state's low legitimacy and politically permeated structure, delegating extensive discretionary regulatory authority to the executive branch was not seen as a serious option in 1890. To be sure, the Interstate Commerce Commission (ICC), the first federal regulatory agency, had recently been established with a significant administrative apparatus. But at least initially, the delegated authority to the ICC was quite limited in practice, and both the President and the Congress continuously intervened in the Commission's decision-making process, limiting the body's efficacy, and ensuring the continued politicization of its decisions. In any case, the ICC governed only railroads, an economic sector that was increasingly seen as a 'natural monopoly', and therefore necessitated more substantial regulation.

The delegation of similar discretionary powers to a federal regulator to govern the entire economy lacked the requisite political support. Aside from progressives, none of the major interests with influence in Congress—shippers, small manufacturers, large industrialists, agrarian movements—were supportive of providing an executive bureaucracy with broad powers to regulate the economy writ large. As Sanders notes of the period, "Only a small sector of American society backed the creation of a genuinely autonomous and expert bureaucracy with power to compel information and order changes in business structure and practices" (280). Opposition to

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[8] Oliver Wendell Holmes, 'Privilege, Malice and Intent' (1894) 8 *Harvard Law Review*, cited in Harding and Joshua 2010.

bureaucratic delegation was perhaps most pronounced within the agrarian movements, which were convinced—with some reason given the patronage system and campaign financing system —that the federal bureaucracy would be captured by industrial interests and political party machines. In fact, of the more than two dozen bills introduced by representatives hailing from agrarian areas during the 50th and 51st Congress, all proposed a judicial enforcement system (Sanders 1999).[9]

Within such a political context, federal courts were arguably the *only* institution at the end of the 19th century with the capacity and legitimacy to establish coherent rules to govern the industrial economy. While seen as imperious and anti-democratic by many popular movements, even among agrarian populists, federal judges enjoyed a reputation for independence and competence—characteristics that starkly contrasted with the "politically volatile legislatures" and patronage-based bureaucracy (Horwitz 1992: 254). That even the agrarian populists supported a judicial rather than an administrative solution, despite the 'laissez-faire' orientation of the courts during the period, is testament to how the past legacies of state development weighed heavily on institutional design as policymakers wrestled with the challenges of the new economy.

The Judicial Interpretation of the Law, 1890-1910

Given the vagueness of the provisions, it was left up to courts— the 19th century "American surrogate for a more fully developed administrative apparatus" (Skowronek 1982: 28)—to rationalize the law. Indeed, one of the reasons the Sherman law was enacted with little corporate opposition was because most professional observers had been assumed that the law's reach would be circumscribed by the courts, which would use the common law concepts used in the legislation to

[9] Draft antitrust laws written by agrarian representatives called for a range of highly specific and hard-lined statutory limitations on the development of large enterprises (denying tariff protection to trusts and forbidding trusts from engaging in inter-state commerce), and strict regulations the behavior of business more generally (outlawing specific practices such as price fixing or price discrimination), but each of these were to be enforced through adversarial and punitive measures in the courts. See Sanders 1999.

protect corporations from being prosecuted for activities deemed to be 'reasonable,'—that is economically beneficial (Sklar 1988). From 1890-1897, lower courts decisions largely maintained this distinction, limiting the application of the law to 'unreasonable' restraints of trade.[10] In doing so, courts maintained the common law standard of regulation that privileged corporation's liberty of contract, and placed courts, rather than the Congress, as the central arbiters of the appropriate scope of economic regulation.

In separate rulings, courts also affirmed another feature of the American constitutional organization of powers: the strict division of regulatory power between the federal and state governments. In the 1895 decision in *United States v. E.C. Knight Company*, the Supreme Court struck down the government's prosecution of the American Sugar Refining Co. on the grounds that the company's monopoly status only indirectly affected interstate commerce.[11] Affirming an economic constitution that placed most police powers in the hands of the states, Chief Justice Melvin Fuller wrote: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State."[12] Thus despite the combination controlling more than 98% of the U.S. sugar-refining industry, the Sherman law would be prevented from limiting the company's monopoly power. Signaling to large corporations that the Sherman law would hardly be an impediment to consolidation even in its most extreme form, the case is seen by many scholars as setting off the late 19th century merger wave (Djelic 2002; Fligstein 1990).

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[10] See Sklar's discussion of lower court cases during this period on pages 117-123.

[11] For a discussion of the case, see Sawyer 2018: 90-93 and Sklar 1988: 124-127.

[12] See United States v. E. C. Knight Co., 156 U.S. 1(1895). Accessible at < https://supreme.justia.com/cases/federal/us/156/1/#tab-opinion-1916465>.

However, between 1898 to 1911, the Supreme Court, by a close majority, partially moved away from the pro-corporate position, developing a new standard that made possible the prosecution of firms engaged in 'reasonable' restraints of trade, but which resulted in intense concentrations of power or which undermined the ability of independent producers to compete (Sklar 1988).[13] In an 1897 decision in the case *United States v. Trans-Missouri Freight Association,* the court ruled 5-4 in favor of a broad interpretation of the law, ruling that the Sherman law prohibited every restraint of trade, and not just those deemed to be unreasonable at common law. To limit congressional legislation to the common law standard, Justice Rufus W. Peckham wrote, would involve "a process of judicial legislation wholly unjustifiable," and therefore was an act the Court "cannot and ought not to do." (See Sklar: 128-129). Speaking for the court, Peckham thoroughly rejected the economic efficiency standard inherited from common law, noting that "it is not material that the price of an article may be lowered" from a large combination's restraint of trade or monopolization. "It is in the power of the combination to raise it," Peckham continues, "and the result in any event is unfortunate for the country, by depriving it of the services of a large number of small but independent dealers who were familiar with the business, and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein."[14]

At the same time, the Court maintained a number of restrictions that limited the scope of the law and provided significant space for large corporations (See Sklar: 135-137). First, the Court limited the law's application to firms engaged directly in interstate commerce, as established in *E.C. Knight*. Second, the law continued to apply only to direct restraints of trade, which allowed those deemed to be ancillary to an arrangement to not trigger the Sherman law's prohibition. Furthermore,

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[13] For a contrasting view, see Bork 1965, who argues that none of the Supreme Court's antitrust rulings from 1897-1911 directly contradicted the Rule of Reason standard eventually developed in *Standard Oil* and *American Tobacco* decisions.

[14] *United States v. Trans-Missouri Freight Association (1897)* 166 U.S. 324. Quotation from James: 145.

at no point did the Court interpret the law to forbid bigness. Insofar as a company achieved economic dominance as a result of superior efficiency or the lawful purchase of other companies, the law was not deemed to apply. In this way, the antitrust jurisprudence from 1897-1911 reflected a combination of smaller producer and large corporation interests that, like many settlements between opposed camps, left all of the main stakeholders unsatisfied.

The Implementation of the Sherman Act

The court's vacillating interpretation, combined with a decentralized system of enforcement that allowed cases to emanate from both the politicized DOJ and private litigation, proved a recipe for political and economic chaos. The court's mix of strict prohibitions against certain kinds of loose coordination with full leniency for monopolistic manufacturing combinations operating in a single state had the unintended effect of encouraging industrial consolidation.[15] Observers of the period are nearly unanimous in concluding that the Sherman law bolstered the merger movement, exacerbating the secular trend toward industrial consolidation, which had prompted the passage of the Sherman law in the first place. (Djelic 2002; Sanders 1999; Chandler 1990; Keller 1990; Fligstein 1990). Between 1895-1904, 3,000 firms merged through holding companies, often headquartered in New Jersey, which had adopted business-friendly incorporation laws (Djelic 2002: 242), resulting in new trusts such as Eastman Kodak, Amalgamated Copper, Borden's Quaker Oats, United Shoe Machinery, International Harvester, and United Fruit that were unprecedented in scope and scale (Sanders 1999: 274). By 1900, a single firm came to dominate more than 100 industries. In 1901, JP Morgan established U.S. Steel—the world's first billion-dollar corporation, controlling 50% of the market (Ibid: 273).

[15] Especially after the 1895 EC Knight case made it clear that large enterprises engaged in manufacturing could not be prosecuted by the Justice Department, corporations began to take refuge in state legal structures that could protect them from the charge of illegal coordination.

Table 4.1: Mean Number of Annual Antitrust Cases Initiated by the DOJ, 1890-1945[16]

	President	Political Party	Mean Number of DOJ Cases Initiated Per Year
1890-1893	Benjamin Harrison	Republican	2
1893-1897	Grover Cleveland	Democrat	1.75
1897-1901	William McKinley	Republican	0.75
1901-1909	Theodore Roosevelt	Republican	5.25
1909-1913	William Howard Taft	Republican	18.5
1913-1921	Woodrow Wilson	Democrat	9.88
1921-1925	William G. Harding	Republican	12.75
1925-1929	Calvin Coolidge	Republican	13.5
1929-1933	Herbert Hoover	Republican	4.75
1933-1937	Franklin Roosevelt (1st New Deal)	Democrat	6
1937-1945	Franklin Roosevelt (2nd New Deal)	Democrat	34

Source: Posner 1970, using DOJ reports. Calculations are my own.

The delegation of a small zone of discretion to a Justice Department that had little independence from the elected President also proved problematic. In possession of neither analytical capacity nor organizational differentiation, early enforcement efforts at the DOJ were tied to White House administrations, leading enforcement patterns to be highly influenced by the economic philosophies of particular Presidents and their top advisers. Table 4.1 shows the instability of the enforcement pattern during its first half century. During the 1890's, just 16 cases were initiated, while from 1905-1914, 13 cases on average were initiated each year. Under some Presidents, only horizontal cartels and peripheral firms were prosecuted, while in other administrations, unions and agricultural cooperatives were the primary targets. Presidents Harrison, Cleveland, and McKinley barely enforced the law at all, while Presidents Roosevelt, Taft, and Wilson each enforced the law in different ways. President Roosevelt prosecuted some of the largest

[16] Data taken from "Table 34: Department of Justice Antitrust Cases by Presidential Term" in Posner 1970: 412. Calculations are my own.

American companies such as Standard Oil, American Tobacco, General Electric, and the Aluminum Company of America, using a flexible administrative approach that provided incentives for large companies to proactively cooperate with the Department of Justice, while President Taft utilized a more rigid, judicialized approach. While each of these approaches had their justifications, the volatility undermined the establishment of an institutionalized regime which could provide consistent rules to guide the industrial economy. Additionally, because cases had to be pursued within the adversarial courts, which placed prosecutor and defendant on a horizontal plane before a judge, prosecuting large cases was a mammoth undertaking for the government, which often faced more well-resourced opponents. For instance, the government's ultimately successful prosecution against Standard Oil involved 12,000 pages of documentation, filling 23 volumes (Keller 1990: 30). This was hardly a model of progressive, expert-based economic regulation that could flexibly respond to new developments.

The incentives for private litigation that had been included as a result of agrarian demands, also undermined regulatory coherence. The 'treble damages' provision, which allowed private actors to collect three times the actual damage they suffered from an alleged antitrust violation, had been intended by its agrarian architects as a way to both limit the executive monopoly on enforcement and encourage private lawsuits by small producers against large interests. Yet, in practice, it proved difficult for small producers to use the law. The most frequent users of the private enforcement provisions were medium and large-sized companies, most often against union and agricultural cooperatives. In one early case of this kind, a company successfully sued its own workers for union activity, forcing the involved workers to pay back the cost of lost business from strike actions, times three.[17] That the same law could be used by different actors to both crack down on unions and the

[17] This case led the Supreme Court to declare the Sherman law to apply to unions and worker organizations. See *Loewe v. Lawlor*, 208 U.S. 274 (*1908*). Also referred to as the "Danbury Mad Hatter's Case."

Rockefeller's Standard Oil, by small businesses seeking protection from large companies, but also by a dominant company against small businesses for coordinating their affairs, highlights the politicized nature of the regime during the period, and the limited degree of enforcement autonomy possessed by the US DOJ at this time.

Explaining the Interest Origins of the Sherman Act

The ambiguity in the law's origins, the vacillating court opinions, and the mixed targets of enforcement are just some of the reasons scholars have continued to debate which interest or set of interests motivated its establishment. One set of academics holds that the law was the result of agrarian agitation, in response to deflation, instability, and uneven economic development during the final decades of the 19th century (Thorelli 1955; Sanders 1999). Others have countered that the law was driven by small businesses looking for protection from competition (e.g. Stigler 1985). Finally, some scholars have argued that powerful capitalists (and their middle-class professional co-beneficiaries) were behind the regime, seeking the legal space needed to establish a "corporate-administered market" (Sklar 1988; Weinstein 1969; Kolko 1963).

The truth is that the law served all and none of the predominant interests during its first few decades, when the meaning and reach of the law was subject to intense political debate and judicial revision. Most economists and many progressives found the legislation absurd—an example of "royal Toryism"—but knew that it would not be reversed by Congress without a replacement. Labor leaders, boosted by the growth of union membership from 800,000 members in 1900 to more than 2 million by 1910, viewed the Sherman law as their *bête noir*, and sought to repeal it. Agrarian populists viewed the legislation as a failure, and sought to create harder, more explicit prohibitions, enforced by even stiffer sanctions through the courts. Many owners of small and medium sized businesses were incensed about the law's prohibition of cartels, and, starting in the early 1900's, leading

business associations sought its repeal and replacement. The captains of industry did, of course, get the resolution they wanted eventually, but until the 1911 'Rule of Reason' judgments, they faced real threats of permanent dissolution or major governmental sanctions, not to mention a degree of political unpredictability that left open the possibility of even more extensive governmental interventions in their affairs. In the face of a political stalemate that could be seen equally in the divided, ever-changing court, the swings of presidential enforcement, and the widely divergent views in Congress, the "resolution of the trust question…[became] the single most important issue in the nation's politics" (Sklar: 172).

4.2: Rationalizing Antitrust: The Failure of Corporate Licensing and the Institutionalization of the 'Rule of Reason'

The Sherman Act, as we have seen, was just the beginning of a multi-decade debate over the appropriate design of economic management in the industrial economy. The legislation had been influenced by a divergent sets of interests, and its meaning remained contested across all three branches of the federal government well into the 20th century. Initial enforcement efforts had produced economically incoherent outcomes that exacerbated rather than resolved the problem of industrial concentration so concerning to agrarians and other diffuse interests, while also providing little by way of predictability for business. While most stakeholders agreed the antitrust system was unworkable, the efforts by the Roosevelt administration to establish an alternative system were consistently prevented by the Congress, whose fragmented structure, and permeability to a broad range of interests prevented the delegation of broad discretionary authority to the executive branch.

With a political resolution of the antitrust question seemingly out of reach, the federal judiciary filled in the gap. By establishing a "Rule of Reason" to govern most antitrust prosecutions, the Supreme Court infused the law with a degree of coherence and predictability that until that point had been lacking. By making it clear that the law would only apply to restraints of trade and

monopolies that lacked economic value for society or involved unfair practices that destroyed the possibility of competition—that is, by restoring the common law interpretation of the law that had guided lower court rulings during the first part of the 1890's— the courts significantly narrowed the reach of the law. In doing so, they significantly circumscribed the enforcement discretion previously enjoyed by the Department of Justice, while simultaneously providing corporate America with the certainty that they would not be subject to politicized enforcement efforts that might threaten the autonomy of private property.

In response, progressive reformers would abandon their campaign to replace the antitrust system with a statist alternative, and seek instead institutional innovations that reinforced the logic of the existing adversarial legal system. A new independent commission would be established with wide legal authority and significant investigative powers. But the new Federal Trade Commission would possess only indirect enforcement powers. Similar to the DOJ, the Commission would have to initiate all enforcement actions in the federal courts, while being subject to extensive congressional monitoring. Thus, while the law did expand national administrative capacities, it did so in a way that reinforced the logic of the existing systems of politicized administration, fragmented enforcement, and judicial rationalization.

The Progressive Movement and the Failure of Corporate Licensing

While societal suspicion of bureaucratic power is often characterized as deeply rooted in American political culture (Dobbin 1994; Vogel 1978), at the turn of the 20th century, much of the educated élite were advocates of expanding the power of technocrats to manage the economy. For many academics, professionals, managers, and 'enlightened' capitalists living in the industrialized areas of the U.S. at the beginning of the 20th century, more active, bureaucratic management was the obvious solution to the antitrust question (Skowronek 1982: 42-45). Progressives had long admired

the more expert and cooperative administrative approach in the UK, Germany and France for addressing the problems presented by industrial development.[18] From Henry Carter Adams, who co-founded the American Economic Association in 1885 with a call for a new scientific form of administrative regulation, to *New Republic* founder Herbert Croly's support for the revival of a "Hamiltonian system of political ideas", progressive academics had sought to instantiate new forms of semi-autonomous administrative economic management in the United States.[19] Specifically, they attempted to create independent administrative bodies, staffed with neutral experts, who would be empowered with the authority to make discretionary administrative judgments without recourse to the adversarial courts. The politicized system of administration and adversarial legal system of enforcement, embodied by the Sherman law, was, in many respects, the progressives' foil.[20]

The unexpected coming-to-power of Theodore Roosevelt, a lion of the Republican party's progressive wing, following the assassination of President McKinley in 1901, placed a major supporter of discretionary bureaucratic management at the head of the government. Roosevelt believed that the judicially-enforced Sherman law unfairly "struck all big business, good and bad

[18] At the end of the 19th century, the progressive vision was influenced by German academic training, including the Bismarckian idealization of the state as a provider of order and stability vis-a-vis a tumultuous economy and society (Kolko 1963: 214). In developing the first state railway commission, for instance, the British and German examples had been thoroughly examined. President Cleveland had even sent a delegation to Europe to study railway management (Skowronek 1982: 134). But by the early 20th century, progressives could turn to their own experiences with administrative regulation, particularly the various economic commissions at the state level, as well as the Interstate Commerce Commission.

[19] Quotation comes from Croly's *Promise of American Life,* published in 1909. Citation from Kolko 1963: 215.

[20] As Roscoe Pound, in his youth an advocate of expanding administrative discretion, would argue in a 1906 address to the ABA entitled "The Causes of Popular Dissatisfaction with the Administration of Justice", the adversary court system led to a "sporting system of justice" that was too abstract, formalistic and rigid, which should be replaced by discretionary administrative tribunals. Citation from Horwitz 1992.

alike", while also being "very inefficient in preventing bad big business."[21] His preference was for "continuous administrative action" over "necessarily intermittent lawsuits".[22]

To the extent possible, Roosevelt used his control over the Department of Justice and the newly created Bureau of Corporations to advance his vision of statist economic management. If a corporation under investigation agreed to 'voluntarily' end certain exploitative abuses, Roosevelt's Bureau would withhold information about the company's illicit behavior from the public and not recommend prosecution to the DOJ. However, if corporations were not cooperative, the information would be released, and companies would be held strictly liable, as happened to Standard Oil in 1906, when a Bureau report on the Rockefellers' business practices resulted in more than a dozen lawsuits, and the company's eventual restructuring into seven separated firms (Murphey 2013).[23] Criticized widely by agrarian activists and some progressives at the time, Roosevelt's opaque but paternalistic approach to antitrust enforcement reflected the imperatives of "New Nationalism", an economic program that sought to use state power to limit the opportunities for exploitation that came with concentrated economic power, while maintaining the gains from industrial concentration (Sklar 1988).

A key priority of Roosevelt's second term was to convince Congress to replace the Sherman law with a version of statist management. The most prominent of the reform attempts was the Hepburn bill, introduced in 1908.[24] Stemming from a decade of work by the Industrial Commission and the Bureau of Corporations, the proposed legislation would have established a permanent

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[21] Quotations from Roosevelt's autobiography. Citation from Murphey 2013: 84.

[22] The quotation is from an article by Theodore Roosevelt for *The Outlook* magazine in 1911, in reference to the government's prosecution of U.S. Steel. The full quotation is the following: "Our prime objective must be to have the regulation accomplished by continuous administrative action, and not by *necessarily intermittent lawsuits*."

[23] See Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). https://supreme.justia.com/cases/federal/us/221/1/.

[24] The discussion of the statist reform efforts from 1908-1914 is based largely on the account offered by Sklar 1988.

administrative body with the power to monitor the activities of companies and to provide immunity to corporations for approved restrictive agreements. By stripping courts of the powers of substantive judicial review, and limiting private enforcement, the legislation would have replaced the judicial system of economic rationalization with a discretionary, administrative approach that resembled western European systems of economic management.[25] As Roosevelt described the legislation to Seth Low, the President of the National Civic Federation: "My desire is to strengthen the hand of the executive in dealing with these matters, and not to turn them over to what I regard as the chaos and inefficiency necessarily produced by an effort to use the courts as the prime instrument for administering such a law".[26]

For many reasons, an effort to create a centralized system of administrative economic management seemed promising during the first two decades of the 20th century. The professional middle class had grown five-fold between 1870-1910 and, through an array of new professional associations and think tanks, possessed increasing influence over policymaking (Horwitz 1992). The Republican party controlled all three elective institutions of government from 1896-1910, and a central thrust of the party's agenda during the period was to expand administrative capacities: to strengthen the civil service, and to apply modern administrative techniques to a broad array of policy areas from forest conservation to the military (Carpenter 2002; Rodgers 1998; Skocpol 1992). Civil service reforms, launched by the 1883 Pendleton Act, had steadily strengthened the reputation and

[25] Specifically, the proposal would have replaced the system of judicial enforcement for antitrust with a centralized administrative model that would have the discretionary power to provide exemptions for restrictive agreements seen as beneficial for economic development, while subjecting all companies to surveillance which would ensure good behavior. Power to control the registration process would be in the exclusive hands of the Secretary of Commerce and Labor, serving at the pleasure of the President. Registration would be voluntary, but effectively compulsory for large corporations, since once registered, continual filings would be necessary to maintain their status. The legislation would also have discouraged private enforcement in several ways. First, the proposal would have prohibited all private suits for damages while the administration was initially considering a case and following a grant of immunity. The proposal also erased treble damages, a key incentive for initiating private lawsuits.

[26] Citation from Sklar: 245.

professionalism of the bureaucracy (Skowronek 1982: 49). Together with the quintupling of the size of federal government—increasing from 53,000 to 256,000 bureaucrats from 1871-1901— a new state constituency had been established that could advocate for economic policy reform (Ibid: 83). Even more important, there was widespread consensus that the decentralized, adversarial enforcement approach needed to be replaced. A broad and diverse coalition supported the establishment of an alternative to antitrust including the prominent National Civic Federation, a progressive forum that brought together capitalists, former leaders in the federal government, many outstanding members of the legal profession, as well as representatives of the farmers group and trade unions, clergy, university presidents, professors, and journalists.

But the Hepburn bill ultimately went down in embarrassing defeat, the first of several political failures that would follow similar efforts to replace the adversarial antitrust system over the coming decades. As with the establishment of the Sherman law, two overriding concerns prevented Congress from enacting Roosevelt's proposal. The first was the body's institutional resistance to delegating discretionary authority to another branch of government. "The universal objection" observed a prominent business reporter from the period, "is the immense increase that would be given by it to the Executive Power".[27] Or, as Senator Nelson, a populist Mid-Westerner would object at Senate hearings in 1908, by providing a "mere bureau head" with legislative and judicial powers, the legislation went against the central constitutional principles of checks and balances (Sklar 1988: 280).

The second, largely overlapping barrier came from organized interests. Although Congress could occasionally overcome its constitutional concerns about delegating discretionary authority to the bureaucracy, it usually did so when the predominant interest groups were supportive. But in this

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[27] Quotation from Henry Parker Willis, in the *New York Journal of Commerce*, March 27, 1908. Quotation and reference from Sklar 1988: 250.

case, the most influential interests did not align with the President's goals. Agrarian populists, who held significant sway over members of Congress representing the periphery, were concerned that a corporate licensing system would create more opportunities for capture and abuse. Fearful of the implications of centralized administrative power in a highly democratic polity, industrial and business interests were also opposed. The combination of opposition from both the left and the right in a legislative body so permeable to interests meant that a centrist proposal that sought to balance these contending interests stood little chance of being enacted.

Legislation to establish an alternative to the adversarial antitrust regime would again be introduced each year from 1910 to 1914— as a corporate licensing system, a voluntary system of registration, and a regulatory commission. Each of these proposals would have placed bureaucrats rather than judges in charge of administration, limiting private control over enforcement, and allowing exceptions for cooperative behavior or monopoly practices that were deemed to be in the public interest. Each bill would have created a system of regulation that bore more resemblance to the administrative system of competition regulation that would be established fifty years later in the European Economic Community than the adversarial legal antitrust system still in place in the United States today. But the congressionally-dominated policymaking process placed major obstacles in the way of their enactment. Ultimately, each one of the statist efforts failed. Time and again, members of Congress would express the same fundamental constitutional objection: that the legislation concentrated too much power in the hands of the federal bureaucracy, and thereby threatened the 'checks and balances' in the US Constitution.

The Rule of Reason and the Rationalization of the Sherman Law

With the failure to establish an administrative system of rationalization, the Supreme Court took charge. In two sweeping rulings in 1911, the Court re-established the common law

construction of the Sherman law as a statute that applied only to 'unreasonable' restraints of trade. In a 1911 decision against Standard Oil, the court ordered the dissolution of the company into 34 different companies but on the grounds that the company had engaged in unreasonable restraints of trade, seeking to "drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view".[28] If the company had avoided using such tactics, and instead had simply used its economic power to restrict trade in a way that lowered consumer prices or increased productivity efficiency, the Court made clear that the government's case would have been overruled.

That same day, the Court also ordered the dissolution of the American tobacco combination on more or less the same grounds. In its ruling in *American Tobacco Company vs. the United States of America,* the decision was once again justified using a reasonableness test that would come to be known as the 'Rule of Reason.'[29] Although this version of judicial economic rationalization was not yet to employ the instruments of micro-economic modeling, or the precision of the consumer welfare tests associated with the law and economics analysis of contemporary antitrust, the Rule of Reason was governed by a similar logic, subjecting legislative sovereignty and administrative interpretation to substantive standards of economic efficiency, as defined by the courts.

Thenceforth, not only would the Department of Justice's discretion be more circumscribed, but large corporations would enjoy far greater freedom to create gigantic combinations, or to utilize their economic power to restrict competition. For instance, in several cases prosecuted during the 1910's, the Court struck down government efforts to dissolve companies with as high as 80%

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[28] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). Quotation from 221U.S. 76. Accessible at < https://supreme.justia.com/cases/federal/us/221/1/>.

[29] In the ruling, the Court majority stated that a reasonableness standard was necessary to prevent the law from "annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve." See *United States of America v. American Tobacco Company,* 221 U.S. 180 (1911). Accessible at < https://supreme.justia.com/cases/federal/us/166/468/>.

market share. Since these combinations were seen as contributing to economic efficiency, there were not liable under the anti-monopoly statute.[30] Even when courts did agree with the government that a firm or group of companies had engaged in unreasonable restraints of trade, the specified remedy would usually preserve, to the extent possible, the autonomy of property. In several decisions during the 1910's, the court outlawed certain unreasonable practices, but left the corporate entity wholly intact, allowing the convicted company, with a few minor adjustments, to continue business as usual.[31] In other instances, a pool or combination might be dissolved, but the now independent units could still pursue 'reasonable' cooperative endeavors that left the basic structure of the market untouched. This was no less true for the many consent decrees that became more popular following the Rule of Reason judgments. Many of the agreements between the DOJ and corporations outlawed specific unreasonable practices, while tolerating corporate structures marked by high levels of concentration or extensive restrictive practices.[32]

The new normal would mean also that most large corporations were assured that antitrust would not present a major barrier to strategy. Short of outright attempts to destroy the possibility of competition, or to establish cartels, the autonomy of private property was vigorously defended by

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[30] See *United States v. Winslow* 227, U.S. 202 (1913). Accessible at < https://supreme.justia.com/cases/federal/us/227/202/> Although the United Shoe Machinery Company controlled 70-80% of the production of shoe manufacturing machinery, the court invalidated the government's case since "the combination was simply an effort after greater efficiency." See also the 1920 case *United States v. United States Steel Corporation* 251 U.S. 417 (1920). Accessible at < https://supreme.justia.com/cases/federal/us/251/417/>. Here, the Court which came to a similar conclusion about the efficiency of the combination, which controlled more than half of US steel production in the early 20th century. Description of these cases can be found in Sklar 1988: 149-150.

[31] See, for instance, *United States v. Terminal Railroad Association St. Louis* 224 U.S. 383 (1912) which stated that the company's combination would be legal with a few minor adjustments See also *Standard Sanitary Manufacturing Company v. United States* 226 U.S. 20 (1912), which voided a patent agreement, but allowed the company, itself composed of sixteen previously independent companies, to continue to exist, despite controlling more than 50% of domestic manufacturing of bathroom fixtures. Citations both from Sklar: 149.

[32] Sklar identifies consent decrees following this blueprint with a number of companies, including American Coal Products Company, the American Thread Company, S. F. Bowser & Company, the Burroughs Adding Machine Company, the Central West Publishing Company, the General Electric Company, the Otis Elevator Company, the American Corn Products Company, and the International Harvester Corporation. See discussion at 152.

the courts. The Rule of Reason would, in this way, reflect the Lochner Era construction of corporate rights, using private law concepts and constitutional rights to limit the coercive, and democratically-influenced interventions of public law (Horwitz 1992). Antitrust would now be subject to a common law standard of that had been developed, not through democratic deliberation, but via private litigation. In this sense, the decision stemmed directly from the 19th century, maintaining a mode of economic rationalization arbitrated by the courts. As Sklar explains: "To construe the Sherman Act as having embodied the common law was in effect to assign to judge-made law a leading authority in regulating the market, and to give it legislative sanction" (168).

At the same time, the Rule of Reason doctrine was hardly *laissez-faire*. Where corporate restraints of trade did meet certain narrow tests of unreasonableness, or create problems for the economy as a whole, courts did allow the government to step in. While placing the burden of proof on the government to intervene in the market, the new policy nevertheless did help institutionalize enforceable limits on corporate behavior and a (limited) degree of democratic control over the marketplace. More than anything, it provided a modicum of resolution and predictability to the antitrust system that, making clear the judiciary would be the key arbiter of the meaning of the law, instilling general rules to guide its application, which contributed to resolution of the antitrust question, and its marginalization from mainstream political debate.

The Federal Trade Commission and the Madisonian Constitution

The Federal Trade Commission (FTC), established in 1914, is seen by some scholars as the triumph of the statist reform effort, the replacement of the judicial system of economic management with a pro-active, discretionary regulatory state. In an influential article, Glaeser and Shleifer (2003), for instance, characterize the Progressive Era as a period when a national regulatory system based on litigation was replaced by a regulatory system controlled by administrators. "During the Progressive

Era," they explain, "regulatory agencies at both the state and the federal level took over the social control of competition, antitrust policy, railroad pricing, food and drug safety, and many other areas", replacing the litigation-based system that had been predominated before (401). A version of the progressive developmentalist view is seen in many important histories of the period as well (e.g. Horwitz 1992)

Certainly, the Progressive Era did significantly expand state capacities, helping to "erode the nineteenth-century belief that private litigation was the sole appropriate response to social wrongs" (Glaeser and Shleifer 2003: 401). The establishment of administrative agencies were signal moments in American state development, significantly expanding the federal government's capacity for economic regulation (Skowronek 1982). The organization of management at the FTC— as a bipartisan, five-person commission with eight-year appointments—did take clear inspiration from the independent commission model pioneered by progressives in the 19th century (McGraw 1984).

Yet the design of the FTC was far from the Rooseveltian ideal of discretionary, administrative management. And its establishment hardly ended the judicially arbitrated system of economic regulation that predominated in the 19th century and which formed a central crux of the American economic constitution. In designing the FTC, Congress did delegate broad *ex ante* authority to an independent federal bureaucracy. But at the same time, it left enforcement decisions in the courts, largely preserving the litigation-based system that had been established in the Sherman Act. By layering the FTC on top of the existing system, Congress also largely preserved the system of regulation via public and private litigation. More than a triumph of administrative management, the case illustrates the continued dominance of the legislative branch over the design of American regulatory institutions. And far from the end of regulation by litigation, the 1914 reforms reinforced the judiciary's prerogative to determine the scope and content of economic management.

The Debate over the 1914 Reforms

The Clayton Act and the FTC Act, both enacted in 1914, expanded the list of business activities prohibited by antitrust law, and established a new independent regulatory commission to administer the law. The two laws were the result of a multi-year process involving dozens of bills and nearly as many important compromises. The substantial expansion of administrative capacities and, by extension, the strength of the executive branch, meant that President Wilson played a much more consequential role in the congressional debate in 1914 than did President Benjamin Harrison in 1890, when nearly all components of the bill were written by Congress. As the head of the executive branch, Wilson pushed for the new antitrust laws to be administered through a regulatory commission that possessed a broad and flexible mandate. But while his contribution was important, Congress still played the primary role in institutional design, and the final legislation reflected the piecing together of disparate components demanded by a variety of factions.

In an extensive analysis of the debate over the two laws, Elizabeth Sanders (1999) has shown how the agrarian representatives succeeded in not only maintaining but expanding the statutory regulatory approach, while also ensuring that private actors could continue enforcing the law, while the FTC was prevented from exempting business trade agreements from the Sherman Act.[33] Like the Sherman Act debate from 25 years before, the main counterweight to the demands of agrarian representatives were Republican and Democratic legislators representing the core industrial areas. Representing the demands of large industry, these legislators sought to weaken the agrarian-inspired provisions, and more generally undermine the authority and effectiveness of the FTC. By blocking attempts to transfer antitrust enforcement to an administrative body, adding broad judicial review of the FTC's "cease and desist" orders, and ensuring strong lines of congressional control over the

[33] For an extensive account on the congressional debate, see pages 273-297 in Sanders 1999.

commission's activities, this constituency significantly limited the new Commission's discretionary authority (291-292).

All things considered, the new trade commission was far from the progressive ideal of a flexible system of expert state management (297). In contrast to the executive-centered designs that had been considered a few years earlier, the FTC was provided no power to require registration and reporting, to grant immunity to cooperative companies, or to condemn companies or seize property through administrative action.[34] While provided significant resources, the enforcement powers delegated to the FTC were entirely indirect, to be exercised through public litigation, leaving judges as the ultimate arbiters of all of its decisions. As Sklar (1988) explains: "The two laws sustained the subordination of executive administration to judicial review, thereby protecting the due process rights of property and insulating contractual relations from direct administrative controls" (331).

Early Enforcement at the FTC

Despite its ostensibly independent status, enforcement at the FTC largely followed the politicized pattern observed in the DOJ's enforcement of the Sherman Act. From 1914-1920, when the majority of Commissioners were populists and progressives, the Commission pursued a number of important investigations of grain exchanges, lumber trusts, aluminum companies, and meatpackers, and issued a high number of cease-and-desist orders (Davis 1962; McGraw 1984). But such cases became less frequent following the Republican election sweep in 1920, which placed the formally-independent FTC at odds with the more conservative Congress and White House. From 1925-1929, the FTC issued just 60 orders, less than half of the 121 issued in 1919 alone (Posner 1970). The Republican Congress also stripped the Commission of certain investigatory powers, including withdrawing its regulatory authority over meatpacking and transferring regulation to the

[34] See Sklar 1988: 330 for a detailed list of the various measures included in earlier regulatory proposals.

more industry-friendly Dept. of Agriculture (Davis 1962: 150). After 1925, when William Humphrey, an irascible and inexperienced businessperson, was named Chair by President Calvin Coolidge, many of the Commission's programs were discontinued. The result of these assertions of political control was that just one investigation of consequence was pursued during the decade.[35]

The FTC's power was further delimited by the federal judiciary. In 1920, the Supreme Court ruled that the FTC could not use its powers to bar activities that had not been previously forbidden at common law, with Justice McReynolds declaring in the majority opinion that "it is for the courts, not the commission, ultimately to determine as a matter of law what they include".[36] Throughout the 1920's, judges questioned the factual findings of the FTC, and limited its investigations. At times, courts refused the government the authority to extract even basic information from corporations (Kovacic and Shapiro 2000). When the FTC did utilize its cease-and-desist powers, courts often dismissed the orders or overturned them on appeal. From 1915-1924, 287 of 342 FTC orders were dismissed outright, and courts eventually overturned 28 additional orders, leaving just 27 orders enforced, less than 8% of the total.[37] Even when orders were sustained in court, companies sometimes patently ignored them.[38] In response, the FTC was forced to operate within the narrow confines established by the court, avoiding actions that would constitute any independent, directive role over the economy (Kovacic 1982: 616).

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[35] The one investigation of consequence, against the public utilities, was possible, in part, because of support from a bipartisan group of influential liberals in the Congress (Davis 1962: 443).

[36] *FTC v. Gratz*, 253 U.S. 421 (1920). For an overview of the case see < https://supreme.justia.com/cases/federal/us/253/421/>.

[37] Calculated made using data from Posner 1970, "Table 12: The FTC's Record of Success in Restraint-of-Trade Cases."

[38] In 1924, for instance, the Commission filed a cease-and-desist order in federal court against the Aluminum Company of America, ordering the company to cease certain behaviors. Although the administration action was upheld in court, the company simply ignored the ruling. By the time the FTC got around to authorizing a second set of orders, a new Republican-majority Commission had been appointed, and recommended against further action. See Davis 1962: 442.

Rather than a departure from the 19th century regulatory paradigm, the establishment of the FTC is more appropriately seen as an example of a type of incremental institutional change that Kathleen Thelen (2003) describes as *layering*, defined as "the partial renegotiation of some elements of a given set of institutions while leaving others in place" (225).[39] The creation of the FTC was decidedly an institutional innovation, delegating broad regulatory authority and significant resources to an independent bureaucracy that expanded the regulatory capacity of the national government. However, these innovations were built on top of a pre-existing system of congressional lawmaking and judicial enforcement. Thus, while the establishment of the FTC would "alter the overall trajectory of policy and politics" (Thelen 2003: 230), contributing to the development of more capacious, administrative powers at the federal level, it also reinforced congressional and judicial constraints on the federal administration, creating new channels through which Congress, and its favored interests, could affect the application of economic regulation, and through which judges could rationalize economic regulation in favor of corporate property. Consequently, even the establishment of an independent commission with significant resources and open-ended legal authority, would, in practice, not significantly alter, and in some ways reinforce, the politically permeated adversarial legal system of antitrust.

4.3. The Trade Association Movement and the Failure of Industrial Corporatism

From 1918-1935, another major political movement attempted to replace the antitrust regime with a less adversarial alternative.[40] Following World War I, U.S. trade associations sought to expand opportunities for business cooperation, by diluting anti-cartel prohibitions, and ultimately

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[39] See also Schickler 2001 for an account of how congressional rules and practices developed through institutional layering.

[40] The discussion in this section draws heavily from Cuff 1973, Himmelberg 1976, Hawley 1979, Hawley 1966, and Alchon 2014.

replacing the antitrust regime with a system of business-administered corporatism. During the 1920's, experiments with cooperative business trade practices conferences seemed to hold great promise for more efficient and effective economic management. Similarly, the sweeping victory of Franklin Delano Roosevelt in 1932 created a window of opportunity to enact legislation establishing a system of industrial corporatism. However, like the movement for corporate licensing during the Progressive Era, the efforts to legalize business cooperation ultimately failed. Once again, the US Congress and the courts proved to be the most substantial institutional barriers to replacing the adversarial antitrust system.

The Associationalist Movement

As in all industrialized countries, World War I "strengthened the economic hand of large enterprise" (Keller 1990: 34). The federal bureaucracy's limited economic management capacity had led President Wilson to call upon business leaders and business organizations to assist in the war mobilization effort through what the historian Ellis Hawley (1979) describes as a "quasi-corporative bureaucracy, part private and part public" system of economic management— to be run by business for public purposes (98). This machinery included a network of organizations, ranging from the War Industries Board, which managed industrial production and procurement, to the Food Commission, which directed agricultural production and set food prices through government marketing agencies. After the 1918 armistice ending World War I, the centralized management apparatus was largely dismantled, but business leaders, who preferred to be regulated cooperatively by "businesscrats" than by either administrators or anti-trust lawyers, viewed the war machinery positively, and saw opportunities in the government machinery to advance reform goals that had been unachievable during the prewar period (Cuff 1973; Hawley 1979: 45).[41] More generally, for many business and

[41] The term "business-crats" comes from Galambos 1966: 205, cited in Finegold and Skocpol 1982: 262.

some progressive leaders, the wartime experience increased confidence in the merits of industrial cooperation and planning through state-sanctioned associations (Hawley 1979: v).

Chief among the postwar goals of the trade association movement was the repeal or substantial revision of the antitrust laws. Although the Supreme Court's 'rule of reason' had established a high threshold for intervening in the affairs of large corporations and conglomerations, which were ostensibly using monopolies or restraints of trade to improve productive efficiency or expand aggregate output. However, a lower 'per se' threshold was applied to the prohibition against horizontal coordination by small- and medium-sized firms, rendering all cartel conduct patently illegal and enforceable in the courts by public and private parties. Consequently, the Sherman law still proved effective at preventing firms from forming loose combinations or engaging in horizontal cooperation. Furthermore, even in the absence of antitrust litigation, explicit business agreements still remained unenforceable at common law.

Small and medium sized producers, in particular, abhorred the antitrust laws, often decrying the regime as causing 'ruinous' and 'destructive' competition, which obliterated profits and forced consolidation. Since as early as 1908, major business associations such as the Chamber of Commerce had formally called for the liberalization of the adversarial Sherman Act and, following World War I, stepped up their efforts to revise the antitrust regime.[42] In some important ways, their reform goals overlapped with that of progressives. Both constituencies wanted to create a more cooperative and flexible system of economic management that avoided the adversarial courts. The key difference, of course, was that the associationalists wanted such a system to be run by organizations controlled by industry while the progressives wanted expert civil servants to maintain control.

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[42] As early as 1908, some business associations pushed to revise antitrust legislation (Himmelberg 1976: 5). In early 1919, the members of the US Chamber of Commerce voted to endorse revising the antitrust laws to broaden the scope of permissible cooperative agreements (Himmelberg 1976: 6-7).

Recognizing the difficulty of repealing an antitrust regime that had strong supporters in Congress—and the impossibility of outright cartel legalization for the same reasons—businesses associations framed antitrust reform as part of a larger project of cooperative industrial management that Hawley terms "associationalism," which he defines as a "nonstatist and nonradical alternative to classical liberalism" (1979: 10). In principle, associationalism was a way to secure greater planning and "cooperative competition" without resorting to outright cartels, mergers, or state control. But in practice, associations fixed prices and sometimes controlled production quantities: establishing uniform methods of accounting and sharing statistics regarding inventory and shipments (Peritz 1996: 76-77). As part of this agenda, business associations urged administrative and judicial accommodation under the antitrust laws for the purposes of information sharing and standard setting.

The political ascendancy of the Republican party during the 1920's heralded both a new era of business dominance over politics, as well as a new willingness by the federal government to actively foster economic cooperation, both between business and government, and among enterprises within a given industry. Within a few years, the New Era administrations came to support some of the antitrust reforms proposed by business associations. Under President Coolidge, the politically controlled Department of Justice advocated a reinterpretation of anti-trust that allowed private industry associations to facilitate information sharing and cooperation. The head of the Division of Antitrust worked with Harvard Law School President Harlan Stone to develop a legal theory, and ultimately successful test case, to provide business associations with broader immunity, which was later upheld by the Supreme Court in an opinion written by newly-appointed Justice Stone.[43] In the mid-1920's, the Antitrust Division also reduced investigations, pushed for

[43] See *Maple Flooring Manufacturers' Association v. United States*, 268 U.S. 563 (1925). Accessible at < https://supreme.justia.com/cases/federal/us/268/563/case.html>. The case provided a more lenient standard for

more informal agreements, and set up privately-run conferences to devise codes of ethics that made it clear how corporations could avoid prosecution. Returning to Table 4.1, can see that the overall frequency of antitrust cases initiated by the DOJ decreased throughout the decade, moving from around 13 cases per year under Harding to less than 5 under Hoover.

The Federal Trade Commission also underwent a transformation, institutionalizing a number of associationalist practices into its own operations. By 1924, when president Calvin Coolidge appointed Humphrey as head Commissioner, the commission had been transformed into an agent of business cooperation. In 1926, a Trade Practice Conferences Division was established at the FTC that sought to use the commission's authority and resources to foster industrial standard setting, collaboration, and sharing of best practices. More than 100 federally approved standardization and conservation agreements and more than 50 trade practice codes were the fruits of these efforts, transforming the FTC from a promoter of competition to a facilitator of business cooperation (Hawley 1979: 102-104).

While celebrated at the time as a remarkable achievement in enlightened scientific management, such programs rested on shaky legal ground. As we saw in the previous section, Congress had refused to delegate to the commission the authority to provide immunity to specific business agreements, which made them inherently unstable. With progressives and populists still holding sway over key congressional committees, the administration did not seek such authority, hoping that the wisdom of cooperation, and the soft tools of peer pressure and moral suasion, would be sufficient to achieve a more enlightened regulatory order (Sawyer 2018).

Following the stock market crash in October 1929, the fragile institutional underpinnings of business cooperation were made imminently clear. As the economy started heading southward, the

business cooperation. By the time the case was heard, Coolidge had appointed Harlan Stone to the Supreme Court, who dutifully wrote a majority opinion in line with the associationalist view. See Himmelberg 1976: 47.

voluntary spirit of cooperation dissipated. Businesses rapidly broke their own agreements, cutting prices and increasing output to maintain their share of a rapidly declining market during the thralls of the Depression. Many of the organizations that had been given 'protection' by the FTC in their cooperative endeavors now faced prosecutions and dissolution by a Justice Department now worried about appearing too lenient in the face of an increasingly angry public. Under the same pressures, the FTC responded, too, by sanctioning fewer activities, and emasculating many of the codes it had previously approved (Himmelberg 1976: 99). By undermining the legal basis for cooperation, antitrust enforcement made it impossible for business associations to stop the deflationary spiral, as companies cut prices to maintain their share of a rapidly declining market.

The new environment radicalized business, leading many business associations, particularly those representing unprofitable industries to, for the first time, openly propose the full suspension of antitrust.[44] While initially more hesitant, the mainline business associations, including the ABA, NAM, and the Chamber, eventually all rallied to support the replacement of the Sherman law, which was increasingly viewed as "the major impediment to more equitable forms of governance and emergency" (Sawyer 2018: 261).[45] During 1932, members of Congress introduced a number of bills that would have altered the antitrust regime in various ways: providing immunity for codes from antitrust prosecution, making codes binding on all parties, and establishing a two year "truce" period when antitrust would not be enforced.[46] Yet, even in this urgent political moment, when the most

[44] Himmelberg notes that support for antitrust repeal was greatest among industries where profits were comparatively low (below the median of American industry as a whole). For a while, the business community was divided on the question because some industrial associations wanted to preserve the Sherman law as protection against unions.

[45] The retail stores were also somewhat resistant to cartelization given their consumer focus. However, the predominance of the industrial trades in the association's membership, meant that retail firms represented a minority interest (Himmelberg: 83).

[46] For instance, a proposal introduced by Sen. Gerald Nye, a progressive Republican from North Dakota, would have provided broader powers to the FTC to hold trade practice conferences, to provide legal immunity to participants, to decide the legality of rules at the conference, and to create a specialized trade court that would adjudicate all antitrust cases in an expedited fashion. See "To Amend the Act Titled 'An Act to Create a Federal Trade Commission, to Define Its Powers and Duties, and for Other Purposes, Approved September 26, 1914; S. 2628, 72nd Cong. (1932). The

prominent diagnoses for the Great Depression was that it had been caused by "destructive competition", the many veto points in the U.S. constitutional setup prevented the replacement of the adversarial legal antitrust system.

Congress and the Failure of the National Recovery Administration

The election of Franklin Roosevelt in 1933, with substantial Democratic majorities in both chambers, created a rare window of opportunity to pursue a significant overhaul of economic policy.[47] In early 1933, the Chamber and other business associations moved quickly to lobby the new administration, seeking to both suspend antitrust and to delegate new powers to trade associations to determine fair wages and hours, prices, and production levels across different industries. Open to a variety of ideas in this 'experimental' moment of the New Deal, the Roosevelt administration agreed to allow such legislation to move forward.

Yet for such an idea to become law, it would still need to win approval in Congress. And even at a moment marked by extraordinary presidential leadership, this would still mean designing legislation that could accommodate a range of congressional factions. Anticipating the many barriers that would be presented by Congress, the Roosevelt administration tried to accommodate a range of interests in its legislation: large business associations seeking to expand the trade practices conferences pioneered in the 1920's as a way to reflate the economy; labor unions trying to gain legitimacy and garner a seat at the negotiating table; advocates of public works and public spending who saw the corporatism as a way to stimulate the economy; small business interests concerned

legislative debate can be read here < https://babel.hathitrust.org/cgi/pt?id=umn.31951d021207456;view=1up;seq=11>. Another proposal would have established a two year "truce" period where antitrust would not be enforced, and a panel of business people would instead be empowered to approve market agreements (Himmelberg 1976: 162-163).

[47] The discussion in this section draws heavily from the accounts offered by Hawley 1979, Himmelberg 1976, Katznelson 2013, Peritz 1996, and Finegold and Skocpol 1982; 1995.

about being engulfed by larger players; and nascent consumer groups. At the same time, the drafters had to provide a means of assuring those opposed to the suspension of antitrust that the new law would not be controlled by large industry and serve as a cover for monopolization.

The outcome of this careful coalition work was the successful passage, in June 1933, of the National Industrial Recovery Act (NIRA). The law established a new independent agency, the National Recovery Administration (NRA), which was empowered to work with business, labor, and other industry representatives to write codes of "fair practices" that set production targets, minimum wages, maximum hours, and prices. The NIRA formally suspended antitrust for the participating industries, leading the DOJ's antitrust enforcement output to fall to its nadir, with just ten cases initiated in 1934 and 1935.

Accommodating such a range of interests and goals into one piece of legislation produced a confounding mix of institutional features in the nation's first system of national industrial corporatism. To start, Congress delegated regulatory authority not to an established bureaucratic organization such as the Department of Commerce, which possessed significant institutional resources and well-established organizational routines,[48] but in a newly established public-private entity. The NRA not only lacked organizational capacity, but was separated from the executive branch and subject to a complex division of authority and set of governing and advisory boards (Sawyer 2018). In order to maximize the range of interests that could participate, industry-level codes were written, setting up a fragmented system that would come to include thousands of separately written codes. Finally, to assuage congressional concerns about delegating discretionary authority to a government body, the NRA was provided few direct enforcement powers, and subject

[48] For a sharp discussion of the way that limited state capacity undermined the NRA, see Finegold and Skocpol 1982. Unlike the Agricultural Adjustment Administration, which lasted well beyond the New Deal, the NRA was not placed within an established agency such as the Dept. of Commerce, making it more difficult to get the organization up and running.

to extensive judicial review. Notably, the body lacked the ability either to compel the organization of business or labor, to rationalize codes, or to directly enforce code rules (Peritz 1996: 127).

At its height, the NRA included 4,000 participating trade associations and 1,000 codes of fair competition (Himmelberg 1976: 211). Yet, in practice, the NRA quickly proved to be unworkable—an "administrative, economic, and political mess", according to the Washington-based journalist Ernest Lindley.[49] The wide degree of participation was intended to ensure the representation of relevant stakeholders but, in practice, it created an administrative nightmare, resulting in many overlapping codes that often worked at cross purposes.[50] By the end of 1933, just six months after being enacted, there was a backlog of 10,000 code violations (Hawley 1979: 125). Over the next year, Roosevelt dismissed the NRA administrator and established a new governing apparatus. Congress began to hold ongoing hearings, with members often challenging various codes, and sometimes threatening to abolish the organization (Sawyer 2018). All the while, federal judges intervened in the operation of the NRA, reflecting the continued predominance of the judiciary over questions of economic management. In the NRA's brief, two-year existence, federal courts issued more than 1600 injunctions invalidating codes for various reasons (Peritz 1996: 142).

The problem was not that the codes themselves were unworkable. The economic evaluation of the effectiveness of the plans is actually quite mixed (Skocpol and Finegold 1982; Katznelson 2014). Nor was corporatist planning simply an economic idea doomed to failure. Systems of state and corporatist industrial planning were successfully institutionalized throughout Europe during the 1930's, often to great economic effect in terms of economic output, as in the Soviet Union, Sweden, and Nazi Germany (Gourevitch 1986). The fundamental problem was that such a system was not

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[49] Quotation from Hawley 1979: 33-34.

[50] For instance, different wage rates were established for workers hauling coal, sand, and gravel, leading to the same workers at the same company getting paid different rates depending on which code they were under. See Sawyer: 278-279.

congruent with the American constitutional arrangement, which could not tolerate such an expansive delegation of discretionary authority to a central bureaucracy. Proximately, the program was ended by the US Supreme Court, which declared the NRA to be unconstitutional in its famous Schechter Poultry decision of 1935. However, historians are mostly united in the assessment that, even if the Court had not invalidated the NRA, the scheme would likely have been killed by Congress (e.g. Schlesinger 2003; Brinkley 1996; Hawley 1966). In fact, when the President asked for the program to be extended in early 1935, the Southern- and populist-dominated Senate balked.[51]

Like the system of adversarial antitrust that it replaced, the NRA's fundamental weakness was its design. The urgency of the moment, and the broad mandate from the 1932 election prompted Congress to delegate broad authority to a central regulatory body. But as with its earlier delegations of authority, Congress designed the program in a way that reflected less the concerns of technical rationality than the demands of favored interests and constituencies. To ensure opportunities for interests to influence decision-making, Congress created a highly fragmented coding system that was subjected to extensive oversight. Additionally, it provided quite limited power to the central administration, undercutting the body's ability to organize its component parts into a coherent whole.

Given its fragmented design, it is scarcely surprising that the NRA became, in Hawley's view, "a mechanism that conflicting groups sought to use for their own ends, an agency that was unable to define and enforce a consistent line of policy" (1979: 33). Consequently, long before it was declared unconstitutional by the Supreme Court in 1935, the NRA had already lost-buy-in from most major labor, consumer, and business groups, a casualty of the institutional confusion that had resulted from building a regulatory system that sought to expand administrative capacities, while also

[51] But the Supreme Court beat the Senate to the punch, voting unanimously to strike down the entire program as unconstitutional, one day before the scheduled Senate vote. The Senate committee recommended a bill that severely curtailed the program at the beginning of May 1935, and which would have entirely ended it by the spring of 1936.

maintaining significant congressional and judicial controls. As Schlesinger (2003) notes: "In the end, NRA foundered on the problem of asserting a vague public interest against the specific and well-focused demands of self-serving private interests" (152). But the problem could easily be understood in institutionalist terms: the NRA's performance suffered because it was not given the discretionary authority needed to succeed in planning or economic rationalization.

Like the movement for corporate licensing, the movement for industrial corporatism had significant support from key economic interests during the first half of the 20th century. And similar to the defeat of the Hepburn bill in 1908, the unwillingness of Congress to delegate broad authority to a central bureaucracy contributed to the failure of America's brief national experiment with industrial corporatism. Had the NRA possessed more discretionary authority, would its project of coordination have been more successful? Without making a strong counterfactual claim, it is worth noting that, in the case of the Agriculture Adjustment Administration, where Congress delegated to federal bureaucrats more discretionary authority and subjected them to less extensive judicial review, cooperative regulatory systems proved longer lasting (Skocpol and Finegold 1982). What is clearer is that Congress, in its influence over legislation and its role as conduit for particularistic interests, and courts in its skepticism of administrative determinations, had once again proved to be roadblocks to reform, preventing the establishment of a workable alternative to the adversarial antitrust system.

4.4. The Revival of Antitrust and the Postwar Antitrust Settlement

Although the judicial system of antitrust had long been discredited, its alternatives—industrial corporatism and statist management—had proven even more politically untenable in a polity where the chief lawmaking body served as a conduit for so many different minority interests and where courts still showed a limited willingness to defer to administrative judgments. In the aftermath of the failure of the 'cooperative' NRA, the Roosevelt administration revived the

adversarial antitrust system. Lacking the capacity to foster economic cooperation at the federal level, and influenced by new theories of oligopolistic competition that saw industrial concentration as a cause of the Depression, the Roosevelt administration shifted course in 1937, expanding the enforcement resources of the DOJ's Antitrust Division, while seeking a more hierarchical system of management for the two regulatory bureaucracies. In response, Congress institutionalized new processes of oversight and control that were focused more on procedural than substantive limitations on the executive branch. With the famous 'switch in time that saved nine', courts also showed more deference to executive agencies and Congress. In the antitrust field, they would not entirely abandon the 'Rule of Reason,' or their right to block prosecutions that did not have a strong economic basis. However, they did become more deferential to the government's expertise within this arena.

The result was the institutionalization of the modern system of adversarial antitrust. On the one hand, the regime would be one where administrators possessed significant resources and authority. At times, this authority could be used as a force that significantly limited the economic power of large corporate enterprises. On the other hand, the use of these powers would remain highly constrained: by the President through appointments and hierarchy; Congress through administrative procedure requirements, oversight committees, and statutory exemptions and directives; and courts that, in addition to the usual judicial review, would also institute reforms that increased opportunities for private antitrust litigation.

The Second New Deal and the Revival of Antitrust

Unable to enact a more centralized and cooperative system of economic management and facing new political and economic pressures with the national economy's return to recession in 1937, the Roosevelt administration embraced the adversarial legal regime and sought to integrate it into a

broader economic program centered on rooting out monopoly. The result was the imposition of a new degree of hierarchical control on the Division of Antitrust, and the expansion of its enforcement capacities.

Beginning in Sept. 1937, the administration launched a program to look into economic concentration in the economy, resulting in the largest study of economic concentration ever pursued by the U.S. government through the Temporary National Economic Committee, which came to the conclusion that business was responsible for the ongoing economic difficulties.[52] Concomitantly, the administration intensified antitrust enforcement, instructing Attorney General Robert Jackson to investigate the antimonopoly laws, and the FTC to look into the "marked increase in the cost of living . . . attributable in part to monopolistic practices and other unwholesome methods of competition."[53] Allying with populist Democrats in Congress, the administration succeeded in expanding by five-fold the budget of the Division of Antitrust, and growing its staff from 58 lawyers to over 300 (Brinkley 1996: 111).

Bolstered by the new White House emphasis, antitrust became "the most prominent of the initiatives of the late New Deal" (Ibid: 106).[54] Beginning in 1938, major investigations were launched across a number of industries, including the motion picture, construction, and typewriter manufacturing industries, leading to a dramatic increase in enforcement output (Hawley 1966: 440). From 1938-1943, the DOJ filed and won more cases than all of its previous years combined. For

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[52] "The power of a few to manage the economic life of the Nation," Roosevelt declared when establishing the body, "must be diffused among the many or be transferred to the public and its democratically responsible government. If prices are to be managed and administered, if the Nation's business is to be allotted by plan and not by competition, that power should not be vested in any private group ...." (Quotation from Galbraith 1952: 56-57).

[53] Citation from Hawley 1966: 385.

[54] The historical discussion in Section 3.4 draws heavily from Katznelson 2013, Grisinger 2012, Brinkley 1996, Horwitz 1992, Hawley 1966, and Hofstadter 1965.

Hofstadter (1965), this was "the true beginning of effective antitrust action" and a "watershed in the history of antitrust jurisprudence." (192).

The transformation reflected the broader impulse of Presidents to impose hierarchical order on what Moe (1995) has termed the "congressional bureaucracy." As noted in the previous chapter, as the only elected official responsible to the entire country, and the head of the executive branch, the President has an interest in a capacious administration with a rationalized structure. Moreover, while Congress wants to insulate particular agencies and mandates from presidential control, the President wants to streamline accountability and ensure that each agency is integrated into a broader purpose. Consequently, they wish to create a system of management that is largely alone the lines of a Weberian bureaucracy based on hierarchical organization, characterized by a clear chain of command, clearly delineated routines and internal procedures, and specialized administrative tasks.

This is exactly what the Roosevelt administration sought to do with the antitrust system: increase the capacity of regulatory agencies, while also integrating their enforcement program into a coherent policy framework. The intensification and professionalization of antitrust enforcement during the Second New Deal reflected larger efforts to strengthen the lines of hierarchy in the executive branch during the period, including the establishment of uniform administrative and judicial processes, and reorganizing, where possible, the alphabet soup of regulatory commissions and agencies into a more rational, streamlined system of executive accountability (Grisinger 2012).

However, the acceptance by Congress of the assertion of such broad discretionary administrative power was short-lived. Before many of the New Deal expansions of administrative power could even be finalized, Congress sought to curtail the discretion of administrators. An alliance of Southerners concerned that federal power would eventually undermine the white supremacist hierarchy back home, and Republicans concerned about the expansion of the federal government, led to new congressional initiatives to constrain the administrative state (Katznelson

2013). The Administrative Procedures Act of 1946, the fruit of these efforts, expanded the procedural rights of regulated interests vis-à-vis agencies, substantially reducing the "implied powers" of agencies to enlarge their authority, even limiting their ability to work collaboratively with particular private organizations.[55] The legislation also expanded Congress' monitoring capacity vis-à-vis agencies (Grisinger 2012: 7).

In the antitrust field, Congress also enacted legislation to promote the interests of particular groups within the antitrust system. At the behest of a number of organized lobbies, Congress enacted legislation that directed the Federal Trade Commission to provide protection for a number of favored interests. One clear example of this was the Robinson Patman Act of 1936, a law drafted by the US Wholesale Grocers Association that prohibited grocery store pricing below certain levels (Sawyer 2018: 303). In the early 1940's, Congress enacted new antitrust exemptions for favored constituencies such as unions, sports, and insurance markets.

With the collapse of the non-delegation theory that had been used by courts to substantively limit the expanse of administrative power during the Lochner Era (Horwitz 1992), courts became more willing to tolerate administrative expertise. And they no longer overturned congressional legislation as unconstitutional violations of corporation's freedom of contract. But in the antitrust field, courts still remained highly involved in determining the reach and content of the law, continuing to limit its scope in line with the American constitution, and to develop general rules to rationalize its enforcement. Additionally, they vigorously utilized the APA to protect the rights of affected parties and, in doing so, limited administrative discretion. Moreover, they continued to affirm the narrow scope of antitrust as applying to economically inefficient activities conducted by national private sector actors. Most consequentially, in a 1943 decision, the Supreme Court

[55] The discussion on the Administrative Procedures Act and Legislative Reorganization Act draws heavily from Grisinger 2012.

established the state action exemption for antitrust in its 1943 decision, providing broad immunity for all state-sponsored or state sanctioned activity. Even at a moment where deference to administrative judgment was high, the Court affirmed the dual sovereignty of the federal and state governments, ensuring that antitrust would remain limited in its reach over many substantial areas of the economy (Garland 1987).

It is perhaps telling of the profound ways in which the US constitution has limited administrative power that, even during this moment of proliferating federal regulatory authority, Thurman Arnold's anti-monopoly campaign—still celebrated by contemporary historians as one of the most effective heads in the history of the Antitrust Division (e.g. Brinkley 1996)—was met with only partial success. In only two cases did Arnold's enforcement program result in structural remedies: one to force the Pullman Co. to divorce the manufacturing of sleeping cars from the provision of sleeping car services, and another to force Paramount to move out of the exhibition part of the industry (Hawley 1966: 451). In fact, after just a few years, the Division's prosecution of influential interests led to pushback by the first branch of government. Pressure from Congress would lead the Division to call off investigations in steel, shipbuilding, aircraft and transportation and to postpone suits in the petroleum, electrical manufacturing, chemical and plumbing industries (Ibid: 442). Two years later, in 1943, Arnold would resign, just five years after he started. As Arnold had said in 1936, antitrust had failed largely because Congress had never overcome its "deep seated attitude against trusting administrative tribunals with power except in very narrow fields."[56] In the face of the institutional limits of administrative discretion built into the US constitution, his analysis would prove no less true a decade later.

[56] Arnold's quotation comes from Hawley 1966: 425.

Antitrust and the Postwar

After six decades of change, the postwar system of antitrust looked decidedly different in 1950 than it had in 1890, when Congress, through the Sherman law, delegated new, limited prosecutorial powers to a small, politicized Justice Department. Two large bureaucratic agencies, now in possession of significant fiscal and analytical resources, would that year complete several hundred antitrust investigations, and prosecute almost as many companies, including some of the nation's largest. But even at this moment, the shadow of the 19th century system would be apparent in the regime's politically appointed leadership, extensive congressional interference, and judicial system of enforcement. While courts would, for a time, show more deference to government cases, they would still possess the prerogative to determine the substantive merit of antitrust cases.

The ongoing competition between the executive and legislative branch to control the antitrust regime had led to new institutional hybrids of political-technocratic, administrative-judicial forms of economic management: bureaucracies staffed mostly by permanent civil servants but led by political appointees; regulatory laws influenced by expert administrators, but still written by elected members of Congress incorporating the demands of various factions; active government enforcement efforts, but even more numerous private antitrust litigation. On the one hand, the system could be described as a capacious, robust system of economic regulation that placed enforceable limitations on business behavior and practices. But on the other hand, the regulatory bureaucracies themselves, would retain a comparatively limited degree of discretion over the application and development of the antitrust regime, hemmed in, in various ways, by the President, the Congress, and the courts.

The postwar enforcement record would reflect this mix of administrative strength and weakness. Antitrust would, like so many other regulatory institutions of the era, play an important role in what Katznelson (2013) describes as the postwar "procedural state," a policy structure which

largely abandoned the attempt to determine a common public interest, instead facilitating dispute resolution between private groups. Where congressional-interest iron triangles were strong, as with small retailers, and where the law did not require complex economic determinations, the antitrust laws were robustly applied. The Robinson-Patman law, for instance, became an effective tool to protect small merchants against competition from chain stores, restricting the consolidation of retail.[57] Moreover, where courts established clear, enforceable rules that did not require significant discretionary judgment, as with the 'per se' standards for horizontal cartels, the law would be applied quite actively through public and private litigation. In these ways, antitrust would form an important institution of what Galbraith (1952) termed "countervailing power"—serving as institutions that, by dint of their exercise of authority against corporations, partially balanced the inequality of power in capitalist society.

But as a tool of economic planning and rationalization, the antitrust regime would remain decidedly weak. The "prolonged delays, legal technicalities, and judicial conservatism inherent in court procedure" explains Hawley (1966), "made antitrust prosecution a clumsy weapon for promoting economic expansion or ironing out the business cycle. At best, economic reconstruction became a lengthy and tedious task. Even when the government could win victories in court, it had trouble translating them into economic victories" (449). Even to address what Galbraith has called the "ogre of economic power", the effectiveness of US antitrust would be partial. From 1955-1969, for every three cases the DOJ would file against horizontal cartels, there would be just one monopoly or exclusionary practices case (Gallo et al. 2000). From 1945 – 1976, just 15 successful instances of divestiture would be finalized, most involving small companies (Kovacic 1989b). When large companies were pursued, they could take so long to resolve through the adversarial courts, that

[57] Robinson-Patman enforcement cases increase from just 94 in 1945-1949 to 545 between 1960-1964. See Posner 1970.

the underlying issues and proposed remedies had become irrelevant.[58] The constraints of taking on complex cases in the court would lead antitrust regulators to have a "preoccupation with trivial cases that could be won with relative ease and would not arouse the hostility of other institutional actors" (Eisner 1991: 62-63).

The most active enforcers of antitrust would be private litigants pursuing their self-interest. The establishment by Congress in 1934 of a central, judicial body (now called the Judicial Conference) with the right to establish uniform rules of judicial procedures including those regulating the rules of evidence, as well as standards of proof, pleading and discovery would lead to a dramatic increase in private enforcement in the postwar, as the new body used its power to expand private discovery rights, and broaden standing rules (Farhang 2010; Burbank 1982).[59] Private antitrust litigation rates would move from just 53 cases between 1930-1934 to 1,002 between 1950-1954. By 1970, thousands of private antitrust cases would be filed each year, outnumbering DOJ cases 10 to 1. Such developments would further undercut administration discretion, limiting prosecutorial discretion, weakening regulators' ability to pursue a coherent antitrust policy and enforcement program, and discouraging cooperation and voluntary compliance within the business community.[60] While the system of private system would be joined by a new assertiveness on the part of government regulators, the postwar pattern would also evoke the 19th century system of common law regulation: once again, the overwhelming majority of regulatory actions would result not from administrative interventions by expert regulators but from litigation between private parties acting on self-interest. Half a century of institutionalization had not altered the foundational political logic

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[58] Examples include IBM, Xerox. See Kovacic 1989b.

[59] See the Rules Enabling Act of 1934. Previous rules of judicial procedure varied by state and were determined largely by precedent. See Burbank 1982.

[60] See generally Burbank et al. 2011 on the disadvantages of private enforcement regimes, especially pages 41-45.

of antitrust as a tool that could be used by a variety of private and public actors, with its ultimate scope and meaning determined by the courts, and their interpretation of the U.S. constitution.

3.5. Conclusion

This chapter has shown that the adversarial legal design of American antitrust was conditioned by its distinctive political origins and the vertical and horizontal separation of powers in the US constitution. Through a close examination of the origins of the Sherman Act, Clayton Acts, and FTC Acts—the three foundational antitrust laws—I have shown that the design of each law was influenced by its enacting coalitions, particularly the populist agrarian social movements active at the end of the 19th and beginning of the 20th centuries, and the large industrial interests seeking a stable market. Some features, such as the incentives for private enforcement, stemmed from the agrarian movement; other aspects, such as the law's common law language, reflected the efforts of business to eschew the development of a more directive, administrative state.

I have shown also that much of the evolution of the antitrust regime stemmed from the organization of the US Constitution, and dueling assertions by the Congress, the President, and the courts to shape the application of the law. Congress has generally sought to limit bureaucratic discretion by establishing "fire alarms" to monitor and control the bureaucracy. Congress has also often stood in the way of fundamental reform, preventing the establishment of a more hierarchical, bureaucratically dominated system of implementation, and continually reinforcing the politically permeated, adversarial legal structure of American antitrust. The President, on the other hand, has attempted to rationalize the bureaucracy through internal hierarchies, sometimes referred to as "police patrols" (McCubbins and Schwartz 1984). As detailed in the chapter, Presidents of a variety of ideological stripes—Theodore Roosevelt, Calvin Coolidge, Herbert Hoover, and Franklin Roosevelt—each sought to establish a more 'cooperative' approach to regulation that could be

integrated into a coherent economic philosophy. Finally, courts have played their own independent role, ensuring that the antitrust regime did not reach beyond the boundaries of the constitutional construction of federal regulatory power, and imposing a "Rule of Reason" requirement, still in effect today, that subjected most antitrust cases to economic reasonableness tests, greatly limiting the types of cases that could be enforced, particularly against large enterprises.

Chapter Five

Credible Commitments and European Integration: The Origins and Institutionalization of European Competition Law, 1950-1990

In this chapter, I explain why the European Commission has been provided broad discretionary authority in the competition field. In contrast to the United States, where the institutionalization of the antitrust regime emerged from the competing demands of concentrated and diffuse interests in a highly permeable legislature, the origin of European competition law lies in the state-led efforts to foster economic cooperation following World War II. As I detail in the pages ahead, the European competition system emerges out of the critical conjuncture of the postwar, when western European countries and the United States were seeking an institutional foundation to ensure peace and economic growth on the continent. A competition law, placing limits on certain protectionist practices, were included in both the Treaty of Paris and the Treaty of Rome, as a mechanism to foster economic cooperation.

Substantively, European competition law placed limits on certain kinds of restrictive agreements and monopolistic practices. However, in contrast to the judicialized approach in the United States, these were conceived as flexible principles that could be weighed against a range of other concerns from promoting industrial productivity to ensuring economic stability. Moreover, far more restrictions were placed on state aid and state-owned enterprises than in the United States, where antitrust was exclusively focused on private restraints of trade, reflecting the deep concerns of the European Union's founders that economic cooperation could be undermined by protectionism. Structurally, European competition law also differed from the adversarial legal U.S. antitrust system. The competition laws of the ECSC and the EEC were both enforced through administrative processes controlled by an independent supranational bureaucracy. The only source of ongoing control came from the European Court of Justice, a court that, while providing an important source

of accountability, has more often expanded than limited the scope of competition law and the discretionary authority of the Commission.

While stemming from the distinct political currents of the postwar, certain aspects of the administration-centered enforcement system have also depended on the broader constitutional organization of powers in the European Communities. The fact that the European Commission, a permanent supranational bureaucracy, is charged under the Treaties with writing all laws, and that the European Council, a fragmented executive body representing each member state, is the center of decision-making, has made it much easier to establish and maintain a Commission-dominated enforcement system. Were authority in the Council more centralized or had the European Parliament possessed lawmaking powers akin to the US Congress, then the initial delegation of *ex ante* power to the Commission might have been more limited, and the number of ongoing political controls more numerous. Similarly, if the Commission had not controlled the introduction of legislation, then it would have been easier for affected interests and aggrieved member states to mobilize against the Commission's broad authority. Analyzing two failed attempts to limit the Commission's discretionary power in the 1990's, I highlight some of the ways these three institutional features—a supranational bureaucracy with significant agenda setting and veto authority, a decentralized executive, and a comparatively weak legislature, each of which cannot be found in the United States—have helped to establish, maintain and expand the Commission's discretionary authority in the competition field.

Finally, through a close analysis of the enforcement practices by the High Authority and Commission, I examine some of the consequences of the delegation structure for the effectiveness of competition regulation. Specifically, I argue that such a design provided the Commission with significant autonomy, allowing the bureaucratic body to use the law as a tool to limit economic protectionism and promote more competitive, integrated markets, to an extent that would not have

been possible had member states possessed more control over enforcement. Time and again, the Commission has successfully avoided political efforts to limit its authority, using its agenda setting power and direct enforcement authority to avoid assertions of political control. With remarkable consistency over the last six decades, the Commission has been able to apply competition law in ways that constrained member state economic policy, resulting in a more integrated and arguably more efficient marketplace.

The chapter proceeds as follows. A first section examines the context of the postwar that led to the establishment of the first competition law in the European Coal and Steel Community. A second section examines negotiations over the Treaty of Rome, explaining why a similar system of competition law was also included in the European Economic Community. A third section considers the expansion of the Commission's authority in the competition field since the 1980's, noting some of the ways competition law has affected powerful private and public interests. A fourth section examines the Commission's enforcement practices during the 1960's and 1970's, highlighting the ways that the design of delegated authority shaped the overall enforcement pattern.

5.1. The European Coal and Steel Community and the First European Competition Law

To understand the origins of the Commission's significant powers to regulate competition, we need to examine the political context of the early 1950's, when the first European competition law was established in the European Coal and Steel Community (ECSC).[1] Immediately following World War II, the United States sought to constrain German industrial power by actively dismantling factories, and pursuing a massive decartelization program run by seconded attorneys from the US DOJ's Division of Antitrust. These efforts resulted in the dissolution of thousands of

[1] The discussion in section 5.1 is informed by Eichengreen 2008, Judt 2006, Wells 2002, Gillingham 1991, and Hogan 1987.

cartels and the breakup of some of the most important German companies, including IG Farben, a chemical and pharmaceutical industry conglomerate that had been central to the Nazi war effort.[2]

However, it soon became clear that the deindustrialization of Germany was economically and politically untenable. In 1947, European agricultural and industrial production still remained below prewar levels, and much of the continent was marked by acute food and energy shortages, increasing the appeal of western Europe's communist parties (Judt 2010: 88). Realizing that a punitive settlement would lead to long-term economic dependence on the United States, and spurred by the growing geopolitical threat of the Soviet Union, the US government's European policy began to shift in the fall of 1947 toward what the historian Charles Maier (1977) has called a "politics of productivity"— an economic paradigm centered around the notion that economic growth and improved industrial productivity could "transcend class conflicts that arose from scarcity" and thereby create a stronger Western bloc (613). By the end of 1947, the American occupying authority had stopped actively dismantling German factories and dissolving cartels, pivoting toward planning for massive economic investment in the region. Over the next five years, the US government pumped $12B into European economies, largely into infrastructure, trade facilitation, and technological transfer, in a set of initiatives that would come to be collectively known as the Marshall Plan. Additionally, the government sought to establish institutions of economic coordination, both to maximize the impact of developmental assistance, and to lessen Europe's economic dependence on the United States. The Organization for European Economic Cooperation (OEEC), the predecessor organization to the OECD, was established as a project to

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[2] One reason for the immediate post-war emphasis on decartelization was the pathologization of cartels by American academics and journalists as a 'cause' of German fascism. For samples of the strong anti-cartel sentiment in the United States during and immediately after World War II, see Ervin Hexner's (1946) *International Cartels* and Wendell Berge's (2000[1944]) *Cartels: Challenge to a Free World*. Partly for this reason, de-cartelization became a core goal of the U.S. government in the immediate postwar. For instance, President Roosevelt wrote in a letter to his Secretary of State in 1944: "[t]he defeat of the Nazi armies will have to be followed by the eradication of these weapons of economic warfare." "Letter of the President of the United States to the Secretary of State concerning cartel policies, Sept. 6, 1944. Accessible at http://www.presidency.ucsb.edu/ws/?pid=16554

coordinate recovery spending, and the European Payments Union, the first institution of European monetary cooperation, was created to assist countries facing balance of payments problems.

Around the same time, plans were made to establish a new independent Federal Republic of Germany from the French zone and the British-American Bi-zone. However, the question of what to do with the Ruhr, the heavily industrialized and mineral-rich region that symbolized German industrial might, remained an outstanding issue for the American, British, and French governments. Reflecting its postwar policy of seeking to limit German reindustrialization, the French government sought explicit limits on German industrial capacity, particularly in steel. It also sought permanent international control of the Ruhr through the establishment of an International Ruhr Authority.[3] While initially supportive of the French position, US officials eventually decided that they would support the development of German coal and steel as part of their policy of expanding European industrial development and limiting Soviet influence (Gillingham 1991: 166). At the end of 1949, French Foreign Minister Robert Schuman was instructed by U.S. Secretary of State Dean Acheson to offer a constructive proposal that would address the French concerns about German industrial power, while still permitting the expansion of German coal and steel production (Karagliannis 2013: 787; Chira-Pascanut 2014: 1253).

It is in the deliberations over *Ruhrpolitik*, or the Ruhr question, at the end of the 1940's, that the first iteration of the European Communities—and European competition law—can be found. The Schuman Declaration, devised largely by the French diplomat Jean Monnet in the winter of 1949-1950, proposed a project to jointly manage coal and steel between six countries: France, West Germany, Italy, the Netherlands, Belgium, and Luxembourg. By establishing common supranational control over strategic sectors, the French government would be partially assured against German re-militarization. At the same time, by creating a set of institutions aimed at economic expansion,

[3] For a thorough discussion of French postwar policy toward the Ruhr see Gillingham: 151-162.

including in heavy industry, the project was also palatable to newly-elected Chancellor Konrad Adenauer, who was eager to define the Federal Republic of Germany around an economically-focused identity. More generally, by organizing western Europe around rather than against the resource-rich Ruhr, the Schuman Plan appealed to the growth paradigm of the postwar (Eichengreen 2008).

At the center of the European Coal and Steel Community, established by the Treaty of Paris in April 1951, was a competition law that covered restrictive agreements, mergers, and state aid within the coal and steel industries. While taking some inspiration from the U.S. system of antitrust in terms of content (Quack and Djelic 2005), the enforcement structure differed greatly. The law would be applied through a discretionary administrative system run by a central bureaucracy called the High Authority, which was composed of international civil servants rather than state representatives, an organizational structure that took much inspiration from the French planning bureaucracy, including "the divisional organization, the system of *cabinets*, the *habilitations* internal delegation of tasks, the *statut du personnel*, and the role of the General Secretariat" (Featherstone 1994: 155). Unlike the dual FTC-DOJ enforcement system in the US, which provided the Congress and the President with direct channels to influence the implementation of antitrust, and placed the substantive determination of individual cases in the adversarial courts, the High Authority was given significant autonomy in the competition field—to approve or reject mergers, to dissolve cartels, to limit state aid—through administrative actions, all without pre-consultation with states. While its decisions could be challenged by member states and companies in a high court, and a European Assembly did provide input twice a year, in practice these institutions rarely challenged decisions by the central bureaucracy (Swann 1983: 14). As one observer put it at the time, the High Authority was "truly to be an *imperium in imperio*, wielding powers previously held by national governments and having some functions not previously exercised by governments" (Diebold 1959: 78). If there were

any American analogue in the design of the High Authority, it is not the fragmented, court-centered, and politicized system of antitrust, but the National Recovery Administration or the Tennessee Valley Authority—centralized organizations that were delegated broad discretionary power to promote industrial development.[4]

Why was a competition law included in the ECSC? And why did it take the form of a supranational system, formally insulated from national politics, and administered by bureaucrats who had been delegated a broad zone of discretion? The historiography on the negotiations over the Treaty of Paris suggests that many aspects of both the content and the design of the competition law, and the ECSC more generally, can be explained as credibility building tools intended to mitigate the deep distrust that existed between countries recently at war, and which were now being pressured by the United States to pool the management of their most vital resources. France was suspicious that Germany would use the agreement to return to industrial dominance. Germany that the ECSC was a thinly veiled attempt by the French to undercut its economic redevelopment. The Benelux countries and Italy had concerns that an economic agreement would be dominated by the two largest European economies. Finally, the US government was worried that a European industrial pool would operate in practice as a cartel, undercutting the liberal international order it was actively trying to establish. By bolstering the credibility of each country's commitment to economic cooperation, the inclusion of a supranational system of competition law, administered by an independent administration, helped address each of these trust concerns, making possible the Treaty of Paris, establishing the first European Community.

The inclusion of a supranational competition law itself was primarily the result of the diplomatic demands of the United States government, which, as the primary financier of the western

[4] In fact, John J. McCloy, the American High Commissioner for Occupied Germany, described the High Authority as a "Tennessee Valley Authority for Europe" — in other words a project of state-led economic development and modernization (Gillingham 1991: 228).

European economies and the supplier of the region's military protection, held significant influence over developments during this period (Quack and Djelic 2005). The overwhelming American perception of the Schuman Plan was that it was "a clever cover for a gigantic European cartel for coal and steel producers" (Acheson 1969: 383-384). As Gillingham notes, "from Secretary of State Acheson and President Truman on down, in the offices and corridors of the State Department, in newspaper reports and editorials, and in letters to the editor as well as in comments overheard on the street, everyone seemed to agree that the Schuman Plan proposal would result in a restoration of the old cartels" (234). Consequently, convincing US authorities that the proposed project to pool coal and steel would not function as a cartel formed a core credibility problem. By agreeing to include an anti-cartel provision with input from US antitrust experts, Monnet provided US officials with the needed assurance that European institutions of economic cooperation would comport with the broader liberal economic order the US was seeking to institutionalize in western Europe. As important, the establishment of a supranational system of enforcement that would be insulated from national governments provided some assurance to US authorities that the future ECSC would be free from national manipulation, and therefore serve to limit both Germany's capacity to monopolize the Ruhr's resources and France's ability to constrain German industrialization.[5]

A supranational competition law also made Germany's commitment to economic cooperation more credible to the French government. The Ruhr had long been seen as an existential threat to France, and the government's first preference, articulated in the earliest postwar planning documents from 1943, was to sever the Ruhr from Germany, and place it under permanent

[5] There continues to be a debate about the intellectual origins of European competition law, with the bulk of scholarship emphasizing the European rather than American intellectual origins of many of the core provisions. However, most scholars agree that the anti-cartel provisions contained in the ECSC and EEC's competition laws were influenced by US authorities (see Harding and Joshua 2010: 96; Wells 2002; Djelic 2002; Gerber 1998). See Djelic 2002 for an extended argument that the ECSC's competition provisions were largely influenced by the American antitrust experience.

international control.[6] After this option was foreclosed by the US in late 1947, French officials sought assurance that Germany would be prevented from using the Ruhr's resources to either re-arm or undermine the Monnet Plan to modernize the French economy. By providing an institutional mechanism that placed limits on cartels and concentrations in coal and steel, the competition law partially mitigated the French government's concerns about German re-industrialization.[7]

The flexible, judicial design was opposed by the American government, but generally supported by European officials. Like the American presidential administrations of the early 20th century, each of the European parties to the agreement were representatives of governments that were concerned about economic development for their countries as a whole. While they wanted to limit the protectionist policies of their neighbors, each state also sought to maintain its own ability to promote industrial growth (Quack and Djelic 2005: 263). In the end, negotiators established a flexible, administrative system of competition law, one that formally could not be controlled by any single state, but which was still headed by member state appointees, and therefore expected to broadly align with their own growth-oriented preferences. To use principal agent language, the parties to the agreement viewed competition law as an incomplete contract, agreeing to follow a set of broad principles, but delegating responsibility for filling in the details to an independent institutional actor that shared a commitment to industrial growth (Majone 2001).

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[6] Gillingham (1991) observes that, in postwar French policymaking circles, there was a "nearly universal conviction that nothing less than national survival depended on a satisfactory outcome of the Ruhr Problem" (152). Milward (1984) notes that postwar French policy was highly concerned with the "partition and permanent weakening of Germany and of acquiring a guaranteed access to German coal and coke resources" (467).

[7] In a letter to his close friend and mentor David Lilienthal, one of the early leaders at the US Tennessee Valley Authority, Monnet notes that the competition rules in the ECSC were meant to prevent "the Ruhr industries" from "occupying a dominant position thanks to artificial advantages which would allow them to maintain their traditional structure". Letter from David Lilienthal to Jean Monnet, 19 May 1953. Citation from Chira-Pascanut 2012: 79. Accessible at < https://dspace.library.uvic.ca/bitstream/handle/1828/4314/Chira-Pascanut_Constantin_PhD_2012.pdf?sequence=3&isAllowed=y>. Last accessed May 13, 2018.

A close analysis of the negotiating preferences of the French and German governments reveals the European governments' overwhelming preference for a flexible, administrative system. During the negotiations, the French government's primary concern was to ensure that the ECSC supported rather than undermined their economic modernization plans. As the historian Alan Milward has quipped, "the Schuman Plan was called into existence to save the Monnet Plan" (1984: 475). While they wanted to constrain German economic policy, particularly with regard to the Ruhr's metallurgical coke (Karagiannis 2013), the French government did not want a rigid, judicialized competition system that could undermine its own industrial policy goals.

If the French government was opposed to judicial enforcement, the German government was even more so. Judicialized antitrust was associated in Germany with the much-hated de-concentration policy that had been established in the American zone from 1945-1947. The overwhelming view in the Federal Republic was that the Schuman Plan was designed by the French to hamper German industrial development. The anti-cartel provisions in particular were seen as targeting German coal production, since they only affected privately owned coal, and since mines were publicly-owned in the other countries that would be affected by the agreement (Gillingham 1991: 268).[8] Initially, Adenauer came out strongly against the anti-cartel law and supranational system of enforcement, preferring for power to be maintained through a Council of Ministers. But once the US government made it clear that ending rigid production caps in the Ruhr would only occur with the establishment of a supranational competition law[9], the Chancellor agreed to go along with the plan, provided the High Authority would utilize its powers in a way consistent with

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[8] Belgium's coal mines were initially excluded.

[9] US High Commissioner for Germany, John McCloy told Adenauer in March 1951, that the removal of industrial production limits in the Ruhr "would be acceptable only in the context of the Schuman Plan containing effective provisions against cartels and combinations". See http://www.let.leidenuniv.nl/pdf/geschiedenis/eu-history/EU_31.doc.

economic productivity (Karagiannis 2013; Gillingham 1991). The end result was the incorporation of a broad competition law in the ECSC, but which would be implemented in a flexible way by a supranational body that was politically independent, but which also shared governments' concern about promoting economic growth.

5.2. The European Economic Community and the Expansion of Competition Law

Like the coal and steel project, the European Economic Community included a detailed competition law to be administered by the new Commission and Council. But as with the incomplete contract design of competition law in the ECSC, the four competition articles in the Treaty of Rome were conditional on a number of other economic, political and social goals. One article prohibited certain kinds of restrictive agreements between different companies such as price fixing between competitors or exclusive deals between suppliers; however, it provided exceptions for any agreement "which contributes to improving the production or distribution of goods or to promoting technical or economic progress" and did not run afoul of other general principles. (Article 85).[10] Another article concerned market dominance, limiting a large firm's ability to discriminate between trading partners, or impose obligations on other firms as a condition of trade. But since the prohibition against dominance depended on the word "abuse", the Treaty provided significant leeway in implementation (Article 86).[11] Four other provisions limited state economic activity. State owned enterprises and public companies were forbidden from receiving "special or exclusive rights", and state monopolies should be subject to the same competition rules as private

[10] The full text of the Treaty of Rome can be accessed here: < https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf>. Last accessed Aug. 31, 2017.

[11] Under Article 86, "abuse by one or more undertakings of a dominant position" were also to be prohibited, especially those that imposed unfair trading conditions, limited production, discriminated between trading partners, or imposed unrelated supplementary obligations as a condition of trade (32).

companies (Article 90). State aids to private enterprises which "distort or threatens to distort competition" were deemed generally incompatible with the common market (Article 93). However, exceptions were granted for aid that had a "social character", to help areas affected by "natural disasters or exceptional occurrences," to develop economically poor areas, to "facilitate the development of certain economic activities", and to promote economic projects in the common European interest.

Why was a competition law included in the Treaty of Rome? And why did it have such a broad scope, covering in principle all private and public activity that affected inter-state trade? Particularly puzzling are the four state aid provisions that, at first glance, seem to go against the current of postwar state-managed economies. While taking different forms, each of the founding member states was pursuing activist industrial policy of some kind during the mid-1950's (Shonfield 1965). Moreover, all six governments had significant and growing publicly owned enterprises, most frequently in energy, telecommunications, broadcasting and transport. Why did they establish rules that constrained how public companies would be managed and state aid allocated?

Credible Commitments, Coal and Steel, and the EEC Competition Law

Once again, concerns about economic protectionism – and more broadly the need to secure a commitment to economic cooperation—was an important factor. While the rapid growth of the 1950's, and the reduced influence of the United States over daily policymaking, had lessened the geopolitical imperative to include a competition law in the Treaty, countries still had economic reasons to distrust each other. The French concern about Germany might no longer have been existential, but the country was still viewed as an economic rival that would exploit its competitive advantage if given the chance. And while the German government was generally enthusiastic about expanding the European project, it still had its suspicions about France and other countries

manipulating the European Community for short-term gain. More diffusely, there was the concern that, without some constraints on states and private actors, any gains from a common customs union and other forms of economic cooperation might be easily erased by protectionist activity.

Like many of the other features of the EEC's institutional design, the competition law helped make countries' commitment to each other more credible, and thereby eased their willingness to pursue a customs union and other projects of economic cooperation (Pollack 2003; Majone 2001; Moravcsik 1998). The commitment motivation can be seen most clearly in the state aid provisions, a dimension of competition law that, as we have seen, is entirely absent in the US antitrust regime. While all of the postwar governments saw state direction of the economy and some degree of public ownership as essential to economic success and social stability, they also recognized that such policies could undermine economic cooperation, particularly insofar as state economic development and taxation policies differed significantly across sectors, as was initially the case between the six countries.

These concerns are evident in the negotiations over the state aid articles from 1955-1957. A number of scholars have concluded that the state aid provisions were initially proposed by Germany and the Benelux countries as instruments intended to ensure that *dirigiste* countries such as France and Italy would not manipulate the common market with state interventions that undercut other countries in the EEC (Buch-Hansen and Wigger 2010; Quack and Djelic 2005; Moravcsik 1998; Milward 1984). Conversely, the French delegation sought a more broadly worded law to ensure that their system of indicative planning could be maintained (Ibid). The final version that emerged—an expansive and detailed state aid provision but beset with a number of loop holes and exceptions—was the compromise between the two positions.

The historiography also suggests that, the Treaty's designers, many of whom had worked at the ECSC, believed that a competition law had the potential to foster improvements in economic

productivity. Analyzing a vast trove of *travaille preparé* around the early debates about competition law, the legal scholar Pinar Akman (2009) has shown that the negotiators of the Treaty of Rome viewed competition law as an institution that would both encourage economic cooperation, and ultimately enhance productive efficiency, with productive efficiency understood as promoting economic production at the lowest, most competitive cost.[12] She has shown also that the experience of the ECSC informed debates about some of the rules to constrain cartels, monopolies, and state aid, leading designers to push for similar rules to be included in the EEC.

More generally, the belief that competition law could be growth-enhancing was informed by the earlier experience of competition law in the coal and steel sectors, and the perception that economic cooperation had helped to bolster the recovery. Growth rates in the coal and steel sectors had outpaced other sectors during the 1950's, with the volume of trade between the six countries in coal and steel increasing 93% between 1952-1955, compared to just 59% for other traded goods.[13] Toward this end, the competition law was seen as playing a salutary role: limiting national tendencies toward protectionism, while also facilitating further trade and integration in the coal, iron, and steel sectors. How much of this apparent success was related to the ECSC competition law, and how much of it stemmed from other factors is unclear. However, there is evidence that the ECSC was widely *perceived* as paying a dividend, and that this expectation of success played a role in the replication of many of its features in the EEC.

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[12] The authors of the influential Spaak report, for instance, viewed competition rules as being valuable to the extent they increased productive efficiency: "Protective measures to eliminate outside competition have an injurious effect on industrial progress and on improvements in living standards since they make for the elimination of internal competition, In a wider market, it will no longer be possible to maintain outmoded methods of production with their twofold effects of high services and low wages; commercial concerns, instead of remaining static will have to pursue a go-ahead investment policy in order to step up production, improve quality and modernise their methods; they must make progress or fail" (10).

[13] Numbers from ECSC, High Authority, Towards European Integration: First Results for Coal and Steel (Luxembourg, June 1956), pp. 7-8. Accessible at < http://aei.pitt.edu/59514/>. Also cited in Haas 1958: 63.

Partly for this reason, the debate over competition law shifted between 1950-1951 and 1955-1957. While in 1950, antitrust was viewed by many politicians and producer groups as a rigid American idea that would undermine industrial development, by 1955, the law was seen as more salutary for economic growth. Associations of firms and workers went from being almost wholly against the establishment of supranational competition powers at the beginning of the decade to being advocates in some cases (Moravcsik 1998). To use the language of historical institutionalists, the successful ECSC experience generated a positive "policy feedback effect" that expanded support for maintaining a competition law (Pierson 1993). This dynamic can be seen most clearly in the West German government's shifting position on the question of competition law throughout the 1950's. During the negotiations over the Treaty of Paris in 1950-1951, Chancellor Adenauer had been the strongest opponent of a supranational competition law, viewing the regime as, at best, incompatible with Germany's highly coordinated economic system, and, at worst, a thinly veiled attempt to destroy German industry (Gillingham 1991; Milward 1984). But by 1955, when negotiations over the future EEC began, and West Germany was enjoying its fifth year of the *Wirtschaftswunder*, or economic miracle, the Chancellor had become the strongest advocate of a supranational competition system (Moravcsik 1998).

5.3. Executive Power and the Establishment of an Administrative Control System

Regulation 17: The First Implementing Directive

One of the early laws enacted by the new EEC was Regulation 17/1962, establishing implementing powers for the cartel and dominance articles. The legislation delegated exclusive enforcement authority to the new Commission, which was provided the power to enforce the law directly, through internal administrative processes (Kelleher 1967). While its decisions could be appealed to the European Court of Justice (ECJ), crucially, the initial determination of whether a violation had been committed would be made by the Commission, and these substantive findings would have an authoritative weight before the court. Additionally, the Commission was provided the power to "negatively clear", or confer legal immunity to, firms engaged in restrictive agreements that it deemed to be economically beneficial.[14] A few years later, this power was expanded to include block exemptions, providing the Commission with a quasi-legislative role to determine what kinds of agreements were acceptable or unacceptable in the economy, thereby determining a significant pillar of European economic policy (Gerber 1998: 351). When the Commission wanted to act, it possessed significant independent powers, including the ability to enter the premises of any company without permission, to examine their books, to make copies, and to interview officials—all without judicial pre-authorization or interference (Gerber 1998; Kelleher 1967). For the standards of the time, the Regulation also established quite hefty and punitive sanctions, including the power to fine firms $1 million or up to 10% of their aggregate turnover.[15] While member states would appoint the members of the Commission which would be charged with making the final determinations by majority vote, the Council would not have a formal say in enforcement decisions, and no legal ability

[14] Regulation 17/1962 was the basis for the Commission's enforcement powers until the regulation was replaced by a new one in 2003.

[15] See Article 14, Regulation 17/62.

to reverse them *ex post*. All in all, the zone of bureaucratic discretion was wide, giving the Commission the powers of "judge, jury, and executioner" in the competition field (McGowan 2010: 9).

Why did the new EEC establish a supranational administrative system characterized by a broad zone of bureaucratic discretion? Outside of trade, in no other policy area were equivalent enforcement powers delegated to the Commission (Pollack 2003). Why did member states provide the Commission with an effective monopoly on enforcing the law? And why did they limit their own ability to control policy development and enforcement within this policy area?

While securing a commitment to economic cooperation, and preventing the risk of protectionism, were among the main reasons a competition law was included in the Treaties, the implementation of the provisions could have been designed in several other ways. The administrative enforcement system used in the ECSC had, of course, established an important precedent, serving as the departure point for institutional design. However, member states still had quite different ideas about how the law would be implemented. All countries wanted limits on the ability of public and private actors to create barriers in the new common market, but they differed on how this goal should be achieved, with some countries supporting administrative enforcement through the Commission, others a dual system of national and European enforcement, and still others a system that relied more on judges (Kelleher 1967; Deringer 1963). For this reason, the Treaty of Rome is quite vague about *how* competition law should be implemented.

The political debate over the implementation of competition law that occurred from 1958-1962 suggests that the Commission-centered design, eventually adopted in Regulation 17/1962, depended on the constitutional organization of policymaking that had been established in the Treaty of Rome. It bears mentioning once again that the EEC contained no institutional equivalent to the US Congress. The Treaty of Rome did, of course, establish a pan-national legislature. However, as a

body that initially possessed only informal consultation powers, and which was staffed by rotating representatives from national parliaments, the European Parliament initially played only an advisory role with regard to the content or design of legislation (Lanaerts 1991). Even once the Treaty of Maastricht expanded its legislative authority, the Parliament remained singularly weak as far as legislative institutions go. While in terms of resources and ultimate authority, member states were the most important actors within the European system, their ability to express consistent preferences in the European policymaking process through the European Council was undercut by their internal divisions. The Commission's agenda setting powers, not least its exclusive right to initiate legislation, generated opportunities to exploit these divisions and promote its own preferences for maximal discretionary authority.

To see the way constitutional design conditioned the eventual outcome, it is worthwhile to briefly examine the legislative debate over Regulation 17 that took place in the early 1960's. The Commission used its legislative agenda setting power to develop a proposal for an implementation system that marginalized national courts and bureaucracies. In 1961, the Commission introduced an implementing regulation centered on an administrative system of enforcement provided exclusive enforcement authority to itself. Although the initial proposal was viewed negatively by a number of other institutional actors, due to its legislative veto power, the relative weakness of the Parliament, and political divisions within the Council, the Commission's initial proposal was largely adopted.

The first institutional player to raise objections to the Commission's proposal was the European Parliament, which recommended an alternative system characterized by more extensive judicial oversight and review of the Commission's investigatory and decision-making powers (Kelleher 1967: 1223).[16] In a critique that was echoed by many legal scholars, the Parliament's

[16] See "Report of the Internal Market Committee of the European Parliament on EEC Regulation 17," European Parliamentary Document 104/1960-61, pp. 120-122. Citation from Kelleher 1967.

objections centered on the lack of strong procedural protections for the accused, which were seen as potentially contravening due process (Ibid). However, since the Parliament's legislative powers were merely advisory, it had little ability to force an adjustment to the legislation.

A more formidable set of objections to the Commission's proposal came from the French government, which, in the days before the advent of qualified majority voting, held veto power over all secondary legislation. The French delegation advocated for an alternative proposal made up of a dual enforcement system, to be shared between the Commission and national authorities, as well as an expert committee appointed by member states that would have veto power over all competition decisions (Gerber 1998: 350). Had they been adopted, such proposals would have severely undercut the Commission's discretionary authority and led to a less independent and more politicized competition system.

However, by using its broad agenda setting power to exploit member state divisions, the Commission eventually won the day. First, the Commission prevented the French proposals from being considered, which reduced the choice set available to members of the Council: they either had to adopt the Commission's proposal or forego having an effective competition law at all. Second, the Commission worked with the German government to mobilize opposition against the French initiatives, leaving France alone in its opposition. Third, the Commission lent its support to a French proposal to increase agricultural payments, offering to push it forward in exchange for the government's support for the competition regulation (Quack and Djelic 2005: 267). By exploiting the divisions across member states, and using the strategic opportunities built into the EU's policymaking structure, the French government finally relented and, the Commission won adoption of a system of an implementation system reflecting its original proposal.

Later Delegations of Authority

Surprising to many observers of European politics, the structure and content of EU competition law has not been substantively altered in more than half a century. In retrospect a watershed moment, the implementing directive of 1962 heralded the establishment of an administrative control system that has largely remained the same over the past five decades. Regulation 17 guided European competition law until 2003, when a new implementation system was established that delegated enforcement powers to national competition authorities. However, the design of competition law as a flexible set of rules, implemented through an administrative control system that is predominated by the Commission, has largely been retained in the 21st century. While the Commission has agreed to improve transparency, develop a more standardized approach to investigations and decisions, and create limited opportunities for private enforcement, the Commission is still subjected to relatively few ongoing controls, especially compared to the United States.

Nor has the content of the competition articles been substantively altered since its establishment in 1957. Almost word for word, the Single European Act, and the Maastricht, Amsterdam, and Lisbon Treaties, have each maintained the competition law language contained in the Treaty of Rome. As can be seen in Table 4.1, which lists all Council regulations that have materially altered the Commission's delegated authority, the secondary legislation in the competition field is relatively minimal. On only a few occasions, have member states altered the structure of delegated authority in the competition field. The most substantial new delegation has been in the area of mergers and state aid, and even in these two areas, enforcement authority was asserted by the Commission, and affirmed by the ECJ, prior to new legislation. But considering the breadth of change in the enforcement of competition law in practice over the last seventy years, the number of substantive shifts in delegated authority is quite low.

Table 5.1: Council Regulations Affecting Competition Law, 1958-2016[17]

Year	Regulation Number	Description
1962	Council Regulation No. 17/1962	First implementing directive. Provided the Commission with exclusive and direct enforcement authority.
1965	Council Regulation No. 19/1965	Provided the Commission with the power to make block exemptions for horizontal agreements.
1986	Council Regulation No. 4056/1986	Expanded the scope of competition rules in maritime transport.
1987	Council Regulation No. 3976/1987	Expanded the scope of competition rules in air transport.
1989	Council Regulation No. 4064/1989	Codified the Commission's authority to regulate mergers.
1991	Council Regulation No. 1534/1991	Expanded the scope of competition rules in the insurance sector.
1992	Council Regulation No. 479/1992	Expanded the scope of competition rules in the liner shipping industry.
1999	Council Regulation No. 659/1999	Broadened the Commissions powers to enforce state aid rules, including quasi-legislative authority to establish block exemptions for certain forms of state aid.
2003	Council Regulation No. 1/2003	Delegated to NCA's the power to implement European competition law. Established the European Competition Network (ECN) to coordinate enforcement through the Commission.
2004	Council Regulation No. 139/2004	Delegated authority NCA's to enforce merger rules in coordination with the ECN.
2006	Council Regulation No. 1419/2006	Expanded the scope of competition rules with regard to cabotage and international tramp services.
2015	Council Regulation No. 1588/2015	Expanded the Commission's quasi-legislative authority to establish block exemptions for certain forms of state aid.

Source: European Commission

As remarkable, most of secondary legislation has not substantively reduced the discretionary authority possessed by competition regulators. In fact, where new authority has been provided it has usually expanded the Commission's delegated authority. In none of the secondary legislation listed in Table 5.1 has the Commission's zone of discretion been significantly reduced.

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[17] This list is extracted from two official publications: one listing all relevant legislation in the antitrust field; the other legislation governing cartels. See "EU Competition Law Rules Applicable to Antitrust Enforcement, Volume 1: General Rules," July 1, 2013. Accessible at http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_1_en.pdf. See also EU Competition Law Cartel Legislation and other reference texts on 1 January, 2013." Accessible at http://ec.europa.eu/competition/cartels/legislation/cartel_compilation_en.pdf.

European Competition Law and Ordoliberal Ideas: An Alternative Explanation

In the analysis above, I have argued that the origins of European competition law lied in the critical conjuncture of the founding of the European Coal and Steel Community, and concerns from the United States and France that the pooling of coal and steel would be undermined by protectionism without rules to prevent it. And I have argued that a similar design was established in the European Economic Community, in part because of similar concerns that the gains of economic cooperation could be undermined by economic protectionism. I have also shown that an administrative enforcement system was established, with significant discretionary authority delegated to a supranational bureaucracy, in part, because of the constitutional organization of powers in the EEC. However, this is not the only potential explanation.

A number of scholars contend that the content and design of European competition law can best be explained as the product of the ordoliberal economic philosophy that informed the thinking of many German policymakers during the postwar period, many of whom rose to positions of authority in the first two decades of the newly established Federal Republic (e.g. Buch-Hansen and Wigger 2010; Gerber 2010; 1998; 1994). The legal scholar David Gerber has developed the most well-substantiated case for the ordoliberal origins of European competition law, publishing a number of books and articles over the last three decades that detail the many links between the Freiburg school of 'neoliberals' and the European competition directorate. He has shown, for instance, how the organization of the competition articles in the Treaty of Rome directly parallel the organization of articles in the German Anti-Cartel Law. Gerber has also highlighted how the concept of economic dominance, which is central to European competition law, has roots in German law and ordoliberal economic ideas. He has noted also a number of other dimensions of European competition law in which an ordoliberal imprimatur can be observed. These include the

outsized influence of a number of prominent ordoliberals within DGIV, the EEC's competition directorate.[18] He also highlights the historical overlaps in the timing of the creation of the West German Anti-Cartel Law and the European competition system, both of which were being debated in the mid-to-late 1950's.

The work of Gerber and others has done much to cast aside the previously predominant view that European competition law was largely a copy of American antitrust (e.g. Wells 2002). As we have seen in the above analysis, the legal structure of European competition law is, in fact, quite different from US antitrust. In no small part due to Gerber's scholarship, this distinction is now more widely understood and appreciated. As important, his work has called attention to the specific ordoliberal intellectual origins of the concept of the abuse of a dominant position, which continues to be a cornerstone of European competition law.

But while there is little doubt that ordoliberal ideas influenced some of the specific content of European competition law, the influence of the Freiburg school on its own cannot explain *why* six countries (five of which were not Germany) agreed to delegate broad power to a supranational institution in the first place. Member states made the decision to delegate power, and they did so for specific political reasons. Other than noting Germany's outsized influence, ideational theories generally are silent about the political factors that led countries to delegate such broad authority to the Commission. More pointedly, we have seen that the original European competition law contained in the ECSC was included, not because of demands by Germany, but because of the concerns of France and the United States. Indeed, it was not ordoliberals who designed the original

[18] Hans Von der Groeben, a prominent ordolberal, was the first Commissioner for Competition Policy, and one of the two drafters of the Spaak report upon which European competition law was based. Walter Hallstein, another German ordoliberal, was the first president of the Commission. The lawyer who wrote the actual text of Regulation 17 establishing the Commission's direct enforcement powers, Arvid Dervinger, was a German attorney. Müller-Armack, also associated with the ordoliberal school, played a powerful role in the development of EEC economic policy. Perhaps most strikingly, the Director General of DG IV (now DG Competition) was, with one exception, German for its first fifty years of existence. See Gerber 1998; 1994.

law, but the French diplomat Jean Monnet, who infused elements of the French administrative system into the bureaucratic architecture that still are in place today.

Nor can ordoliberal philosophy alone account for the structure of European law as a flexible, administrative system. Ordoliberals associated with the Freiburg school sought the establishment of an inflexible "economic constitution" or *Wirtschaftsverfassung* in order to ensure the conditions of "perfect competition", understood as "competition in which no firm in a market has power to coerce other firms in that market" (Gerber 1994: 43).[19] Under such a system, enforcement should be entirely non-discretionary, and based on clearly defined rules (Foucault 2008). Yet, as we have seen, this is the opposite of the discretionary administrative system seen in the EEC. In fact, as will be recounted in the next section, during the 1990's, widespread frustration with the 'politicized' and discretionary European competition structure led German politicians to actively campaign, ultimately unsuccessfully, to move competition enforcement to an independent European Cartel Office that would be designed more like the German *Bundeskartellampt* (Wilks and McGowan 1995).

Finally, the enforcement record does not suggest that the competition regime is fundamentally rooted in ordoliberal philosophy. Under the 'constitutional' framework designed by members of the Freiburg school, concentrated private power should be severely limited, so as to preserve the conditions of competition and, by extension, economic freedom (See Gerber 1994: 39; Ptak 2015). For this reason, members of this school called for the elimination of firms with dominant economic positions. And competition authorities such as the *Bundeskartellampt* that are strongly guided by ordoliberal ideas have, in practice, applied competition rules in a way that limits the concentration of economic power (Ergen and Kohl 2017). Yet, as we will see in the analysis of

[19] The intellectual father of ordoliberalism, Walter Eucken, argued that while capitalism itself had no inevitable tendency toward monopoly or under-production, the exertion of private and public power within capitalist societies did undermine the competitive order. However, if the conditions of a competitive order could be protected by a strong state that was juridically self-limiting, the problems associated with capitalism would generally disappear (Foucault 2008).

enforcement actions during the 1960s and 1970's in the next section of this chapter, European competition law has facilitated more than limited economic concentration. At various other times, it even encouraged restrictive practices, insofar as these were seen as furthering the single market project. Far from a model of the ordoliberal economic constitution, the enforcement of European competition law reflected instead the political origins of the regime as an institution created to support a transnational project of economic cooperation. More than limiting the power of public and private power, the enforcement record suggests the regime's original purpose and ongoing function is to facilitate market integration and economic growth.

5.4. Analyzing the Enforcement of European Competition Law

Now that I have explained how the political origins and constitutional structure of the European Union influenced the structure of delegation in the competition field, I will examine some of the consequences of the Commission's discretionary power for the enforcement of competition law. While the previous sections were primarily concerned with explaining delegation, the focus of this section is to understand the relationship between institutional design and enforcement. In particular, I am interested in assessing to what extent, and in which ways, the political origins of the regime, and the design of bureaucratic discretion influenced the enforcement program.

In what follows, I use a close analysis of enforcement practices in the ECSC and EEC to show that the broad zone of discretion provided to the Commission, and the Court's general affirmation of the Commission's authority, allowed supranational actors to use the law to systematically promote integration and economic development. Many of these goals were supported in principle by member states and had been anticipated in the credible commitment design of competition law. But precisely because they often had divergent interests, the pattern of competition policy enforcement depended on the independence and administrative discretion of bureaucratic

actors. Had member states possessed more control over the enforcement program, or had supranational actors possessed less extensive *ex ante* authority, enforcement outcomes would almost certainly have been different.

Largely free of political interference, the Commission could challenge state aid schemes or restrictive agreements that discriminated across countries, even when countries were opposed. In possession of an administrative system of enforcement, the Commission could apply the law in a flexible way that limited anti-competitive behavior while also encouraging economic development and cooperation. Finally, the Commission's monopoly on enforcement meant that it could broadly control the way the law developed. This limited the extent to which the law could be coopted by self-interested actors, helping ensure that competition law could be used by the Commission and the courts to promote market integration and limit economic protectionism, reflecting the law's political origins.

Competition Enforcement in the ECSC

The pattern of competition enforcement by the ECSC during the 1950's suggests that the High Authority applied the law in a way that was generally independent of particular member states, as intended by its designers. In one of its first administrative actions in 1953, the Authority ordered the French government to discontinue a compensation fund for certain kind of coal production that discriminated against Belgian coal (Haas 1958: 63). Throughout the decade, the High Authority forced producers to offer the same prices to all customers, regardless of nationality or place of business, investigating hundreds of illegal rebate cases and bringing many states to task.[20] It established and enforced a policy against discriminatory pricing in railway transport, pushing the six

[20] In one two-year period, it brought to light more than 25 violations, and imposed several fines on member states (Haas 1958: 65).

state-owned railways to gradually taper discriminatory pricing.[21] And countries were often ordered to reduce subsidies: Luxembourg to abolish a compensation program in coal mining, Italy to remove state aid to shipyards and certain mines, and France to reduce coke subsidies (Haas 1958: 85-88).

However, because the competition law had been included more as a tool to limit economic protectionism than to constrain economic power, the High Authority was permissive of agreements seen as creating economic stability, while showing little tolerance toward agreements and practices that discriminated across national lines. Generally speaking, the High Authority addressed cartel practices in an accommodating way, dissolving only three relatively unimportant registered syndicates among 80, and providing industrial associations with significant space to coordinate their activities as long as they avoided discriminatory practices.[22] It also took a permissive stance toward mergers, especially those that fostered integration.[23] By 1958, the High Authority had not prevented a single of several dozen combinations that had been pursued under its remit, including some very large mergers. "We are not hostile to mergers," explained Albert Coppé, the Vice President of the High Authority, to a group of German firms in 1954. "Where they promote productivity, they will always be approved."[24] As a result, the industrial structure of both steel and coal became much more concentrated during the 1950's. This generally permissive attitude toward industrial concentration and cooperation was in stark contrast to the rigid de-concentration and de-cartelization efforts

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[21] In 1955, for instance, the ECSC banned terminal charges that were imposed at the border, resulting in a reduced rate for shipping Ruhr coke to France and Luxembourg by nearly a third, as well as other routes of iron ore from France to Belgium and coal from the Saar to South Germany (Gillingham 1991: 344). See also discussion in Haas 1958: 95-96.

[22] For discussions of how the High Authority approached restrictive practices during the 1950's see Haas 1958: 75-80; Buch-Hansen and Wigger 2010: 48; and Gerber 1998: 342.

[23] Haas (1958) reports some of the cross-national mergers approved by the High Authority, including "the French combine Sidélor of a large German mine, the acquisition of the biggest Ruhr steel firm by the Dutch Hoogovens, and the purchase of another large German plant by the Swedish financier Axel Wenner Gren" (82).

[24] The remark was made at a German business association dinner in August 1954, as reported in *Die Ziet*, 5 Aug 1954. Citation from Gillingham 1991: 340.

pursued by U.S. military governments in Japan and Germany during the aftermath of World War II.[25]

Some scholars have suggested that the High Authority's lack of enforcement against cartels and mergers reflected its limited organizational capacity and power during the period (Gillingham 1991; Harding and Joshua 2003). To be sure, the ECSC faced the growing pains of all new organizations, including initial difficulties recruiting appropriate staff, developing effective organizational best practices and routines, and establishing its authority vis-à-vis more well-entrenched business organizations and governments. Yet, given its broad mandate, and high level of funding (with a $100M infusion from the United States beginning in 1953), when it prioritized certain actions, the High Authority's decision could be consequential, as seen in its cases against discriminatory practices.

The lack of enforcement against cartels and concentrations reflected less capacity limitations, than the High Authority's view, shared by many member states, that the application of competition law should ultimately serve the purpose of economic development. For economies where industry was both predominated by small and medium sized firms, fragmented across countries, some accommodation of restrictive agreements might even be beneficial. Unlike the United States, where Congress had intentionally limited bureaucratic discretion, the ECSC had been designed by governments to do the opposite: to provide supranational bureaucrats with discretionary authority that would ensure independence from any one set of national interests, but also allow officials to balance competition against a range of other economic and political concerns.

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[25] See Gillingham 1991: 340. For example, *Vereinigte Stahlwerke*, a major German steel conglomerate central to the Nazi war effort, had been broken up by the Allied Military Government, but was allowed to recombine through vertical mergers and agreements under the ECSC. Similarly, the two largest steel companies, *ATH* and *Phoenix-Rheinrohr*, were given permission to merge, and much of the German coal sector allowed to become more concentrated during the period (Buch-Hansen 2010: 49).

Enforcement in the EEC, 1958-1985

Enforcement by the Commission during the first few decades of the European Economic Community paralleled, in many ways, the enforcement pattern seen at the ECSC. Like the High Authority, the Commission applied the law in a flexible way that sought to take into consideration concerns for economic growth and market integration. And similar to enforcement in the ECSC, the predominant focus was against discriminatory practices and other measures that undermined the common market.

One of the earliest indications of how the Commission would use the law comes from a report by Hans Van der Groeben, the first Commissioner of Competition, published in July/August of 1961.[26] Summarizing the first three years of the Commission's work in the competition field, Van der Groeben clarifies that the first and foremost aim of competition law was the "integration of the domestic markets of the six economies"(4). In particular, competition law should help ensure that the benefits of economic cooperation through a common customs union are not replaced by "other measures in restraint of trade" (Ibid). He affirmed also that the enforcement of European competition law should not be based on hard, inflexible rules such as the *per se* ban against horizontal cartels or the structure-conduct-performance used to limit mergers in the US at the time. Rather, the evaluation of restrictive agreements should be made on a case-by-case judgment, using administrative expertise. Whether considering a horizontal agreement between a group of small manufacturers, the marketing practices of a dominant company, or a member state government's industrial policy, the evaluation could not be determined by legal content alone, but instead required an "economic interpretation in each case" (13). More broadly, real competition could only emerge through active state guidance. "Genuine, fair competition" Van der Groeben explained, "does not

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[26] Von der Groeben, Hans (1961) *Policy on Competition in the EEC. Supplement to the Bulletin of the European Economic Community 7-8/61*. [EU Commission - Working Document]. Accessible at < http://aei.pitt.edu/32825/>.

develop automatically; often its external conditions have to be created by the means discussed, and its continued existence secured by binding rules" (11).

The early enforcement record also suggests that from the earliest years of the EEC, the Commission used its broad autonomy over competition enforcement to promote integration. Similar to the High Authority, the Commission did not seek to root out all cartels or scrutinize the practices of all large companies. Rather, it applied its power selectively, and in ways that confirmed a central focus on market integration and economic development within European competition policy. In its first recommended enforcement decision in 1966, the competition directorate made clear that the unity of the market was its primary concern, superseding economic output where the two were in conflict. The case involved a German company, *Grundig GmbH*, which had made an exclusive agreement with a French company, *Consten SaRL*, to distribute electronic goods in France. While the law had increased trade by 4,000%, according to the firms, the Commission prosecuted the case as an illegal vertical agreement under Article 85. The Commission argued that, by providing exclusive territorial rights on a national basis, the two companies had fragmented the common market (Sauter 1999). In a pattern that would hold for many decades, the Commission's decision was upheld by the ECJ. In explaining its judgment, the Court stated:

> an agreement between producer and distributor which might tend to restore the national divisions in trade between the Member States might be such as to frustrate the most fundamental objections of the Community.[27]

Over the following decade, the Commission repeatedly brought companies with vertical restraints in licensing and distribution, or with export bans that limited trade to courts. In fact, of the

[27] See Consten SaRL and Grundig GmbH v. Commission (1966) Case 56/64. Accessible at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0056:EN:PDF.

16 prohibition decisions pursued under Article 85 from 1966-1977, nearly all related to agreements seen as violating the unity or openness of the market:[28]

- Five involved export bans, quota fixing or market sharing, which undermined the market.
- Two cases involved rebate cartels that worked exclusively with home-based manufacturers.
- Three cases involved national cartels between manufacturers and/or dealers engaged in price fixing within a single country.
- Three cases involved collective buying agreements among manufacturers and/or dealers in a single country.
- Two cases involved exclusive buying obligations or restrictions on admission to a national market.

These cases, and the ECJ's affirmation of them, suggest that competition law was systematically used to foster market integration. As with the ECSC, the enforcement program supported the broader project of economic integration.

But while the Commission was intolerant of restrictive agreements that undermined the unity of the market, it was genuinely permissive, or even supportive, of restrictive agreements that served the purpose of either breaking down national barriers or increasing productive efficiency. In contrast to the United States, where there was a *per se* ban on horizontal cartels that forbid any kind of cooperation between firms, no matter the purpose, and which was enforced vigorously by public and private plaintiffs, the European cartel provision was applied more selectively and strategically. As Emmanuel MJA Sassen, Commissioner of Competition from 1967-1971, would explain in a speech to the American Bar Association in 1969, "Competition policy should be carried out with regard for modern technical development and its impact on the economy of the Common Market. It must be more than a mere 'anti-policy', whether directed against restrictive agreements or monopolies." Consequently, "mere knowledge of the terms of an agreement is not a sufficient basis

[28] Case descriptions taken from a summary provided in the Commission's Seventh Competition Report. See Commission of the European Communities 1978: 29.

for a decision as the application of the European rules of competition. Market analysis is essential to European competition policy" (5).[29]

Examining the pattern of negative clearance and block exemptions during the EEC's first two decades, we can see that the Commission generally approved agreements that either encouraged companies to form agreements that spanned national boundaries (thus advancing integration) or that plausibly would lead to increased productivity (thus bolstering industrial growth). In 1967, for instance, the Commission issued a block exemption for restrictive selling and purchasing contracts that involved two companies in different countries, and which was seen as contributing to economic development.[30] In another early case, the Commission made it clear that agreements between firms wholly owned by one of the parties did not restrict competition.[31] At the same time, it issued a range of block exemptions for restrictive practices seen as beneficial to growth, including for research and development, standard setting, and certain licensing agreements.[32] And it encouraged coordination and technology transfer between small- and medium-sized enterprises (SMEs) by exempting companies with a level of economic activity below a certain threshold, covering an estimated 90% of all companies.[33] In addition to providing space for SMEs to develop extensive cooperative schemes, these block exemptions also facilitated a number of collaborative economic projects, including the

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[29] Sassen, Emmanuel M.J.A. (1969) *The Competition Policy of the Commission of the European Communities. Address by Emmanuel M.J.A Sassen, Member of the Commission of the European Communities, at a luncheon of the Federal Bar Association. Washington DC, 10 September 1969.* [EU Speech]. Speech is accessible at < http://aei.pitt.edu/12878/>.

[30] See Buch-Hansen and Wigger 2010: 66.

[31] See *Christiani & Nielsen and Kodak* decision 69/195/EEC[1969].

[32] Other exemptions included those for Common Advertising agreements, Common Trademarks and Standardization, Joint Buying Agreements, and Rationalization Agreements regarding participation in fairs and exhibitions. See generally Hawk 1972.

[33] See Buch-Hansen and Wigger 2010: 67.

European Space Agency, the TGV, Airbus, and Concorde—projects that contributed greatly to the broader goal of European economic cooperation.[34]

Comparing American and European Cartel Enforcement

To appreciate the distinctive approach of the European Commission, it is instructive to compare the enforcement pattern with that of the United States over the same period. As will be recalled, during the postwar period, the United States government and private plaintiffs actively enforced antitrust rules through the adversarial legal system. A rare bipartisan consensus for antitrust, combined with the growth of the private antitrust bar, and the establishment by the courts of a range of new 'per se' bans for restrictive practices such as tying arrangements, group boycotts, and exclusive dealing, led to a dramatic increase in antitrust enforcement during the 1950's and 1960's. From 1960-1979, the US DOJ initiated 737 antitrust actions in federal courts, the majority of which involved horizontal cooperation between small companies.[35] Hundreds of more cases were initiated by the FTC against companies engaged in restraint-of-trade, and against retailers exceeding local market caps.[36] Additionally, thousands of private antitrust cases were initiated over the period.[37]

The enforcement pattern in Europe was dramatically different. From 1960-1979, the European Commission reached just 156 formal decisions—the majority of which impinged on central questions of economic integration.[38] Because the Commission possessed significant political

[34] For more on the role of the Commission in encouraging joint industrial projects see Buch-Hansen and Wigger 2010; Thatcher 2013

[35] See Gallo et al. 2000: 78. "Table I. Number of antitrust cases", Column 2 (Posner). 59% of antitrust cases filed from 1960-1979 did not involve Fortune 500 companies (Column 6, With Fortune 500 companies).

[36] The FTC filed 647 Robinson-Patman lawsuits from 1960-1969. See Posner 1970: 370.

[37] Between 1960-1969, 6,490 private antitrust cases, the vast majority involving horizontal restrictions, were filed in federal courts. See Table 3: Private Antitrust Cases, Posner 1970: 371.

[38] See Carree at al. 2010: 105, Figure 2: Types of formal Commission decisions per year.

independence and enjoyed an effective monopoly on enforcement, the supranational bureaucracy could apply the law in a way that targeted only those activities seen as directly impinging on market integration. As long as they did not discriminate across national boundaries and had some plausible economic purpose, firms were permitted, and sometimes even encouraged, to pursue horizontal coordination.

Dominance Enforcement

Competition enforcement related to the abuse of dominance and monopolization followed a similar pattern. While the US Department of Justice prosecuted dozens of monopolies during the 1960's and 1970's[39], sometimes blocking mergers that affected as little as 5% of total market share,[40] the European competition directorate took a permissive attitude toward concentrations, as long as firms avoided engaging in discriminatory practices. And while the Commission did not possess the formal authority to authorize mergers until the late 1980's, the competition directorate made it clear that it viewed mergers mostly in a positive light. As Commissioner Sassen noted in his 1969 speech to the ABA, "I believe that in the vast majority of [merger] cases, the aim is to adjust the market structure in response to the growing pressure of competition on the European and world market" (8).

Not a single enforcement action against market abuse, using Article 86, occurred until 1971, fourteen years after the signing of the Treaty of Rome. In the *Gema* case, the first of two cases finalized that year, a Germany society that managed the rights to musical recordings and mechanical

[39] Between 1955-1979, the DOJ pursued 78 monopolization cases, 16 of which resulted in significant dissolution or divestiture. See Gallo et al. 2000: 100.

[40] See *Brown Shoe Co. v. United States*, a 1962 case where the Supreme Court upheld a decision to block a merger between Brown Shoe and Kinney, companies that held 4% and 0.5% shares, respectively, of the national shoe market. See Skitol and Vorrasi 2012 for details on the case.

reproduction, and which had a virtual monopoly on the German market, was accused of discriminating against suppliers and users from other countries, granting special terms to some members, and maintaining national groupings (Commission of the European Communities 1972: 75-77). The Commission pursued an investigation, which resulted in a prohibition decision that was not appealed. GEMA was ordered to pursue specific remedies including providing users with more control over their rights, to restructure users' access to pension funds, and, most importantly, to no longer discriminate based on national origin, whether in terms of access to membership or pricing schemes (Ibid). Consequently, the company retained its monopoly status and continued to operate. The problem had not been its size, or even its economic power, but its discriminatory behavior, which was seen as threatening the unity of the common market.

Combined with the rapid economic growth and technological transfer of the period, and the benefits of establishing a common customs union, the Commission's effort to root out barriers to economic trade and cross-national industrial cooperation bolstered industrial concentration and market integration during the 1960's. The level of cooperation between firms across territories, and the number of multi-national mergers and subsidies both increased (Schlieder 1972). From 1966 to 1971, the number of firms in the EEC with operations in multiple member states jumped from 1,350 to 2,158, a 60% increase over a five-year period.[41] From just 1970 to 1971, the number of new international joint subsidiaries increased 10.7%, and the number of non-joint subsidies by 17.4%.[42] At the same time, the total number of industrial firms in the EEC decreased over the decade, reflecting the increased concentration—and competitiveness—of European industry. From 1962-

[41] Commission of the European Communities 1973: 142. See Table 1: International operations in the EEC in 1966, 1970 and 1971.

[42] Commission of the European Communities 1973: 141.

1969, the number of total manufacturers of wool declined by 34%, of motorcycles by 29%, or pharmaceutical products by 17%, even as the total output in these industries dramatically increased.[43]

State Aid Policy

The state aid program at mid-century has been characterized by a number of scholars as being underdeveloped and mostly ineffectual (e.g. Moravcsik 1998). Until the 1990's, the Commission lacked the ability to provide exemptions to certain state aid activities, which limited its ability to shape the broader pattern of member state economic policy (Smith 1999). Certainly, the intensity of state aid enforcement was much lower in the 1970's than it is today. Yet it would be a mistake to interpret these differences as simply the result of political control—although, of course, member states' preferences always mattered. The lower intensity of state aid enforcement reflected as much the distinctive economic paradigm of the period as member states' opposition to state aid enforcement. The officials of the competition-directorate were products of their time, and therefore took a more sanguine approach to the question of state aid, seeking more to improve than eliminate it and, once again, showing their greatest concern for policies that undermined the unity of the market. It is important to emphasize that, even during the 1960's and 1970's, the Commission developed state aid rules to enforce them. The bureaucracy's willingness to challenge member states in these areas, even during the heyday of national industrial policy, provides yet another indicator of the significance of the Commission's bureaucratic discretion in the competition field.

[43] Commission of the European Communities: 149. See Table 7: The number of firms and their development in certain industries and certain Community countries and industries in 1962, 1966 and 1969.

Examining an internal report on state aid, written in 1962, we can gain some insight into the Commission's approach.[44] Even at this early moment in the EEC's history, the Commission was willing to scrutinize state aid, insofar as doing so promoted integration and economic development. The first part of the report carefully and systematically catalogues all of the laws in the six countries that authorize aid in various forms. The second part lists all of the known expenditures, broken down by region, by economic and industrial sector, and by type of aid that had been made between 1959-1962. A particular focus of the report is developing comparable metrics to evaluate aid across sectors and countries. For instance, one of the most comparable figures is an estimate of the cost per new job created. Another examines the estimated private sector investment that has accompanied state expenditures. In other state aid reports published in 1965 and 1972, one can observe a consistent focus on both surveying the entire landscape of state aid and developing a comprehensive scheme for distinguishing between productive and less productive measures.[45] More than anything, the Commission emphasized the need for aid harmonization, presumably to minimize the extent to which industrial promotion efforts were working at cross purposes. It also indicates that, from the earliest days of the EEC, the Commission sought to evaluate the effectiveness of aid, and disseminate best practices for state investment.

At the same time, where aid was seen as undermining the unity of the common market, the Commission utilized the full extent of its Treaty-based powers. By 1961, the Commission had initiated administrative proceedings in ten cases, including some that had resulted in concrete rescissions such as the removal of "the price equalization fund for rubber in the Federal Republic

[44] The report was initially confidential but is now available at the European Commission Archives. See Communauté Économique Européenne Commission. DG IV. 1962. "Aides susceptibles d'etre accordées par les États members dans le cadre de l'expansion économique," 66B/IV/62-F. Historical Archives, European Commission, Brussels, Belgium.

[45] See "Fiche relative á une aide notifiée en vertu de l'art. 93 par. 3 du Traité." Annexe IV and V. Communauté Économique Européenne Commission, DG IV. SEC(69)29. Available at Historical Archives, European Commission, Brussels, Belgium. http://ec.europa.eu/historical_archives/index_en.htm.

and aids to certain branches of the French textile industry" (Van der Groeben: 13). In other early actions, the Commission instructed France to end its *carte d'exportateur* program, a law that gave tax benefits to firms with a high level of exports; ordered Italy to cancel tax relief for Italians purchasing Italian cars; and contributed to a state aid plan for the French and Italian shipbuilding sectors that was in line with the state aid provisions.[46] In the shipbuilding scheme, one can observe many of the principles still in place in the state aid regime today: a push for states to develop plans for their 'infant industries' to 'grow up', and attempts to prevent, in all cases, measures that would harm the economies of other member states.

By the 1970's, state aid enforcement had become relatively frequent, with an average of 60 investigations per year over the decade.[47] For instance, in 1979, the Commission investigated 133 cases of state aid, 54 of which resulted in conditional changes, withdrawals, appropriate measures, or positive findings, and three of which led to formal sanctions. Over the decade, the Commission became more involved in developing a state aid policy framework. For instance, in response to a race to the bottom in regional subsidies, the Commission spearheaded a regional policy in 1971 that limited subsidies to 20% of total investment, and set up rules meant to ensure such aid was effective and proportionate (Schlieder 1972: 213).[48] This eventually became the basis for the Regional Development Fund, established in 1974, which has since allocated hundreds of billions of Euros to pursue economic development projects in the poorest regions (Ehlermann 1992). After many EEC industries began to face competitiveness challenges during the 1970's, the competition directorate worked with countries to establish "crisis cartels" in the shipbuilding, synthetic fibers, steel, and

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[46] See O'Brien 1997: 147-169. See also Van der Groeben 1961: 13; Ehlermann 1992; 1994.

[47] See Commission of the European Communities 1983, "Table 1: Activity in the control of State aids (excluding aids to agriculture and fisheries, and transport)"

[48] See also Ehlermann 1994: 415.

motor vehicles sectors (Ibid). Harmonized codes were established that permitted government support, but also required a reduction in production to reduce overcapacity, and a plan to taper down industry aid.

To be sure, the Commission did not enforce state aid rules at the level seen today, when thousands of reviews and scores of administrative actions might be finalized in a single year. Reflecting the differences in the predominant views about the appropriate role of the state in the industrial economy, the Commission was more willing to approve industrial subsidies. However, when state aid was seen as contributing to a beggar-thy-neighbor policy, the Commission would take a hard-lined approach, as it did against many cases of "unilateral aid" and export subsidies.[49] But when state aid was seen as providing stability in a time of economic crisis, or served a productive economic purpose, the Commission was more permissive.

Beginning in the 1980's, the enforcement approach would change, as neoliberal economic ideas and new international competitiveness concerns led to an intensification of enforcement, particularly with regard to state owned companies. However, as we will see in the next chapter, the neoliberal turn did not alter the fundamental design and function of the law, as a system established to promote economic growth and cooperation, to be implemented by a politically insulated supranational bureaucracy with strong integrationist preferences. In possession of a broad zone of discretion, the Single European Act and the turn toward economic liberalization would create new opportunities for the Commission to use competition law to advance the integration process, and to rationalize state policies and market rules toward economic growth and productivity.

The maintenance and expansion of the Commission's discretionary authority has not been due to a lack of political opposition from either member states or industry. During the late 1980's, a

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[49] In 1979, for instance, the Commission forbid even quite small marketing promotion programs, because of its potential to hurt firms from other countries in the EEC. See Commission of the European Communities 1980.

number of powerful industry groups such as the Union of Industrial and Employer Confederations of Europe (UNICE), the umbrella business association in Europe, argued that the Commission's powers in competition law were overly broad and sought to curtail its authority (McGowan and Wilks 1995). Similarly, when the Commission superseded the Council, and enacted liberalization legislation using unilateral legislative authority, many member states balked (Schmidt 1998). In other instances, companies lobbied European officials or national governments to reverse particular competition decisions, only to be disappointed. Time and again, efforts to reduce the Commission's *ex ante* authority, to impose new mechanisms of political control, or to reverse individual decisions, have failed.

It is worth recalling how different has been the pattern of principal-agent relations in the United States. As soon as large companies began to be affected by the Sherman Act in the late 19th century, they began to organize for its reform, eventually winning a 'Rule of Reason' construction of the law that effectively limited the law's reach to small and medium sized companies. As detailed in Chapter Four, at various times over the last century, affected interests successfully mobilized majorities in Congress to provide new sectoral exemptions for antitrust enforcement or new procedural protections against prosecutions or rulemaking.

Why have European principals continued to expand, while rarely constraining the Commission's discretionary authority in the competition field? Once again, an examination of constitutional structure can help explain why efforts to constrain bureaucratic power have been less successful in Europe than in the United States. More specifically, the Commission's unique legislative powers combined with the internal division of the Council and the weakness of the European Parliament have limited the number of political channels through which affected interests could constrain the Commission's authority. Whereas in the United States a powerful legislature has enacted several dozen laws that constrain the discretion of the antitrust regulators in various ways,

any initiative by the European Parliament or the Council to limit the competition-directorate must be written and introduced by the Commission itself. This agenda setting and law writing authority has allowed the supranational bureaucracy to shape the form and type of constraints that are considered and adopted into law. And while in the United States a unified elected executive can impose hierarchical controls and use political appointments to influence the enforcement program, in Europe, the constitutional organization of powers makes it more difficult to impose controls on the Commission.

By examining two unsuccessful efforts to limit the Commission's zone of discretion that occurred during 1990's, this section shows how the organization of powers in the European system has made it difficult for political principals to impose new constraints. The first case considered is the French and Italian governments' attempt to reverse the De Havilland/ATR merger prohibition decision of 1991, which was seen as challenging a core dimension of national industrial policies. The second episode is the German-led effort to move the Commission's competition authority to a European Cartel Office, which also ultimately failed. Finally, to gain some additional analytical insight into the effect that a weak Parliament may have had on the delegation structure, I examine the Parliament's preferences for delegation in the recent period, when it has gained more authority. These three episodes point to how the organization of policymaking under the European Treaties has played an important role in maintaining the Commission's broad zone of discretion initially established during the early years of the competition regime.

De Havilland/ ATR Case

In 1991, the competition directorate, DG IV, recommended a prohibition of the proposed acquisition of De Havilland, a Canadian aircraft manufacturer, by ATR, a French–Italian aircraft

manufacturing consortium.[50] The French and Italian governments were furious about the competition directorate's recommendation, seeing the proposed prohibition as fundamentally undermining their ability to pursue core industrial policy goals. Already incensed by the Commission's increased scrutiny of state aid, the two governments actively lobbied the College of Commissioners to oppose the competition directorate's recommended prohibition. While managing to win support from seven Commissioners, a majority of eight Commissioners voted to prohibit the merger, with even Jacques Delors, the Commission President, supporting the competition directorate over his own national government. Following the Commission vote, the French government called for a review of the Commission's merger powers, which had just been codified through secondary legislation a few years earlier. Concomitantly, Foreign Minister Roland Dumas stated that France would appeal the decision to the ECJ and seek additional action in the Council. But in the end, the institutional barriers proved too formidable, and none of these actions were taken.[51]

It is certainly notable that France and Italy managed to convince seven Commissioners to vote their way. Since nearly all competition votes are decided unanimously by the College of Commissioners, the presence of such a divisive vote points to the core national interests at stake in the merger prohibition. Additionally, the episode exhibits the difficulty of parliamentary control within an executive-heavy, bureaucracy-centered lawmaking process. To be sure, the Commissioners could have voted against DG IV's recommendation. However, in a context where each member of the Commission comes from a different country, and where political intervention is generally seen as inappropriate politicization, asserting control vis-à-vis the competition directorate is exceedingly

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[50] See European Commission Press Release on the case at < http://europa.eu/rapid/press-release_IP-91-896_en.htm>.

[51] For discussions of the case, see Majone 2000: 285-287; Pollack 2003: 290-294 and Warzoulet 2014: 20-21.

difficult. Precisely for this reason, the full College has almost always affirmed the competition directorate's recommendations.[52]

Similarly, the Council could have eliminated the Commission's merger powers through secondary legislation, while member state governments could alter the Commission's delegated authority through Treaty revision. But as a principal divided between multiple actors with heterogeneous interests, such collective action is exceedingly difficult, even more so because the Commission can use its monopoly on legislative introduction to play member states against one another, and thereby shape their policy preferences.

The European Cartel Office

Another serious attempt to reduce the Commission's authority was pursued during the 1990's. Alarmed by the potential for politicized decision-making, as exemplified by the De Havilland controversy, the German and UK governments sought in the 1990's to transfer the Commission's competition enforcement authority to a new European Cartel Office, which would be organized as an independent European agency to implement competition law. The German government placed significant diplomatic heft into the proposal. The *Bundeskartellampt* published a series of papers calling for the Commission to be stripped of its competition powers, a critique that was echoed by the Federal Economics Ministry, the Länder economics ministers, the Bundesrat, and key trade and consumer organizations (McGowan and Wilks 1995: 268).

But like the French effort to intervene in the Commission's decision-making, the German attempt to strip the Commission of its enforcement authority was ultimately unsuccessful. The Commission was able to use its monopoly on legislative introduction to prevent the formal

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[52] I am aware of no instance in which DG Competition's recommendation has been voted down by the College of Commissioners. Insofar as member state political pressure has influenced competition outcomes, it has mostly been through informal channels.

consideration of an initiative to establish a European Cartel Office. At the same time, the Commission diluted calls for reform by introducing a number of alternative proposals in the 1990's to make its enforcement approach more transparent and consistent. These proposals culminated in the modernization of competition law, characterized by the 'more economic approach' discussed in Chapter Two as well as a number of additional procedural changes.

Modernization of European Competition Law

In 2003, the EU adopted legislation (Regulation 1/2003) that delegated to national competition regulators the power to also enforce European competition law (Wilks, 2005). Additionally, the EU has adopted secondary legislation ostensibly designed to expand opportunities for private actors to enforce competition law.[53]

A number of scholars have interpreted these reforms as evidence of the end of the "administrative control model" in competition enforcement, and its replacement with a decentralized system of private enforcement similar to that found in the United States (Kelemen 2011; Wigger 2007; Wigger and Nölke 2007). Wigger (2007) describes the 2003 reforms as a "a stepping-stone in a much broader process of enhanced convergence towards the US model of private enforcement (104)." Kelemen (2011) argues that as a result of the reforms, administrative enforcement will be replaced by a decentralized adversarial legal system where "[f]irms and consumer groups would enforce competition law by suing each other—much as they do in the United States" (167).

However, such claims have generally been made without comparative analysis of either the design of regulatory delegation or the actual practices of competition enforcement. As the empirical

[53] These legislative efforts are summarized here <
http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

analysis in this section demonstrates, adversarial legalism is neither reflected in the design of the new European Competition Network (ECN), which was established by the 2003 reforms, nor the pattern of enforcement. Instead, what we find is a vertically-coordinated network, centered on the European Commission, which has used its influence to push national regulators to pursue an enforcement agenda that supports European integration goals.

First, while competition law enforcement has been decentralized, the administrative model of enforcement has been preserved and reinforced. Much like the Commission, national regulators in the ECN mostly utilize administrative actions to enforce the law. This contrasts greatly with the litigation-based system in the US, where all antitrust actions, whether by federal regulators, state Attorneys General, or private consumers must be initiated in the courts. As discussed in the previous section, the provision of authoritative control to a public bureaucracy over the initial stage of enforcement is more reflective of bureaucratic than adversarial legalism.

Second, unlike in the US, where the delegation of antitrust powers to state-level actors created a non-hierarchical, dual enforcement system (Posner 2004), the delegation of competition enforcement authority to national-level regulators in the EU is hierarchically structured. The legislation was adopted only after the ECJ had affirmed that the Commission's decisions took precedence over those made by national courts.[54] Far from undermining the Commission's hierarchical position vis-a-vis national regulators and courts, Regulation 1/2003 reinforced it (Wilks, 2005). National regulators and private litigants are now legally prohibited from pursuing competition cases being investigated by the Commission, which also retains the right to intervene in any national case (Ibid). Moreover, the Commission's rulemaking and compliance authority, provides it with significant influence over the enforcement priorities and processes of national regulators.

Finally, the EU's efforts to encourage private enforcement, while significant, have

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[54] See *Masterfoods v. HB Ice Cream,* Case C-344/09. Decision accessible at < https://tinyurl.com/ybmzftyb>.

nevertheless maintained a state- rather than party-driven enforcement system. In the 2014 Directive on Private Damages Actions, for instance, the Commission specifically rejected the inclusion of contingency fees, pre-trial discovery rights, multiplied damages, and opt-out clauses for class actions – legal tools that have been identified as pre-requisites for American adversarial legalism (Burbank et al. 2014).[55] Furthermore, the Directive specifically excluded any requirement to establish a system of collective redress (or class action) at the national level.[56] Indeed, the Commission has stated that it has sought to avoid the "excesses that we have seen in other legal systems", and to utilize instead measures that are rooted in "*European legal culture and traditions*".[57] Rather than limit bureaucratic discretion, the focus of private enforcement legislation is on the narrower goal of facilitating actions for damages following a successful public case—for instance, by requiring that public findings be available for use by private parties seeking compensation.[58] Put a different way, the EU's private enforcement effort is intended to complement, rather than undermine, the bureaucratically-centered enforcement system.

The European Parliament

If the Council had been more centralized, and the European Parliament's powers more substantial, would such broad authority have been delegated to a supranational bureaucracy?

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[55] The text of the 2014 Directive on Antitrust Damages Actions can be found at < http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html>. For an overview of European legislation regarding collective redress and actions for damages in the competition field see < http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html>. Last accessed June 25, 2018.

[56] See Section 13 of the Directive at < https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0104&from=EN>.

[57] White Paper on Damages Actions for Breach of EC Antitrust Rules. COM(2008) 165 final. 2 April.

[58] For instance, the 2014 directive made it easier to pursue follow-on actions by setting a minimum time frame during which legal actions could be pursued, providing easier access to records uncovered during public proceedings, and requiring that public conviction constitute proof of actions. See http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

Rational choice theory and the American experience both suggest that a strong legislature in a separation of powers system leads on average to a narrower zone of bureaucratic discretion. If it had possessed more authority, would the European Parliament have imposed more constraints on the Commission's discretion?

The behavior of the European Parliament after it acquired increased lawmaking powers in the Maastricht and Amsterdam Treaties suggests the answer is yes. In a study of delegation patterns in the 1990's, Kelemen (2002), finds that, as it has received stronger legislative powers in the Maastricht and Amsterdam Treaties, the Parliament has sought to limit the delegation of new authority to the Commission, supporting the placement of new rulemaking authority, not in the Commission's established directorate-generals, but within independent regulatory agencies, organizational structures more conducive to monitoring and intervention by the Parliament and private interests. Additionally, the EP has consistently promoted private enforcement, seeking greater transparency and accountability at the Commission and Council (Kelemen 2006). These preferences have been limited by the European executive branch (the Council and Commission), which even today retain more relative policymaking authority than the Parliament, a legislative body that still cannot even introduce legislation. Nevertheless, the contemporary efforts of the Parliament to limit the Commission's discretionary power, to increase transparency and accountability, and to expand the opportunities of private actors to enforce European law, suggests that, had the Parliament possessed more legislative authority in the past, it would have sought to limit the Commission's discretionary authority in competition law and other policy areas.

Conclusion

This chapter has outlined the origins, early development, and enforcement pattern of the European competition regime during the 1950's, 1960's, and 1970's. Unlike the American antitrust

system, where politicized administrative agencies enforced the antitrust law in the courts, the implementation of European competition law was delegated to elite supranational bureaucracies, empowered to enforce the law through administrative processes. The delegation of such a broad zone of discretion stemmed from two related factors.

First, the design reflects the origins of European competition law as a device to limit economic protectionism in the context of an unprecedented project of international economic cooperation following a destructive war. Concerns about the credibility of governmental commitments to work together—and, in particular, fears that the gains of cooperation might be undermined by various forms of economic protectionism—led countries to establish a competition law with a broad scope that covered most economic activities, and which included extensive rules on state aid and public companies. The administration of the law by a supranational bureaucracy provided assurance to countries that the implementation of competition rules would be independent of the demands of any one country. The many exceptions contained in the provisions, and the significant discretion provided to the Commission, allowed the competition rules to function as an incomplete contract: setting broad principles, but providing an agent with the authority to fill in the details in ways that could factor in new developments and circumstances.

The constitutional organization of powers in the European Treaties structured the institutionalization of the European competition system. The Commission's monopoly on introducing legislation allowed the supranational bureaucracy to shape the confines of its own enforcement and rulemaking authority, subject to vetoes by member states. At the same time, the Commission's agenda setting power provided tools that could effectively block or redirect occasional efforts by member states to assert control or narrow its authority. Finally, the absence of a strong parliament likely limited the pattern seen in the United States, where an independent legislature limits bureaucratic through narrow *ex ante* delegations and ongoing controls

Analyzing the Commission's enforcement pattern at mid-century, I have also highlighted in the chapter how the political origins and institutional design of competition law affected its enforcement. Because the competition directorate was politically independent of elected officials and organized interests, it was able to use competition law to pursue its own integrationist preferences, using the law to systematically prevent companies and governments from pursuing activities and policies that undermined economic cooperation. From the earliest days of its enforcement program, the Commission applied the law in ways that challenged member states' prerogatives, especially when their actions were seen as promoting protectionism or fragmenting the market. While the economic paradigm of the period led the Commission to be more permissive of restrictive agreements and industrial policy, when the Commission did enforce the law, the European Court usually affirmed it, and member states and industry almost always complied. Such a bureaucracy-centered application of the law differed greatly from American antitrust of the period, which was marked by both more volatility in the enforcement pattern across different administrations and political epochs, and a more rigid, judicialized overall approach.

Chapter Six

Constitutional Structure, Bureaucratic Delegation, and Varieties of Regulatory Liberalization, 1975-2017

This chapter comparatively examines economic liberalization and its relationship to competition policy and enforcement. Drawing on a quantitative comparative analysis of enforcement output, and a qualitative examination of competition policy across a number of key sectors, I show in the chapter that, while policymakers in the United States and Europe supported similar economic liberalization goals, differences in the constitutional organization of political power, and the organization of competition policy in the EU and the US led to distinct liberalization processes, affecting which institutional actors played the leading role (courts, legislatures, or regulators), as well as the character of the overall liberalization process. As a result of its broad zone of discretion, the European competition authority was able to play a leading role in the liberalization process, developing an extensive policy framework for state aid, writing and enforcing scores of liberalization directives, and actively enforcing competition rules within state-owned and regulated sectors. By contrast, the narrow zone of *ex ante* authority possessed by American regulators limited efforts by antitrust officials to amplify the broader liberalization process through legislative advocacy and enforcement. While antitrust litigation did contribute to initial reforms, the overall liberalization process depended much more on Congress, where regulated interests retained significant influence, and the courts, which continued to constrain the reach of antitrust over states.

The chapter points to how the political construction of competition policy during its formative periods in each system has affected competition policy and its enforcement in the contemporary era. Neither the congressional architects of American antitrust nor the bureaucratic designers of European competition law could have anticipated the policy challenges of economic liberalization and industrial policy reform during the final decades of the 20th century. Yet, choices that political principals made at the founding of each regulatory regime—about whether competition

law was enforced through judicial or administrative processes, whether competition rules should or should not apply to state activities—conditioned the capacities of regulators to reform state regulatory policy, and promote competition in regulated sectors.

Examining more than a dozen episodes where competition regulators successfully or unsuccessfully expanded their authority during the 1980's and 1990's, I also highlight some of the ways that constitutional structure—particularly, the construction of federalism and the organization of legislative authority—shaped the liberalization process. In the US, the dominance of Congress over the legislative process and its significant influence at the FTC, created impediments to using antitrust as a tool to promote liberalization and regulatory reform. In particular, the 'dual sovereign' structure of the US constitution, which gives states regulatory autonomy from the federal government within some areas of policy, hampered the ability of the antitrust agencies to reform state and local policy.

The constitutional organization of powers in Europe created more opportunities for reform. The weakness of Parliament, fragmentation of the Council, and the Commission's unique legislative powers provided the Commission with opportunities to autonomously expand its mandate in the competition field, while present barriers to the assertion of political control by member states. Additionally, the 'cooperative federal' structure of relations between central and state governments and the explicit limitations in the Treaties on state aid and protectionism, made it possible for the Commission to steadily intensify its enforcement of state aid rules and public company liberalization, even in the face of significant opposition from some member states and industry.

The chapter proceeds as follows. Part 6.1 provides an overview of the legislative initiatives that promoted liberalization in a wide range of network industries, understood here in a broad sense to mean industries such as telecommunications, electricity generation or certain forms of transportation where a service is delivered through a common network such as a road or

telecommunications system, and where there is a sunk cost to establishing this infrastructure (Klein 1996). I then analyze the comparative, longitudinal pattern of competition enforcement within regulated sectors. I demonstrate that a significant portion of European enforcement has occurred within three of these network industries (telecommunications, energy, and transportation), while only a handful of significant US antitrust cases have been pursued in these sectors over the last twenty years, despite significant barriers to competition existing in the American market, and similarities in the liberalization priorities of policymakers.

In 6.2, I consider several potential explanations for the divergent pattern, noting some of the reasons that differences in market structure and policy paradigm cannot account for important dimensions of each system's policy trajectory. I then point to some of the ways that the constitutional theory of bureaucratic discretion, developed in the previous chapters, helps explain why European regulators have pursued so many cases within liberalizing network industries and played such an active role in public subsidy reform, while American antitrust officials have played a comparatively marginal role in the regulatory liberalization process, and only an advisory role in state aid. Specifically, I argue that institutional differences in the reach of bureaucratic power—in terms of delegated discretionary authority and constitutional limitations—explains why the Commission's competition directorate has been able to actively use competition law to promote regulatory liberalization and public subsidy reform, while US antitrust agencies have been comparatively constrained, particularly when it comes to limiting state aid and reforming protectionist policies at the state and local level.

This argument is developed through two case studies of regulatory liberalization and public subsidy reform within each political system. Part 6.3 examines the efforts of US regulators to support the liberalization process in the United States. Highlighting several episodes when political principals tried to stop or dilute antitrust agencies' enforcement activities and advocacy efforts, I

point to some of the ways that the narrow zone of bureaucratic discretion, and the broader organization of legislative and executive power in the United States, have limited the efficacy of US antitrust as a tool of market and economic policy reform.

In Part 6.4, I conduct a similar historical analysis of the use of European competition law to support the liberalization of network industries and the reform of national industrial policies. Through the close analysis of European competition enforcement during the 1980's and 1990's, I show that much of the intensification of enforcement has been driven by the European Commission's more active use of its delegated authority under the Treaty of Rome, originally included to serve as a check on economic protectionism. Examining several prominent attempts by member states to limit the Commission's enforcement, I highlight some of the ways that the broader organization of powers in the European system has undergirded the Commission's entrepreneurship in the competition field, allowing European competition law to serve as a powerful tool for regulatory and public subsidy reform.

6.1. Comparing Liberalization and Competition Enforcement in the EU and US

During the final decades of the 20th century, the rich industrialized world pursued broad-based economic liberalization. One thrust of reform was the liberalization of network industries and network industries that had previously been organized as regulated public utilities or publicly owned companies. Countries throughout the OECD introduced competition into markets such as telecommunications, broadcasting, aviation, electricity, and finance where competition had long been restricted (Vogel 1997). Governments around the world sold off trillions of dollars of state assets and state-owned companies, seeking to transform sectors once considered to be 'natural monopolies' into more dynamic economic fields subject to competition (Clifton et al. 2006). Another focus was to transform the state's involvement in industry. Traditional economic

development policies based on promoting national champions were called into question, and developmental policy increasingly took the form of market conforming interventions that targeted narrowly-defined market failures or sought to make industry more internationally competitive (Lawton 1999; Cerny 1997).

Broad-based economic liberalization efforts were pursued in both the United States and European Union. Table 6.1 lists the dates for major laws promoting liberalization within each jurisdiction. Reform in the US occurred earlier, beginning in the late 1970's while, outside of the UK, the brunt of European reforms occurred in the 1990's and 2000's. However, by the beginning of the 21st century, economic liberalization had been enacted in most of the same sectors, including transportation, telecommunications, and energy. In some respects, the scope of EU liberalization was wider, covering sectors such as postal services, ports, and professional services where, in the U.S., there were not major federal reform efforts.

Leading policymakers in both systems also championed public subsidy reforms. The US government led the charge against national industrial policy, calling for market conforming economic policies. During the 1970's, the US trade negotiators pushed the GATT to establish a system of countervailing measures against state aid in international trading rules. American government officials also worked with the OECD to initiate programs that encouraged the reduction and reform of industrial subsidies (O'Brien 2016). In Europe, member states agreed to pursue substantial reforms of public sector expenditures under the auspices of the 1992 White Paper on Industrial Policy (Lawton 1999), and later, the Lisbon Agenda and Europe 2020. Through these policy initiatives, a new emphasis was placed on reducing operational and investment subsidies, particularly in developed regions, while targeting development policy toward market conforming interventions that increased the efficiency of European economies and competitiveness of European industry, as defined by economists.

Table 6.1: Timing of Liberalization Initiatives in the US and EU

Sector	Dates of Major Liberalization Legislation in the US[1]	Dates of Major Liberalization Legislation in the EU[2]
Aviation	1978	1993-1998
Trucking	1980	1985- 1994
Road Transport	1982	2009
Rail Freight	1986	2007
Rail Passenger	1976; 1980	2010
Telecommunications	1984; 1996	1987; 1996
Natural Gas	1978	1998
Electricity Generation	1978; 1992	1996
Maritime Transport	1984; 1997; 1999	1993-1999
Maritime Ports	None	2017
Postal Services	None	1997; 2002; 2008
General Services	None	2006
Professional Services	None	2005; 2013

Comparing Competition Enforcement in Liberalizing Sectors

But while these policy initiatives were similar in paradigm, the role of competition regulators in the liberalization process varied significantly across the two federal systems. In Europe, liberalization legislation is accompanied by a major *increase* in competition enforcement. In the EU, the intensity of competition enforcement has increased as part and parcel to the liberalization

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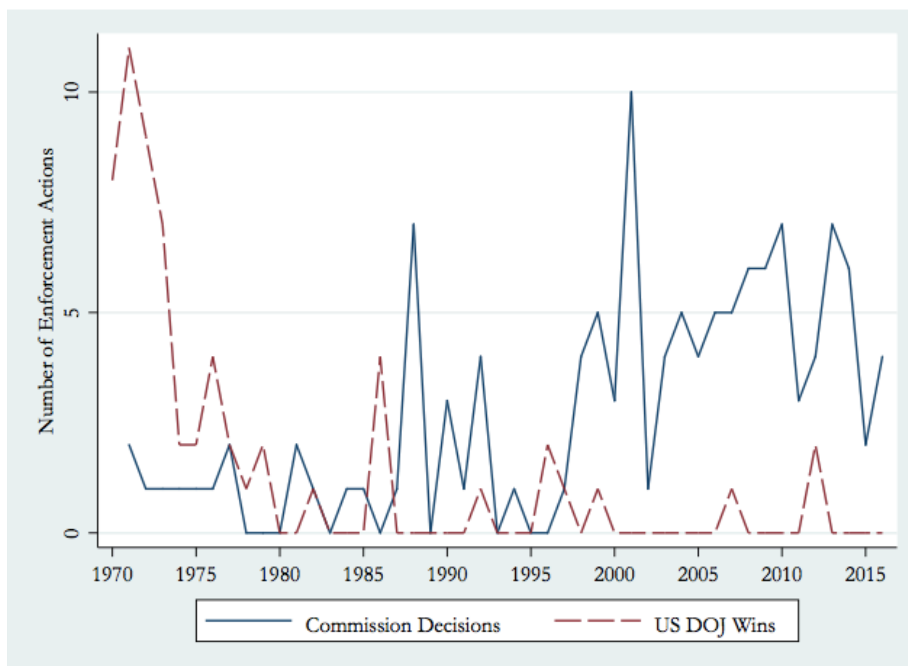
[1] Major congressional acts include the Airline Deregulation Act of 1978, the Motor Carrier Act of 1980, the Bus Regulatory Reform Act of 1982, the Surface Freight Forwarder Deregulation Act of 1986, the Railroad Revitalization and Regulatory Reform Act of 1976, the Staggers Rail Act of 1980, the Natural Gas Policy Act of 1978, the Natural Gas Wellhead Decontrol Act of 1989, the Public Utilities Regulatory Policies Act of 1978, the Ocean Shipping Act of 1984, the Ocean Shipping Reform Act of 1998, the Energy Policy Act of 1992, the Ocean Shipping Reform Act of 1999 and the Telecommunications Act of 1996. Forcing long-distance competition at AT&T was managed by a federal judge beginning in 1984.

[2] From 1987 to 1997 the European Commission enacted directives that airline reduced fare and capacity restrictions, common licensing, and the right to operate domestic flights in any EU country. See http://ec.europa.eu/competition/sectors/transport/air_legislation_general.html. Similar initiatives in road, rail, and inland waterway transport were undertaken during the 1990's and 2000's. Generally speaking, legislation had two related goals: first, to instill competition, and second to reduce national barriers within each sector. See generally <http://ec.europa.eu/competition/sectors/transport/rail_road_inland_legislation_general.html>. Major telecommunications initiatives include the 1987 Telecommunications Green Paper, the EC Directive (EC 96/19/EC) on the liberalization of basic telephony by 1998, and the Telecom Reform Package of July 2000. Major liberalization initiatives in energy began in electricity in 1996, and gas in 1998, and were followed by more extensive legislation in 2003. http://ec.europa.eu/competition/sectors/energy/overview_en.html.

process. Comparing the timing of EU liberalization initiatives and competition enforcement, we can see that there is rough correspondence between the enactment of liberalization legislation and the intensification of competition enforcement, with the intensity of action in both categories increasing dramatically at the end of the 1990's. In the US, on the other hand, we see the opposite pattern: a dramatic decline in antitrust enforcement during the late 1970's, 1980's, and 1990's, the period in which most liberalization laws were enacted by Congress.

To be clear, not all of these cases relate to the economic liberalization of traditionally regulated sectors. Figure 6.1 reports the number of market abuse cases across *all* economic sectors, including many prominent cases in the high tech and pharmaceuticals sectors. However, a significant number of the cases in Europe—and much of the driver of the overall increase—relates to the liberalization of public utilities and other network industries.

Figure 6.1: Number of Successful Enforcement Actions Related to Market Abuse, United States and European Union, 1970-2016



Source: US Department of Justice, European Commission.

Table 6.2: Proportion of Non-Merger Cases Involving Three Regulated Sectors, 1999-2016

	EU Non-Cartel Cases (Formal decision taken)	**US Civil Non-Merger Cases (Investigations opened)**
Energy	24 (10.5%)	1 (1.1%)
Telecommunications	29 (12.7%)	1 (1.1%)
Transportation	29 (12.7%)	3 (3.4%)
Total Cases	229	89

Source: European Commission, US Dept. of Justice

Table 6.2 reports the number and proportion of competition cases in each system where a formal investigation was initiated involving telecommunications, energy, and transportation companies, three economic sectors that have been a major focus of regulatory reform efforts in both jurisdictions.[3] The data makes clear that a disproportionate share of European competition enforcement has been against incumbent companies within network industries undergoing liberalization. Over the 17-year period examined, the Commission finalized 82 decisions in these sectors, representing nearly 30% of all decisions. Compared to the value of these sectors in the economy as a whole— estimated at around 12% of GDP—the Commission's enforcement focus is disproportionate.[4] Furthermore, the emphasis on these industries stands in stark contrast to the United States, where not only fewer enforcement actions are observed, but a much smaller portion of cases—just five percent—involve the energy, telecommunications and transportation sectors. As we will later in the chapter, US regulators have sometimes launched investigations and pursued cases in these sectors, but they have faced far more barriers than their European colleagues.

[3] In the EU, I examine all non-cartel cases that have been finalized. Since there are relatively few market abuse cases in the US during this period, I expand the case selection to also include civil cartel cases as well. Because of data limitations, the FTC is excluded from this analysis. However, based on the data available, the FTC does not appear to have pursued a significant number of cases in these three sectors.

[4] Telecommunications is estimated at 3% of EU GDP, energy 4%, and transport 5%. See European Commission 2014: 26 for an estimation of the EU's Gross Value Added in 2011.

Table 6.3: Proportion of State-level Cases in Network Industry Sectors, 2004-2013

	EU NCAs	**US AG's**
Energy	80 (12%)	6 (3.2%)
Telecommunications	29 (12.7%)	6 (3.2%)
Transportation	29 (12.7%)	1 (0.5%)
Total Cases	229	182

Source: European Competition Network, National Association of Attorneys General. Calculations by author.

Comparing State-Level Enforcement

At the state-level within each system (EU member states and US states), a similar enforcement pattern can be observed. Table 6.3 reports the state-level cases that resulted in a formal decision by a National Competition Authority (NCA) in the EU or a successful judgment or settlement in an antitrust case involving an Attorney General in the United States from 2004-2013.[5] The data shows that European national competition authorities pursued hundreds of competition cases involving network industries over the decade, while state Attorneys General in the United States pursued only a handful.

Within the three sectors examined before, EU NCA's issued nearly 200 formal decisions: 80 decisions in the energy sector: 69 in the transport sector, and 48 in telecommunications. All in all, the three sectors constituted 36% of total decisions, an even higher proportion of cases than at the European Commission. Moreover, the vast majority of the cases appear to promote economic liberalization. For instance, many of the enforcement actions in the telecommunications sector were against dominant players that used restrictions on network access or margin squeezes to make it more difficult for rivals to enter the market (European Commission 2014: 38). Similarly, the bulk of

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[5] European data from the European Competition Network. See COM(2014) 453, "Commission Staff Working Document: Ten years of Antitrust Enforcement under Regulation 1/2003." Accessible at < http://ec.europa.eu/competition/antitrust/legislation/swd_2014_230_en.pdf>. State Attorney General data from National Association of State Attorneys General (NAAG). 2017. Multistate Litigation Database. Note that some cases involving US AG's overlap with the cases reported for the US DOJ and FTC.

the cases in the energy sector were against incumbent gas and electricity market operators (32); in aviation, against dominant carriers (49); in maritime, companies that controlled access to harbors (49), and so on. Nearly all involved specific remedies designed to facilitate or promote liberalization.

Among state US Attorneys General, the rate of antitrust enforcement within these three sectors was much lower. In the 182 antitrust lawsuits finalized between 2004-2013, just 13 cases, or 7% of the total, involved telecommunications, energy, or transportation firms. Additionally, the kinds of cases pursued by state AG's was qualitatively different. For instance, all six of the telecommunications cases were merger challenges and four of the energy cases related to price fixing. While each of these cases had their justifications in terms of antitrust law, they do not appear to be directly related to the broader economic liberalization program pursued at the congressional level. None of the 13 antitrust cases initiated by Attorneys General resulted in remedies that opened market access to economic rivals. This stands in contrast to Europe, where competition enforcement has been a central component of the legislative liberalization program.

6.2. Explaining the Divergent Pattern: Theoretical Perspectives

What explains the divergent pattern of competition enforcement in liberalizing sectors within each system? Why have European regulators pursued so many market abuse cases within these sectors, while American officials only a handful?

Degree of Liberalization

One potential explanation could be that antitrust enforcement is simply not necessary where sufficient *ex ante* regulation is already in place. Perhaps American regulatory rules were sufficient to ensure the effective liberalization of network industries, rendering antitrust enforcement unnecessary. While there can be different approaches that achieve the same goal, in the literature on

regulatory liberalization, competition promoting *ex ante* regulation and *ex post* enforcement are generally seen as complements, not substitutes. In fact, many of the designers of regulatory reform were proponents of active antitrust enforcement in deregulated industries. For instance, Alfred Kahn, who helped spearhead the use of marginal cost pricing in electric utilities and led the deregulation of aviation as the head of the Civil Aviation Board, argued that deregulation "greatly accentuated the importance of antitrust enforcement" (1987: 1059). In the present period, many economists specializing in network economics argue that deregulated public utilities and network industries should be subjected to a combination of *ex ante* regulation mandating network access and basic interconnection, with *ex post* competition enforcement to prevent vertical discrimination (Shelanski 2007). The current US approach of "heavy handed" and inflexible *ex ante* regulation with almost no *ex post* public enforcement of competition rules is frequently criticized by experts as ineffective (e.g. Geradin and Sidak 2003).[6]

Another distinct possibility is that the divergent pattern simply relates to differences in the degree to which markets were already liberalized. If the American economy is comparatively more liberalized, than this may explain the dearth of antitrust enforcement in recent years. As late as the 1990's, many economists argued that American markets were more relatively liberalized than those in the European Union (Gutiérrez and Philippon 2018). However, over the past two decades, economic analyses suggest that many sectors of the European economy are now *more* liberalized than the United States. According to a most recent survey of the OECD's "Service Trade Restrictiveness Index"—which provides a comparative index of liberalization based on an analysis

[6] For instance, in telecommunications, the FCC possesses significant *ex ante* authority, but this authority is quite rigid—determined either by statute or through protracted rulemaking processes that can take decades to resolve through the courts. At the same time, its *ex post* enforcement powers are more limited, lacking the capacity or resources to investigate competition issues in the manner of competition agencies (Geradin and Sidak 2003). Meanwhile, the antitrust agencies are subject to increasingly narrow authority in the telecommunications and other sectors, leaving them unable to effectively unable to serve this function (Shelanski 2007).

of 16,000 laws and regulations across 40 different countries for 2014-2015—the U.S. was below the OECD average in 13 of 22 categories, including in air transport, maritime transport, broadcasting, insurance, and construction.[7] The United States was less liberal than France in 14 of 22 categories, including computer services, commercial banking, architecture, and engineering.[8] And the U.S. had more restrictions on competition in 19 of 24 sectors compared to Latvia, where extensive liberalization was a pre-requisite for EU accession.

There is also evidence that Europeans consumers pay less than Americans for services such as cell phones and airfare, indications that the European telecommunications and aviation sectors may be more liberalized. According to the International Telecommunications Union, in 2014, US consumers paid $35.62 for a standard basket of cell phone services, while Swedes, Germans, British, Italians, Czechs, Austrians, Danes, and Greeks all paid between $9-20.[9] Europeans also pay less for airfare, particularly short-haul flights, in part because there are more low-cost carriers in Europe, and lower barriers for foreign carriers to enter the market.[10]

Energy prices in many European countries are slightly higher than those in the United States. However, a good portion of this price difference relates not to a comparatively lower degree of competition but to the much higher level of energy taxes in Europe, due to the continent's more

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[7] See Regulatory Database for Services Trade Restrictiveness, accessible at http://www.oecd.org/tad/services-trade/regulatory-database-services-trade-restrictiveness-index.htm.

[8] See "Service Trade Restrictiveness Index," OECD, < http://www2.compareyourcountry.org/service-trade-restrictions?page=1&cr=usa&cr1=oecd&lg=en>. Last accessed Nov. 5, 2016.

[9] See "Table 4.2: Mobile-cellular sub-basket, 2014", "Measuring the Information Society Report, 2015", International Telecommunications Union. Report accessible at https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2015/MISR2015-w5.pdf.

[10] See for instance "Why are flights so much cheaper in Europe than in the United States?", Oct. 12, 2017. *Washington Post*. Accessible at < https://www.washingtonpost.com/news/worldviews/wp/2017/10/12/why-are-flights-so-much-cheaper-in-europe-than-in-the-u-s/?utm_term=.723adbee2873>.

serious approach to mitigating climate change.[11] In any event, the US electricity market is neither integrated nor organized on a competitive basis. Only 22 states pursued pro-competitive deregulation during the 1980's and 1990's. Then, following the collapse of Enron in 2002, seven reversed reforms, returning to a regulated market.[12] According to various observers of US energy policy, the result was a less integrated electricity market (Correljé and De Vries 2008) and no reduction in overall prices (Joskow 2006). Given the many barriers that exist in each of these markets in the US, the lack of antitrust enforcement can hardly be explained as due to the already high degree of competition in the US market.

Finally, the *lack* of state aid enforcement in the US cannot be explained by the absence of public subsidies to industry. Scholars estimate that economic incentives from state and local governments are worth between $45-$90B per year (Story 2012; Bartik 2017) While European explicit public industrial support has declined in recent years, the value of economic investment subsidies in the United States have tripled as a percentage of value added since the early 1990's (Bartik 2017). One comprehensive examination of industrial aid schemes in the period 2010-2011, found that within EU countries only three awards of $100M or more were made by governments to individual companies, compared to 21 in the United States over the same two-year period (Thomas 2012).

Differences in Economic Ideas

Another possibility is that differences in economic theories of efficiency might explain the divergent enforcement pattern (Ergen and Kohl 2017). As we have seen, the two antitrust systems

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[11] See "Energy Taxation in Europe, Japan, and the United States", November 2010. Finnish Energy Industries. Accessible at https://energia.fi/files/725/et_energiav_naytto_eng_040211.pdf.

[12] Data as of September 2010. See "Status of Electricity Restructuring by State," U.S. Energy Information Administration at < http://www.eia.gov/electricity/policies/restructuring/restructure_elect.html>.

were shaped by distinct coalitions, stemming from their divergent political and economic contexts. While the economic ideas governing these two systems has been growing more similar over time, the differences between the European conception of market abuse and the American concept of monopoly reflect these distinct political origins. While the neoliberal and ordoliberal view of competition share some similar roots (Mirowski and Plehwe 2015), differences in the economic ideas institutionalized in the law may explain part of the reason why the European Commission's enforcement program has been more active in recent decades.

Certainly, changes in economic ideas help to explain the rapid reduction of antitrust enforcement in the US during the 1970's and 1980's. It is well established that this change was driven, in part, by the intellectual influence of the Chicago School of Economics, a movement associated with the University of Chicago that sought to maximize the autonomy of business corporations vis-à-vis the state (Van Horn and Mirowski 2015). Taking aim at the US antitrust system during the 1960's and 1970's, Chicago-based economists attacking the rationale of many of the government's prosecutions and prevailing jurisprudence at mid-century, crystallizing what is now commonly referred to as the Chicago school of antitrust (Van Horn 2015; See also Posner 1979). Scholars associated with this school directly challenged the structuralist theories of oligopolistic markets associated with Harvard University economists such as Carl Kaysen and Donald F. Turner, and which had justified much of the postwar antitrust program.[13] While the Harvard School of antitrust, and challenging the structuralist theories of oligopolistic markets associated with Harvard University such as Carl Kaysen and Donald F. Turner that had justified much of the postwar antitrust program, and proposed that a certain level of market concentration would always present problems to competition, the Chicago school held that markets with a small number of sellers

[13] A good overview of the Harvard School of antitrust can be seen in Kaysen and Turner's (1965) *Antitrust Policy: An Economic and Legal Analysis*.

tended to be competitive, and that even private monopolies, in the rare cases they existed, were unstable, and therefore mostly self-correcting (Posner 1979). Whereas the Harvard school held that certain kinds of coercive practices by dominant firms such as predatory pricing, tie-ins, restricted distribution, and vertical integration presented barriers to competition, the Chicago school held that these restrictions were generally beneficial for consumers. And since net efficiency, based on consumer welfare, was the ultimate decision rule for whether an antitrust case should be pursued, such antitrust prosecutions should be abandoned (Hovenkamp 1985: 226). As Robert Bork succinctly put the point in his influential *The Antitrust Paradox: A Policy at War with Itself*: "The only legitimate goal of American antitrust law is the maximization of consumer welfare" (1978: 51).

Combined with the growing political organization of business at the end of the 1970's (Waterhouse 2013), the ideological transformation led to a near halving of the real resources of the antitrust agencies,[14] a major shift in the enforcement program at both regulatory agencies (Eisner 1991), and the integration of Chicago-inspired antitrust standards into jurisprudence (Kovacic and Shapiro 2000; Kovacic 1989a).[15] The number of prosecutions for vertical restraints decreased from seven per year under Carter, to less than one per year under Reagan and Bush. Merger enforcement fell by two-thirds, even as merger activity increased six-fold during the Reagan administration (Krattenmaker and Pitofsky 1988). This shift in prevailing economic ideology almost certainly explains why US antitrust enforcement declined within key areas, including the number of market abuse cases, as indicated in Figure 6.1 (Ergen and Kohl 2017).

But while the Chicago antitrust revolution may help to explain some of the differences in

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[14] The FTC's staff was cut in half during the 1980's, decreasing from 1719 FTEs in 1979 to just 894 in 1989. The Division's staff was cut from 989 in 1980 to 509 in 1989. Figures from FTC and Division Annual Reports.

[15] In 1977, a court noted that cases should be rooted in studies that have "demonstrable economic effect", establishing a norm that all antitrust cases addressing vertical issues should be based on micro-economic analysis. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977). See discussion in Kovacic 2003 at 398.

certain areas of European and American enforcement, it is less help in explaining variation in antitrust cases within network industries, against public constraints, or regarding state aid, where prevailing economic ideas are more or less the same in each jurisdiction. In the United States, as in the European Union, economists agreed that consumers would benefit from increased competition in highly regulated sectors such as telecommunications, energy, and transportation, and in response to state-sponsored protectionism. While Bork was opposed to most antitrust enforcement, he did support federal government action to limit public restraints on competition. In his *Antitrust Paradox,* he critiques the "enormous proliferation of regulatory and licensing authorities at every level of government" noting that the "profusion of such governmental authorities offers almost limitless possibilities for abuse" (347). And he argues that toward reducing such protectionist regulations, "antitrust can not only perform a valuable service to consumers but, as a by-product, can also contribute to the integrity and efficiency of administrative and judicial processes" (364).

Nor can cross-Atlantic differences in economic ideas explain the failure of federal regulators or the federal government to address the race to the bottom in industrial subsidies that took off in the 1980's in response to the weakening competitive position of many US industries (Eisinger 1988). Even the most ardent Chicago-school critics of government regulation, such as Milton Friedman, supported limiting *public* barriers to competition and government subsidies for industrial operations (Van Horn 2015).

Discretionary Administrative Power and the Competition Enforcement Program

To understand the differences in the role of competition regulators in the economic liberalization process within each system, we need to instead consider how differences in the institutional structures of competition—in terms of the scope of antitrust authority and the constitutional organization of powers—structured the liberalization process. In both systems,

policymakers, economists, and competition regulators generally supported regulatory liberalization and public subsidy reform. Moreover, in both systems, regulated industry opposed efforts to increase competition and sought to prevent and limit reform. However, the way in which these ideas were implemented, and the character of the overall liberalization process, was channeled through the existing institutional construction of competition policy. Depending on the degree of discretionary authority possessed by competition regulators—in terms of the *ex ante* scope of their authority, the organization of enforcement powers, and their degree of independence from political principals—they had more or less capacity to pursue common regulatory reform goals.

As recounted in Chapters Four and Five, due to differences in the political coalitions that established competition law, European competition authorities enjoy today much broader discretionary authority, and are subject to fewer ongoing controls, than American regulators. As will be detailed in the case studies that follow, the integrationist origins of European competition law, gave the Commission a number of tools that could be used support the liberalization process and reform state industrial policy. This included extensive rules limiting state aid and public companies that had been included to address concerns about economic protectionism. In the United States, by contrast, the 19th century populist origins of American antitrust, meant that antitrust officials had a narrower mandate focused exclusively on private sector activity. Additionally, within a constitutional arrangement where federal regulatory power was delimited to areas affecting interstate commerce, and U.S. states possessed sovereign regulatory powers that could only be superseded by the federal government in limited cases.

Additionally, we need to consider how the broader differences in the constitutional organization of lawmaking has conditioned the ability of competition regulators to expand their authority through entrepreneurship, and the capacity of industry or states to resist reform. Specifically, we need to consider how the constitutional organization of the European system—

characterized by a strong Commission, divided Council, and weak Parliament—created opportunities for the competition-directorate to gradually expand the reach of its authority while subverting efforts by member states and regulated industry to limit its discretionary power. And we need to factor in how the Madisonian constitutional structure system made the assertion of bureaucratic autonomy within this policy area more difficult in the U.S., while providing ample opportunities to subnational governments and incumbent industry to resist or dilute reform.

6.3 Liberalization and the Limits of U.S. Antitrust

The United States led the world in both the dissemination of neoliberal ideas and the pursuit of economic liberalization. It was the intellectual center of the "rebirth of the liberal creed" during the 1970's, with American universities, and particularly economists and legal scholars at the University of Chicago, producing many of the initial critiques of economic regulation and state ownership that provided the analytical impetus for the global liberalization efforts defining the final decades of the 20th century (Fourcade-Gourinchas and Babb 2002). It was among the first countries (followed closely by the United Kingdom) to instill competition in long closed sectors such as aviation, transportation, and telecommunications (Derthick and Quirk 1985). The U.S. Treasury Department was key in developing a set of lending policies during the 1980's that came to be known as the "Washington Consensus", which actively promoted and enforced economic deregulation, privatization, and public subsidy reforms around the world (Williamson 1990).

The FTC and Division of Antitrust were both strong proponents and key architects of the regulatory liberalization program. Both authorities were heavily involved in competition advocacy throughout the 1970's and 1980's, helping design some of the laws that spearheaded regulatory reform around the world (Derthick and Quirk 1985). In 1976, a Special Regulated Industries Section housed by economists and other experts on liberalization was established at the FTC, which served

as a consulting group for other agencies. This section remained active throughout the 1970's and 1980's, providing advice to an array of government agencies including the Federal Communications Commission, the Postal Rate Commission, the International Trade Commission, the Nuclear Regulatory Commission, the National Credit Union Administration, the Securities and Exchange Commission, the FDIC, the Federal Home Loan Bank Board, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Department of Energy, and the Federal Maritime Commission (Eisner 1991: 160-161). In 1978, this Section provided comments in 134 regulatory proceedings (Ibid). The Division of Antitrust, for its part, participated in dozens of interagency and international meetings related to competition on topics from state aid reform to regulatory liberalization. In 1980, for instance, Division personnel participated in 79 meetings and filed reports on public procurement, the activities of the International Energy Agency, and gasoline shortages (US Department of Justice 1980).

Where possible, both agencies accompanied this advocacy with active enforcement. For instance, at the end of the 1970's, the Division prosecuted several motor carriers in the South for instituting joint rate policies which were seen as having an anti-competitive effect.[16] The FTC, for its part, initiated a number of antitrust actions in the healthcare sector designed to overturn restrictions on competition: investigating Blue Cross Blue Shields' insurance plans, and suing professional associations of dentists, doctors, and anesthesiologists for restricting competition (Federal Trade Commission 1978: 3-4).

However, these efforts often ran against the limitations of the agencies' constitutional and delegated authority. Interpreting the narrow scope of administrative power that had been institutionalized in American constitutional development, on numerous occasions, federal courts

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[16] For a summary of the case, United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29 (N.D. Ga. 1977), see < https://law.justia.com/cases/federal/district-courts/FSupp/439/29/1578036/>.

blocked cases that would have aided economic liberalization. For instance, the Supreme Court ruled against the FTC in the motor carrier case, declaring that such rules were exempt from antitrust because the regulatory schemes, while administered by private actors, were state-sanctioned.[17] Over the following decade, the Supreme Court made it explicitly clear that nearly all state-sanctioned regulatory schemes were exempt from antitrust liability, cutting off much of the earlier efforts to use antitrust to systematically reform state-sponsored restrictive regulations (Garland 1987). Despite the tremendous growth of the role of states in economic development policy, they remained semi-sovereign entities whose regulatory policy could not be restricted by antitrust.

At the same time, antitrust officials ran into the legal limits on their delegated authority within regulated industries. As discussed in Chapter Two, in the regulatory field, the scope of antitrust law is entirely 'residual'—left to address issues where other regulatory law do not conflict. Although most regulated sectors are not formally exempt from enforcement, implied immunity within regulated sectors makes prosecutions more difficult. Some scholars have suggested that these barriers have contributed to the lack of enforcement in some regulated sectors (Shelanski 2012: 498-506; Noll 1999). Where regulatory action runs up against state regulatory schemes, federal authority has been circumscribed further. As Kovacic and Cooper (2010) explain: "The FTC and DOJ can engage in advocacy but have no formal authority to veto policy; the state action and Noerr-Pennington doctrines leave a vast array of anticompetitive conduct beyond the reach of enforcement" (1585).

Adding to the reticence to pursue cases in regulated sectors is the difficulty of addressing complex economic issues in the adversarial courts. As we saw in Chapter Four, the judicial enforcement system has proven to be a powerful, and often effective, forum in which to enforce a set of straightforward economic rules, especially in areas where courts have established 'per se'

[17] See Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

prohibitions. However, as an institution to adjudicate complex policy problems within sectors characterized by rapid technological change or contested economic theory, courts are far from ideal.

Whereas the European Commission can enforce competition rules against companies largely on its own turf, investigating and making the initial determination through an administrative process, in the US, the adversarial process gives firms substantial space to pursue discovery and contest factual determinations. Even where a case has a strong economic basis, it may take so long to work its way through the adversarial legal system that the underlying issues are rendered moot, as the decade-long suits against IBM and AT&T made clear.[18] Since most US antitrust officials are lawyers whose future employment in the private sector depends on developing a strong prosecution record, the prospect of investing so much time and energy into cases with ambiguous prospects may limit their willingness to take on competition cases. Consequently, the judicial enforcement system may have further contributed to the low number of major antitrust cases in regulated sectors during the 1970's and 1980's.

Congressional Controls and the Limits of Antitrust Activism

Congressional constraints presented another formidable barrier to using antitrust law to bolster the process of economic liberalization. During the 1960's, the FTC had become increasingly involved in competition advocacy, working with the Securities and Exchange Commission to reform rules in the stockbroker industry, and advocating the elimination of regulatory barriers to entry (Owen 1986). During the late 1970's, under the leadership of a new Chair, Michael Pertschuk, the Federal Trade Commission sought to play a more active role promoting competition. By 1978, the

[18] Labeled by Robert Bork as "the Antitrust Division's Vietnam", the DOJ's prosecution of IBM involved 91 million pages of documents in discovery, 1300 depositions, and a trial that lasted 568 days (Kovacic 1989b). After spending $17M over a 13-year period, courts eventually dismissed the case. Commentators from across the political spectrum have described it as a failure (e.g. Lopatka and Page 1995; Kovacic 1989b; Bork 1978).

Commission had allocated 59% of its antitrust budget to sectoral investigations into energy, transportation, health care, food, and chemical industries, with a strong focus on competition concerns (Katzmann 1980). And from 1975-1980, more than a dozen rulemakings were initiated each year, including several that established standards of competitive conduct in specific industries. One of the rules required insurance companies to provide cost disclosures in the insurance market. Another proposed rule limited the ability of professional associations such as the American Medical Association and American Bar Association to ban price advertising (Hasin 1987; Eisner 1991).

Needless to say, many of efforts to limit anti-competitive conduct irked powerful industries. In response to the FTC's competition activism, the Chamber of Commerce and National Association of Manufacturers launched a campaign around the notion that industry had become "victims of the FTC", actively lobbying Congress to circumscribe the Commission's discretionary power. Following the longstanding pattern of inter-institutional relations, members of Congress responded to the concerns of interests by constraining the decision-making power of regulators. After the 1978 election, which brought many pro-industry members into leadership positions at key congressional committees (Weingast and Moran 1983), Congress subjected the FTC to extensive scrutiny. At various times during the 1978-1979 congressional session, members of Congress described the FTC as a "king-sized cancer on our economy"; "a virulent political and economic pestilence"; "a dangerous and tyrannical entity", and an organization pursuing "demagoguery and social experimentation at the expense of the American consumer and taxpayer", among other things (Eisner 1991: 190).

The virulent rhetoric was followed by concrete action that constrained the Commission's authority. The Federal Trade Commission Improvements Act of 1980 subjected the Commission to a number of more stringent administrative procedures and reporting requirements. The legislation also significantly reduced the FTC's rulemaking power, leading the Commission to initiate almost no

new rules in the decades to come. Finally, the Act expanded antitrust liability exemptions for the insurance and agricultural industries, further narrowing the *ex ante* scope of antitrust authority (Kintner et al. 1980). Even in the name of a set of policy goals ostensibly supported by Congress itself, bureaucratic entrepreneurship would remain limited by political principals.

Congress and Competition Promotion in the Reagan Administration

Ronald Reagan was elected in 1980 with a mandate to reform regulation. To the leadership of the Division of Antitrust and the FTC, the new President appointed a number of longstanding proponents of economic liberalization such as William Baxter and James C. Miller II. While eager to dramatically scale back the agency's aggressive approach to mergers, vertical constraints, and predatory pricing, both officials supported using antitrust authority to reform public subsidies and competition-restricting regulations.

As part of this thrust of regulatory reform, the administration supported a number of antitrust cases targeting anti-competitive regulatory schemes. One focus was to use antitrust law to reform the restrictive practices of professional licensing boards such as the American Medical Association (AMA).[19] Another campaign centered on instilling competition in the taxicab industry. After an investigation of anti-competitive practices in the industry, the Commission issued complaints against the City of Minneapolis and the City of New Orleans alleging that each city's restrictive practices restrained competition in the taxicab industry (FTC 1984: 47).[20] Finally,

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[19] In 1975, the Commission had filed a lawsuit against the doctor's groups alleging that, by preventing price competition, the organization, restricted competition among healthcare practitioners. The Reagan continued to support this and similar enforcement efforts (Hasin 1987).

[20] In 1984, the FTC also published a 176-page study on anti-competitive rules in the taxicab industry, concluding that "there is no persuasive economic rationale for some of the most important regulations." The report did find that a limited number of regulations related to vehicle safety, liability insurance, and fare maximums did address a market failure. See "An Economic Analysis of Taxicab Regulation," Mark W. Frankena and Paul A. Butler, Bureau of Economics Staff Report, May 1984. Accessible at https://www.ftc.gov/reports/economic-analysis-taxicab-regulation>.

competition advocacy became a central goal of the Reagan administration's antitrust program. DOJ personnel participated in more than 600 regulatory proceedings regarding competition. Over the decade, the FTC's competition advocacy increased from 13 formal recommendations in 1981 to 102 in 1987.[21]

But in a pattern of inter-institutional relations present since the foundation of the federal regulatory state, Congress sought to block such efforts. The administration's taxicab lawsuits, for instance, were specifically put to a halt by Congress, with several appropriations bills forbidding the FTC from spending money on these cases (See Kovacic 1989a).[22] More broadly, Congress responded to the FTC's focus on competition promotion by questioning the Commission's leadership in formal hearings, seeking to defund the agency and shut down its enforcement efforts (Celnicker 1988).

The Local Government Antitrust Act of 1984 was one manifestation of this effort. The law was a direct retort to the administration's antitrust investigations of restrictive regulations at the local level. While the law ultimately did not foreclose the capacity to use antitrust to restrict local government, antitrust immunity was provided to all municipalities against private actions. The law made crystal clear that Congress would intervene if regulators challenged too aggressively the policymaking prerogatives of local governments (Celnicker 1988).

Congress also severely hampered the administration's advocacy for pro-competitive regulation. In 1987, Congress mandated new limits on the FTC's competition advocacy program, requiring the Commission to provide the House and Senate with a 60-day prior notification before offering comments to any government agency. The House sought to go even further: forbidding

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[21] Calculation from FTC Annual Reports.

[22] And Congress tried to go further. One proposal in Congress that passed out of the House would have removed all FTC jurisdiction in professional services and nullified all past commission decisions in these areas. It became clear that to avoid congressional sanction, the FTC would need to avoid extending its enforcement too far.

comments unless explicitly solicited, requiring that all comments go through the politically appointed Commission rather than through staff, and mandating that all comments be kept secret unless a FOIA request required their release (Celnicker 1988: 394). Such congressional interventions had a clear impact on the FTC's behavior. Annual advocacy filings shift from 90 in 1988, to just 2 in 1992, staying below 20 in most years during the Clinton administration (Cooper et al. 2004). While intervening less in the work of the Division of Antitrust, Congress refused to even seriously consider DOJ proposals to codify new merger policies, to eliminate treble damages provisions, and to expand antitrust to include state aid (Eisner 1991).

Constitutional Structure and the Dearth of New Delegations of Authority

Perhaps the most puzzling aspect of the Reagan administration's economic liberalization program was the failure to delegate new authority to the antitrust agencies to promote competition. In contrast to most other countries where liberalization was accompanied by the enactment of new regulation *for* competition (Vogel 1997; Moran 1993), the United States did not pass legislation that expanded the scope of antitrust or increased the real resources available for antitrust enforcement. In fact, antitrust enforcement budgets declined over the 1980's, and no new capacities were established, whether to limit state aid or enforce competition in regulated industries.

The biggest gap in American antitrust law has long been its lack of coverage over public activity. While it has sometimes been possible to use antitrust to limit privately administered regulatory schemes that are not actively managed by states, even these cases have been limited by the constitutional construction of American federalism.[23] Consequently, during the late 1970's and early 1980's, there was a movement by some economists, legal entrepreneur, and policymakers to narrow

[23] See for instance, the case, *Arizona v. Maricopa County Medical Society* 457 U.S. 332 (1982), where the state of Arizona successfully used the Sherman Antitrust Act to restrict a price fixing scheme setup by a local medical association. Following this precedent, many similar lawsuits were initiated throughout the country.

the state action exemption doctrine (Garland 1987). The FTC and Division of Antitrust, for their part, had also long been interested in state aid reform, often calling for new authority to address public constraints on competition. As the level of investment incentives increased in recent decades, there have been persistent calls to limit the growth of economic incentives (Bartik 2017; Story 2012; Kovacic and Cooper 2010). However, Congress has showed little interest in providing new regulatory power to the antitrust agencies to address state-sponsored anti-competitive regulation or the race to the bottom in business subsidies.

Even more tellingly, many of the liberalization laws enacted by Congress during the final decades of the 20th century have restricted further the authority of antitrust officials. In stark contrast to the pattern in Europe where the *ex ante* authority of competition regulators was expanded with liberalization, many of Congress's liberalization legislation *reduced* the regulatory authority of the antitrust authorities. For instance, in the 1996 Telecommunications Act, establishing a pro-competitive regulatory framework for the industry, Congress delegated competition enforcement authority not to antitrust authorities, which possess experience enforcing competition rules, but to the Federal Communications Commission, a sectoral regulator with close ties to regulated industry. Similarly, the legislation eliminating the Civil Aviation Board and liberalizing the aviation sector, left it to the Federal Aviation Administration and the Department of Transportation to be the primary monitor of competition. This design went against the expert consensus that independent competition agencies would be better positioned to enforce competition rules following liberalization. To name but one example: Stephen Breyer, currently a Justice on the Supreme Court, and one of the leading experts on regulatory reform, advocated early on that the antitrust agencies should be charged with enforcing competition rules in liberalization sectors such as transportation or telecommunications (Breyer 1987: 1016).

Why was regulatory reform designed in this way? One reason may be that a permeable legislature, rather than a partially-autonomous executive bureaucracy, is the chief architect of legislation. While the intellectual currents of the time compelled Congress to liberalize network industries (Derthick and Quirk 1985), the fragmented organization of American lawmaking meant that the congressional architects of reform legislation still had to build a political coalition that drew support from a variety of constituencies. Consequently, most liberalization initiatives incorporated many of the demands of the regulated sector. The preference of regulated industries was for sectoral regulators to administer competition rules, rather than antitrust officials singularly focused on competition issues. Since these industries retained strong links to Congress, their influence may have played a role in the design choice. Whether industry was the decisive influence or not, the design differed from that in Europe, where most liberalization initiatives were written by the Commission or executive bureaucracies, and where liberalization was accompanied by the delegation of new regulatory authority to independent competition regulators.

The AT&T and AMA Cases

The antitrust lawsuits filed against AT&T by the DOJ in 1974 and the FTC in 1975 can be considered partial exceptions to the general pattern of antitrust inaction described above. Initiated after a monopoly investigation commenced by the Division of Antitrust in the late 1960's, the prosecution of AT&T, finally settled by the Reagan administration in 1982, broke the national telecommunications monopoly into seven regional phone companies, speeding up congressional initiative to liberalize the telecommunications sector. Similarly, the FTC's administrative lawsuit against the American Medical Association, in response to its price fixing practices, was also successful, helping to curtail the ability of local medical associations to limit competition between healthcare providers (Ameringer 2000).

While the two cases do show how the antitrust laws did initially play key roles initiating the liberalization process in some regulated sectors, they also show the difficulty of promoting competition through litigation within a system characterized by strict constitutional limitations to federal power, an adversarial legal enforcement system, and a legislature that is highly permeable to organized interests. Both the AT&T and AMA cases took nearly a decade to reach a final judgment, and then a decade more to implement. The AT&T case was marked by dozens of lawsuits, continual conflict between state and federal regulatory authorities, and court adjudication characterized by continuous "contradiction and inconsistency" (Noll 1995: 508). Similarly, the AMA case was only resolved on a 4-4 tie vote in the Supreme Court, which effectively upheld the lower court decision, hardly establishing a firm precedent for federal regulatory power within markets primarily regulated by U.S. states.

The success of these cases also depended, in part, on the assent of Congress. Many of the central issues confronting telecommunications liberalization were unresolved by the litigation, leaving it to Congress to establish a regulatory framework. 22 years after the DOJ began its prosecution, the Telecommunications Act of 1996 was finally enacted, providing some clarity. However, even following this legislation, regulatory agencies completed years of protracted rulemaking.

While the FTC's litigation against the AMA did not depend directly on Congress, without the advocacy of pro-consumer and market reform groups, putting pressure on Congress, it likely would not have succeeded (Hasin 1987). In fact, the Congress was close to creating antitrust immunities for the medical industry that would have prevented it. Propelled by the AMA's political organizing and substantial campaign contributions, a majority of members of the US House voted to provide the AMA with an antitrust exemption in 1982 (Ameringer 2000). Only after the formation of a cross-ideological alliance of industry, free market conservatives, and consumer advocates, and

intensive pressure by the White House, was the exemption campaign defeated in the US Senate (Ibid).[24]

Consequently, the two cases illustrate the limits as much as the strength of bureaucratic power within the U.S. antitrust system. Even when antitrust enforcement proved crucial to the liberalization process, the role of the antitrust agencies was still delimited by the design of bureaucratic and legal authority in the antitrust field. Regulators did pursue investigations and prosecutions of consequence, but these efforts occurred in the shadow of congressional intervention. And while antitrust cases could sometimes prove consequential, whether and how they applied to particular situations remained ultimately the determination of the courts rather than regulatory agencies.

6.4 European Competition Law and Economic Liberalization

During the mid-1980's, the members of the European Economic Community 'relaunched' the European integration process on a neoliberal basis (Sandholtz and Zysman 1989; Eichengreen and Frieden 1998; Moravcsik 1998; Jabko 2006). Through the Single European Act, they agreed to eliminate 279 non-tariff barriers to trade, including the liberalization of trade in services (Moravcsik 1998). Six years later, member states deepened their economic cooperation through the Treaty of Maastricht, agreeing to a form a single monetary union and to pursue internal adjustments of government spending and economic structures to make feasible the pooling of monetary policy. Additionally, much of European legislation during this period related to economic liberalization—in telecommunications, energy and gas, airlines, maritime, road transport, railroads, finance, banking, and postal services, as summarized in Table 6.1. Much of the policy focus was aimed at increasing

[24] See also Hasin 1987.

the competitiveness of European firms and the efficiency of the western European economies (Lawton 1999).

Like in the United States, the European competition-directorate was broadly supportive of the liberalization program, serving as a conduit of advice and expertise on competition questions. But in addition to the advisory role performed by US antitrust officials, and the handful of consequential litigation efforts, the European competition authority played a more active, entrepreneurial role: initiating liberalization legislation, developing extensive rules to govern state aid to industry, coordinating enforcement by national regulators, and enforcing competition rules—frequently and often consequentially—within liberalizing sectors. Over the past three decades, the Commission has initiated scores of competition cases against dominant companies in regulated sectors and hundreds of state aid cases against member states that have contributed to liberalization.

Such an active and extensive enforcement program was possible because, as a check against economic protectionism, the Commission had been delegated broad *ex ante* authority during the 1950's and 1960's, the formative years of the European Communities. The Commission's competition powers applied to most economic sectors as well as both private and public activities. Moreover, competition law could be enforced through administrative rather than judicial processes, that provided much more leeway to regulators. When it came to public companies, the Commission even possessed the legal authority to issue unilateral directives.

The Commission's liberalization program was also aided by the design of the European Treaties as a system that provided the Commission with an agenda setting veto in the lawmaking process and that allocated to principals few channels of *ongoing* controls in areas such as competition law where, by the 1980's, the Commission's authority was well established. In particular, the competition-directorate did not face legislative bodies like the US House and Senate that could,

through a simple act of legislation, curtail its authority. Similarly, it was not subject to a centralized executive which could use political appointments to influence the enforcement program.

The main limitation on the Commission's authority in the competition field was the Court of Justice of the European Union, an institution that has strengthened the accountability and legitimacy of competition enforcement and helped to guide its long-term development. However, since the European courts have long held strong integrationist preferences—with some observers characterizing rulings that consistently expand but rarely circumscribe the expansive of European law as governed by a 'teleological' logic (e.g. Lord 1996)—where the Commission's enforcement program was seen as advancing European integration, the two supranational bodies' preferences have been aligned. Moreover, because a broad delegation to the Commission of competition enforcement was established early on in the EEC, the courts have generally found legitimate and appropriate the Commission's exercise of discretion in competition matters, rarely overturning decisions on substantive grounds, and usually deferring to the competition directorate's expertise.

As we will see in the examples below, the Commission's wide zone of discretion in this field gave the competition directorate a number of policymaking and enforcement opportunities that were not available to American regulators. First, the Commission could use its agenda setting and legislative authority to encourage initiatives that liberalized key economic sectors such as telecommunications and energy. With veto power on the introduction of legislation, and expansive court interpretations of the Treaties, the Commission's competition directorate could shape many of the details of liberalization. In some areas such as state aid, it could use its delegated authority to develop 'soft' law that, over time, crystallized into harder, actionable rules.

Second, the Commission could utilize its enforcement discretion to systematically apply competition rules in ways that bolstered liberalization and other legislative priorities. This wide authority, enforced through administrative rather than judicial processes, meant that legislative

initiatives could be accompanied by enforcement actions that forced compliance (Geradin and Sidak 2003). Formally independent of member states, and facing few channels of influence by organized interests, the Commission could enforce competition law even in areas involving core member state interests and which challenged the business models of powerful companies.

Finally, the Commission's lawmaking powers under the Treaties gave the competition-directorate strategic resources that could be used to autonomously shape member state preferences and, under certain circumstances, evade political control. This agenda setting power allowed the Commission to push the project of economic liberalization and industrial policy reform beyond the immediate preferences of member states. Indeed, the pattern of developments suggests that certain dimensions of European liberalization would not have been achieved if the Commission had been originally delegated less expansive authority in the competition field, or if the broader constitutional organization of powers had been more constraining on bureaucratic power, as in the United States.

In what follows, I first examine the Commission's competition enforcement program, and the ways in which it has aided the broader liberalization program. A second section examines public enterprises, and the legislative powers the Commission has asserted in this area. A third section looks at state aid policy, examining how the Commission used its delegated authority to gradually expand the scale and scope of enforcement against member states' economic development schemes, and analyzing some of the effects that this policy has had on economic subsidies in the EU.

6.4a Competition Enforcement and Regulatory Liberalization

One area where we can observe the effects of the design of European competition law is in the enforcement of competition rules within sectors such as telecommunications, energy, and transportation, network industries that have been a focus of economic liberalization efforts over the past three decades. Liberalization within these sectors has been more intensely pursued in Europe,

in part, because the Commission and national-level competition authorities, could accompany liberalization legislation with *ex post* enforcement actions that helped ensure compliance, and addressed ongoing competition challenges that emerged in these markets. Precisely because the Commission possessed broad independence in this area, it was difficult for member states or companies to resist individual competition enforcement actions. As long as majority support could be maintained for the project of economic liberalization as a whole, the Commission enjoyed significant political independence in specific enforcement decisions.

Competition Enforcement and Telecommunications

The clearest example of competition enforcement playing a central role in the promotion of liberalization can again be seen in the telecommunications sector. During the late 1990's and early 2000's, the Commission, as part of its liberalization program in the sector, pursued a number of inquiries regarding excessive accounting rates, roaming charges, leased lines, and mobile phones (De Streel 2014). In 1998, the Commission initiated seven cases against incumbent telecommunications firms for excessive accounting rates, leading the companies to reduce rates by an average of 27% in Finland, Austria, and Portugal (De Streel 2014: 190). In 1999, the Commission began a sectoral inquiry into the leased lines sector of telecommunications, which were seen as important infrastructure for internet technology. Upon conclusion of the inquiry in 2002, the Commission opened five cases against companies for excessive pricing, which were withdrawn only after companies significant reduced prices (Ibid: 191). Around the same time, the Commission launched a quasi-sectoral inquiry into mobile phones, which led to several cases against incumbents for "allegedly excessive fixed termination charges, fixed retention charges, and mobile termination charges" (Ibid). In 2000, the Commission pursued another inquiry into roaming charges, opening cases in 2004-2005 for excessive roaming charges, which became the basis for the enactment of

legislation in 2007 outlawing roaming charges entirely (Ibid: 192). Many of these actions led to significant changes in industry practice.

At various times, the Commission also initiated administrative procedures against telecommunications companies seen as abusing their dominant positions. Large fines or statements of objections were issued against Wanadoo in 2003, Deutsche Telecom in 2003, Telefónica in 2007, TeliaSonera in 2011, Telekomunikacja Polska in 2011, and Slovak Telecom in 2012—all under Article 86. Many of the remedies imposed by the Commission have gone beyond existing regulatory requirements, highlighting the way in which competition enforcement has often led, rather than followed, legislation.[25] More recently, fewer cases have been initiated at the European level, but similar cases against dominant telecom players continue to be pursued by national regulators.

Competition Enforcement and Other Regulated Sectors

Competition law has also been actively applied to advance liberalization in other regulated fields such as water, sewage, transport, postal services, and energy (Buch-Hansen and Wigger 2010). For instance, in the 1990's, when the Commission found it difficult to convince member states to fully sever their ties with state owned postal and rail operators, it issued a number of actions against postal and rail operators to "place an end on abusive practices, including cross-subsidization, discrimination, predatory pricing, excessive pricing, tying, refusal to supply, etc." (Geradin and Sidak 2003: 18).

[25] Geradin and Sidak 2003 report: "For instance, in *Atlas*, a JV between France Telecom and Deutsche Telekom, the Commission granted a five-year exemption that provided inter alia that France and Germany liberalize alternative infrastructures, a requirement that was not yet imposed by EC telecommunications legislation. Similarly, the Commission cleared the *Telia/Telenor* merger after the Swedish and Norwegian governments committed to introduce local loop unbundling in their countries—that is, more than a year ahead of Regulation 2887/2000, which imposes local loop unbundling to the fifteen Member States" (17-18).

Energy is another sector where the competition-directorate has been active. A recent report by European Parliament's Directorate-General for Internal Policies identified 351 separate merger and antitrust cases handled by the Commission in the energy and gas sector from 1994-2014.[26] Two sectoral inquiries have been initiated at the European level, while national competition authorities have pursued their own inquiries.[27] As part of the monitoring of the implementation in practice of energy sector liberalization, the Commission has analyzed the switching rates of energy consumers, market concentration, and barriers to entry, pursuing cases when deemed appropriate. Finally, a number of state aid cases have been initiated against member states in the energy sector. In the 1990's, the Commission pursued infringement procedures regarding gas and energy monopolies against Denmark, Spain, Italy, Ireland, the Netherlands, Belgium, Greece, Portugal and the UK (Schmidt 1998: 177). More recently, cases were pursued against member states for illegally subsidizing energy sectors: renewable energy in Portugal, liquefied natural gas in Finland, renewable support in Croatia, cogeneration in Germany, and renewable energy in Italy.

Article 90 and the Reform of Public Enterprises

The European competition directorate also used its regulatory authority over publicly owned companies to promote liberalization. In this area, we can directly observe the legacy of the delegation choices of the 1950's in the policy program of the 1980's. The predominance of massive industrial policy programs such as the Monnet Plan in France or the Cassa per il Mezzogiorno in Italy during the postwar had led member states to establish extensive state rules in the Treaty of

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[26] See "Competition Policy and an Internal Energy Market," 2017. European Parliament Directorate-General for Internal Policies, Policy Department, at page 34. Accessible at <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/607327/IPOL_STU(2017)607327_EN.pdf>.

[27] Germany, for instance, conducted official inquiries related to the gas transmission sector (2009), the fuel sector (2011), the electricity sector (2011), and district heating (2012). See European Parliament: 38.

Rome. The benefits of a common customs union would hardly be realized if member states could use the public purse to subsidize industry at the expense of their neighbors. Thus, member states delegated to the Commission particularly strong authority when it came to public undertakings and private undertakings granted state privileges. Under Article 90 of the Treaty of Rome (today Article 106), the Commission has the power to "address appropriate directives or decisions to Member States" if their public undertakings or undertakings granted special rights are deemed to undermine the European Treaties.[28] This effectively means the Commission has the legal authority to issue unilateral directives and decisions that are binding on member states in the area of public enterprises (Schmidt 1998: 170).

During the 1960's and 1970's, when each member state had a veto in the Council, and the main focus of the EEC was industrial development and the establishment of a common customs union, there was only limited political will to actively utilize these powers (Cini 2001). This changed in the late 1970's and early 1980's. The economic challenges of the period led member states to spend increasing public funds subsidizing struggling industrial sectors such as steel, shipbuilding, and textiles. From the Commission's standpoint, many of the problems faced by these industries related to overcapacity, a problem that was exacerbated by industrial subsidies. In response, the competition-directorate established codes for shipbuilding, steel, and textiles, both to limit the negative effect on the common market and to encourage more productive use of public dollars. However, it often struggled to receive basic information about expenditures from member states, undermining the effectiveness of the codes (Smith 1998).

[28] These provisions are now contained in Article 106 of the Lisbon Treaty See < http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-vii-common-rules-on-competition-taxation-and-approximation-of-laws/chapter-1-rules-on-competition/section-1-rules-applying-to-undertakings/374-article-106.html>.

Frustrated with member states' opacity in the area of state aid, and tired of seeing requests for information ignored, in 1980, the Commission decided to use, for the first time, its authority under Article 90 of the Rome Treaty. The Commission Directive on Transparency requires member states to provide detailed information about all enterprises that receive public funding.[29] Like any other European legislation, the directive had the force of law, so if member states refused to comply, the Commission could initiate an infringement procedure at the European Court of Justice. The Commission's unilateral authority in this area also meant that it could continually update the directive in response to new developments, without prior consultation with member states. Over the last three decades, the Commission has amended the directive on five occasions, each time making reporting requirements more specific, often in response to creative strategies by member states to obscure state aid, such as the guaranteeing of loans through opaque instruments (Smith 1998: 63).[30] With stronger incentives to report requested information, and fewer opportunities to evade them through creative measures, member states have gradually become more forthcoming about aid to public enterprises, making it easier for the Commission to implement a comprehensive state aid program.

Article 90 and Network Industries

These legislative powers have proved crucial, at times, to advance the economic liberalization agenda (Schmidt 1998; Larouche 2000). During the late 1980's, the Council failed to agree on several liberalization initiatives proposed by the Commission and supported by a number

[29] The directive is quite detailed about the information member states need to provide, setting clear timelines for reporting and covering a wide range of subsidies, from the provision of capital to the provision of loans on privileged. See "Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings" at < https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31980L0723&from=EN>.

[30] See European Commission, Legislative Archive: Transparency of public undertakings at < http://ec.europa.eu/competition/state_aid/legislation/transparency_archive.html>.

of member states. In response to the impasse, the Commission enacted one of the proposals unilaterally, using its Article 90[106] under the Treaty of Rome. The directive required member states to liberalize all terminal equipment, the communications equipment used at either end of a communications link, that converts user information into signals or converts signals back into user information. At the time, these devices were mostly controlled by public companies, which created opportunities for them to limit both competition and economic integration within the sector.

Like other legislation, the directive took direct effect in member states. But unlike nearly all other European legislation, it had not gone through the standard decision-making procedure, involving the Council. The Commission's assertion of unilateral legislative powers on an initiative that the Council had only recently voted down upset several powerful members of the Council. Spain, with the support of France, Belgium, and Italy, sued the Commission in the ECJ, challenging the body's authority to issue its own directives in the telecommunications field. However, since this power had been established in the Treaty of Rome, and since the Court was wont to rule against the Commission in a case that furthered European integration, the new telecommunications directive was upheld. Efforts to sanction the Commission through reverse legislation were blocked by Germany and other northern European countries supporting the telecommunications legislation. Outnumbered in the Council and with a legal remedy unavailable, the losing governments accepted the legal authority of the Article 90 directives.

With the backing of the ECJ, the Commission continued to use its unilateral lawmaking powers over the next decade. In 1990, it issued another Article 90 directive forcing the liberalization of telephony services (Schmidt 1998: 173). And the Commission continued to do so whenever member states would not agree to legislation through the co-decision procedure, issuing its own directives in satellite services and equipment in 1994, cable TV networks in 1995, the liberalization of alternative networks in 1996, and the full liberalization of all services and networks after 1998

(Schmidt 1998: 173). Thus, in great contrast to the US, where the Telecommunications Act of 1996—a law written by multiple factions of Congress under the broad influence of regulated industry—structured the liberalization in Europe, the telecommunications industry was liberalized via bureaucratic decree. Even when legislation was enacted through the normal co-decision procedure, negotiations over legislation occurred under the shadow of the Commission's unilateral authority, expanding the supranational authority's leverage. For instance, several times during the 1990's the Commission explicitly threatened to use its Article 90 powers to liberalize the energy sector if member states did not agree to various proposals.[31] Such was the legacy of the 1957 Treaty of Rome, and the broad delegation of authority established in that formative period.

These directives, all of which had the force of law, had a major impact on the structure of European telecommunications, contributing to the privatization of most public companies, new investments in the industry, the growth in the number of companies with operations in multiple countries, and the gradual reduction of consumer prices. The fact that member states did not have the opportunity to water down legislation with amendments, or to accommodate particular interests, likely contributed to the effectiveness of the European telecommunications liberalization program.

To be sure, the use of these powers would not likely have been possible if there had not been general support for liberalization, or if there had not been a crystallizing consensus during the 1980's and 1990's that further economic integration would be economically beneficial. The absence of public company legislation during the 1960's and 1970's, when the political climate significantly differed, suggests that the Commission's authority is constrained by the overall preferences of member states. Yet, the significance of the institutional legacy of this authority should not be ignored. Had such powers not existed in the Treaties, it would have been easier for the

[31] In 1991, for instance, the Commission drafted Article 90 directives to sidestep resistance to gas and energy liberalization, and proposed similar measures in 1995 (Schmidt 1998: 176-177).

telecommunications and other industries to mobilize their national governments to dilute liberalization legislation, as occurred in the congressionally-dominated liberalization process in the United States. And had the Commission not had broad-based competition enforcement authority, it might have been easier for incumbent players to maintain market dominance, and member states to resist reform.

6.4b State Aid Policy

The reform of state economic development policy is another area where the institutional design of bureaucratic discretion has affected the trajectory of economic liberalization. As has been recounted by a number of scholars (Smith 1996; Smith 1998; Cini 2001; Blauberger 2009), the Commission's state aid enforcement has changed dramatically since the 1970's. The average annual number of state aid cases formally initiated by the Commission rose from 60 during the 1970's to more than 200 in the 1980's, to 513 in the 1990's, to annual totals that often exceed 1,000 in the 21st century.[32] The remit of state aid has also expanded, from an initial focus on just sectoral and regional aid, to one that now includes many core economic policies such as infrastructure financing, environmental promotion, and research and development, to name just a few examples. Finally, the Commission increasingly uses its state aid powers to force member states to claw back significant amounts of money. From 1999-2015, the European Union issued 255 state aid recovery orders, totaling € 11.3 billion.[33] In August 2016, the Commission finalized its biggest recovery order to date,

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[32] Data collected from Commission Annual Reports. Calculations are my own.

[33] "State Aid Recovery Statistics". Accessible from < http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html>. Last accessed Nov. 4, 2016.

requiring Ireland to recover €13B of tax benefits that had been provided to Apple, the American technology company.[34]

The intensification of state aid policy has helped to transform economic development policy in Europe. While aid to the steel, shipbuilding, coal, and manufacturing sectors made up as much as 5% of GDP in some member states during the early 1980's, support to industrial sectors outside of railways and agriculture has now fallen to less than 0.03% of GDP in the EU-27.[35] Even agricultural aid, long seen as evidence of the EU's protectionist stance, has fallen from 0.2% of GDP at the beginning of the 1990's, to just 0.04% of GDP in 2016. While in the United States, there has been a significant uptick in economic incentives programs—with one scholar estimating a 300% increase in the value of programs as a percentage of industrial value added since the early 1990's (Bartik 2017)—in the EU, these programs have been limited by state aid law. In 2005, Thomas (2011) estimates that US cities and states paid out an estimated $47B in grants and tax expenditures—far more than the $12.9B offered by EU states through economic incentives grants and tax breaks. While conceivably member states could hide subsidies through permitted 'horizontal objectives' such as research and development and environmental sustainability, total state aid is also on the decline, shifting from an estimated 3% of GDP in the EU-10 during the early 1980's to around 0.66% in the EU-28 today, with only 0.04% falling into the categories of sectoral aid, rescue and restructuring aid, or closure aid that used to constitute such a significant chunk of state expenditures.[36]

[34] "State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", European Commission, Press Release, Aug. 30, 2016. Accessible at http://europa.eu/rapid/press-release_IP-16-2923_en.htm. Last accessed Nov. 6, 2016.

[35] See Commission of the European Communities. 1988. "First Survey on State Aids in the European Community. SEC (88) 1981. 13 December 1988. Accessible at <http://aei.pitt.edu/3100/>.

[36] 1980's figures based on Commission 1988. More recent figures from Eurostat, which can be accessed now on the website of DG Competition. See https://webgate.ec.europa.eu/comp/redisstat/databrowser/explore/all/all_themes.

The intensification of state aid enforcement has been strongly influenced by the entrepreneurship of the Commission. Indeed, nearly all of the seminal shifts in state aid enforcement—the development of quasi-legislative codes, the expansion of these codes to increasing numbers of policy areas and dimensions of economic policy, the enforcement of these codes through administration action, the recovery of state aid through the ECJ—were changes initiated by the Commission. While member states did, of course, assent to the shift in enforcement focus, delegating new implementation authority to the Commission during the 1990's and 2000's, and supporting the general thrust of policy, their supportive position was strongly shaped by the Commission's entrepreneurship. Put a different way, the Commission was able to utilize its longstanding agenda setting and enforcement powers to alter the preferences of member states, which remained quite divided on the question of state aid during the 1980's and 1990's, and continue to balk at certain enforcement efforts today. By framing state aid enforcement as necessary for integration and development, and by acting strategically to isolate opposition, the Commission helped to change the debate on state aid, and dramatically intensify its enforcement.

State Aid and Soft Law

The Commission's entrepreneurship can be seen clearly in the gradual expansion of the state aid framework from 1970 to 1990. During the early 1970's, the Commission had responded to the Council's refusal to delegate broad implementing authority in state aid, by developing "guidelines, frameworks, communications, codes, and even at times letters" to guide state policy (Cini 2001). The first example of this "soft law" occurred in 1971, when the Commission established a framework for state aid in textiles and clothing. Over the decade, similar informal codes were devised for coal, steel, and ship building as well as for horizontal objectives such as regional aid (Smith 1998).

During the 1980's, this soft law was gradually transformed into harder instruments that could be enforced against member states (Blauberger 2009; Cini 2001; Smith 1998). The two liberal competition commissioners during the Delors Commissions, Peter Sutherland and Leon Brittan, developed new codes in a number of areas such as motor vehicles and research and development, while tightening the screws on the existing programs. Gradually over the 1980's, state aid rules developed entirely by the Commission not only became more detailed and expansive, but also increasingly binding as the Commission pursued enforcement actions against member states that did not voluntarily comply (Cini 2001). By the end of the late 1990's, the Commission had used its agenda setting and legislative veto powers to convince the Council to codify much of its state aid protocol, and to delegate explicit authority to the Commission to continually update and revise state aid policy in response to new developments (Blauberger 2009). As a result of this bureaucratic entrepreneurship, a set of protocols and guidelines developed by the Commission over multiple decades, now serves as a significant constraint on national economic policy.

In the 21st century, the reach of the European state aid policy framework has only grown. Sector specific rules have now been developed for audiovisual production, financial services, broadband, broadcasting, electricity, postal services, air transport, maritime transport, and rail and road transport, among others.[37] During the financial crisis, the Commission developed a significant body of rules to guide bank recapitalization and financial stabilization.[38] Most recently, the Commission completed detailed guidelines on how state aid should be structured across more than a dozen different kinds of infrastructure.[39]

[37] See European Commission, "Legislation: sector-specific rules," at http://ec.europa.eu/competition/state_aid/legislation/specific_rules.html.

[38] See European Commission, "State aid temporary rules established in response to the economic and financial crisis," at < http://ec.europa.eu/competition/state_aid/legislation/temporary.html>.

[39] See European Commission, "Analytical grids on state aid to infrastructure, 2016-2017" at < http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html>.

It is important to emphasize that member states have often opposed these developments and sought to stop their implementation. However, because member states have heterogeneous interests, and the Commission retains a monopoly on introducing legislation, it has been difficult for any single or small group of member states to limit the Commission's authority through secondary legislation or political pressure. In certain areas, the Commission's authority is so clear under the Treaties, that to sanction the Commission, member states would need to revisit certain Treat provisions, a task which would require unanimous agreement. Additionally, the Commission's agenda setting and lawmaking authority under the Treaties, has provided the supranational bureaucracy with strategic resources that can be used to push member states toward its own integrationist preferences. The result of the broad zone of independent decision-making authority established by the Treaty of Rome is that the Commission has rarely been constrained by its political principals within this policy domain. On the one hand, the Commission's independence has bolstered member states' credible commitment to cooperation; but on the other hand, it has meant that member states have sometimes found it difficult to limit the Commission's assertion of new authority, even in areas where core interests were at stake. By looking at several episodes from the late 1980's and early 1990's where some member states sought to restrain the Commission's competition powers, we can see some of the ways that the European 'constitution' facilitated the supranational bureaucracy's relative autonomy within this policy area.

Motor Vehicles and Soft Law

One of the Commission's goals was to reform the structure of the motor vehicles sector. Over the period, DG IV pursued an increasing number of cases against automakers, ruling on 21 cases in total from 1987-1992 (Stephen 2000: 153). In 1986, it prohibited a distribution agreement used by Peugeot and found the British automaker Rover guilty of abusing its dominant position. The

following years, it ruled against Volvo for using certificates of conformity to limit parallel trade, and Fiat for requiring distributors to use oil. In 1989, it ruled against VW in the supply of cars to the British market (Ibid: 151). But at the same time, it approved agreements, sometimes with conditions, that it viewed as either improving productivity or promoting integration, such as joint ventures between Volvo and Renault, Ford and VW, and Fiat and Iveco, a truck manufacturer (Ibid: 152). Despite these enforcement actions touching on core economic interests, the Commission was largely successful at securing compliance.

In 1989, the Commission intensified its enforcement by targeting member state industrial policy in this sector, enacting a Community Framework of State Aid to the Motor Vehicle Industry. An example of soft law developed entirely by the Commission, the framework established comprehensive rules for state aid in the motor vehicle sector, as well as requirements to notify the Commission of aid in this sector, including both direct and indirect means of support. As in the earlier period, the focus of the framework was to make European industry more competitive; thus, all operating aid to the industry was forbidden, while innovation aid, modernization aid, and rescue and restructuring aid could be applied in limited circumstances (Cini 2001).

The scheme was accepted voluntarily by ten countries, but the Spanish and German governments declared their intention not to comply. The Commission responded by using its discretionary authority under the Treaties to convince the two states to adopt their stance. To the Spanish government, the Commission made it clear that if the framework arrangement were not voluntarily accepted, every Spanish aid program in the sector would be scrutinized on an individual basis by the competition-directorate. Facing the prospect of a more invasive enforcement program, the government changed its position and agreed to accept the motor vehicles framework.

With such a core area of industrial policy at stake, the West German government was more resistant, and initially refused to adopt the code. The Commission responded by initiating a formal

administrative action under its state aid authority, the first time that formal action had been taken against a member state for refusing to adopt a 'voluntary' code. Realizing that appealing the Commission's negative decision to the ECJ would likely be unsuccessful, and outnumbered in the Council, Germany accepted the program's legitimacy and implemented its requirements by the end of 1990 (Cini 2001).

Both examples were reflective of the Commission's bureaucratic autonomy, in the sense used by Carpenter as the capacity of a bureaucratic organization to "change the agendas and preferences of politicians and the organized public" (Carpenter 2001: 15). The Spanish and German governments agreed to a policy that they otherwise would not have supported in the absence of the Commission's broad agenda setting and enforcement powers. By leveraging its enforcement discretion and framing its actions as necessary to reduce economic protectionism, the Commission was able to convince member states to change their position on a key issue, and thereby advance its own preferred policy program.

The European Council and State Aid Policy

Another revealing episode occurred around the same time period. In response to the expanding scope and scale of the Commission's state aid rules, the Council President, Adolfo Battaglia, sought to develop a Council Regulation that would allow member states to write the details of state aid soft law, and thereby limit the Commission's *de facto* discretion in this policy area (Smith 1998; Slot 1990). As Stephen (2000) notes, the proposal was "designed to limit the discretion of the Commission and so set in stone the existing permissive regime, which Brittan wished to steadily tighten" (160).

In 1990, Battaglia requested that Competition Commissioner Leon Brittan introduce legislation along these lines. In possession of a monopoly on the introduction of legislation, the

Commission, at Brittan's request, refused to introduce state aid regulation. Since the Commission is an independent institution with a monopoly on legislative introduction, there was little the Council could do in the short-term, especially at a time when member states were divided on the question of state aid. In the end, Battaglia, never received his requested legislation that, if enacted, could have severely limited the Commission's discretionary control over state aid policy.

Seven years later, in 1996, the Commission did introduce secondary legislation to modernize state aid, but for its own reasons and on its own terms. Facing capacity constraints, the Commission wrote a directive that delegated to itself the ability to exempt certain forms of state aid in block (Sinnaeve 2001). Additionally, the Commission introduced legislation that altered state aid procedures, expanding its power to recover state aid and limiting the ability of national courts to intervene in these processes. Both regulations were accepted by the Council. However, because the Commission could control when the legislation was introduced, the initiatives were only allowed to proceed during a moment when member states were less interested in constraining its powers. Thus, the adopted legislation included few amendments from the Council, and largely codified the Commission's own state aid protocols and established preferences in this area (Smith 1998).

This new delegation of authority not only legitimized the Commission's state aid program, but also expanded the competition directorate's capacity to shape member state economic policy. By creating block exemptions, the competition regulator could play a more active role developing 'positive' policy for member state investments, while also better targeting its enforcement efforts against 'negative' violations. Member states had agreed finally to give explicit authority to the Commission in this heavily guarded area touching on core economic interests. But such a move had been possible only because detailed state aid rules had been included in the Treaties, reflecting the origins of European competition law as a tool to limit economic protectionism. Moreover, the authorization of such a broad delegation of enforcement discretion to the Commission had

depended on the organization of powers in the Treaties. Much like Regulation 17/62, which delegated to the Commission exclusive enforcement authority, and the 1965 legislation establishing its block exemption authority for horizontal coordination, the state aid legislation had depended, in part, on the executive-centered organization of lawmaking. Because it controlled the timing of legislative introduction, the Commission was able to resist attempts at political control. And because it could write the legislation considered by member states in the Council, the Commission was able to construct a state aid policymaking and enforcement system that maximized its own discretionary authority.

6.5 Conclusion: Competition Policy and Varieties of Liberalization

Comparative political economy scholars have in recent years called our attention to *variation* in economic liberalization. Across a number of different dimensions from labor regimes (Thelen 2014) to taxation (Christensen 2017), nearly all OECD countries have subjected to market forces many economic sectors once organized around alternative developmental or social logics (Evans and Sewell 2013; Streeck and Thelen 2005). At the same time, they have structured liberalization in different ways, which have resulted in more or less egalitarian outcomes (Thelen 2014), or more or less extensive reforms (Christensen 2017). Even when liberalization initiatives have led to broadly similar outcomes they have, nevertheless, been undertaken differently, with variation in the timing and mechanisms undertaken (Dobbin and Simmons 2008). As Steven Vogel (1997) noted twenty years ago, freer markets would lead to more rules, but the specific details of these rules and the ways they are embedded in domestic political systems would continue to be influenced by longstanding political coalitions and state institutions, thereby preventing convergence (5).

In this chapter, I have highlighted one dimension of variation in liberalization that has not been widely noted by scholars, but which has had a profound effect on the liberalization process. In

the above analysis, I have shown that the pattern of competition enforcement has differed greatly in the United States and the European Union, two of the most important regulatory jurisdictions in the world. Specifically, I have shown that competition policy and competition enforcement has formed a much more central component of the European liberalization process than in the United States, where antitrust regulators have played a comparatively marginal role. As a result, European liberalization has been more comprehensively applied, and resulted in more liberalized markets in certain areas compared to the United States, a departure from the pattern observed during most of the 20th century.

In Europe, liberalization has been accompanied by a significant expansion of state capacities in competition regulation, and a dramatic increase in competition enforcement. The European Commission has spearheaded the liberalization process, developing extensive legislation that liberalized network industries and established state aid rules, while actively enforcing it across a wide range of sectors. In the United States, the period is marked by the opposite set of developments: the reduction in antitrust enforcement and the establishment of almost no new *ex post* capacities to limit state aid or enforce competition in regulated industries. While advocating for pro-competition reforms, and initiating a few important lawsuits, antitrust regulators have played much less prominent roles monitoring and enforcing reform, and almost no role at all reforming public subsidies to industry.

I have explained these varieties of liberalization largely as the result of distinct delegation choices made by political principals during the formative periods of competition law within each system. In the United States, the narrow zone of discretion reflected the origins of the antitrust regime in the crucible of the late 19th century, when the legitimacy of federal public administration was low and skepticism toward delegating authority to a bureaucracy high. And this initially narrow zone of bureaucratic discretion was shaped by inter-institutional struggles for control that both

expanded the capacity of antitrust regulation, while also limiting its reach. In Europe, the broad zone reflected the unique origins of European competition law as an institution to limit national protectionism and help foster economic cooperation.

Additionally, I have pointed to some of the ways that the broader organization of powers in the American and European constitutional systems have conditioned these broader developments. I have explained these differences as rooted in the legacies of distinct delegation structures. In the US, a constitutional structure that provides both the President and the Congress significant opportunities for political control has limited the application of antitrust to regulated sectors, while preventing the expansion of antitrust to include new areas such as state aid. In Europe, the independence of the Commission, the lack of a strong Parliament, and the divided structure of the Council are institutional features that each presented barriers to political principals asserting political control. Such a structure has also created opportunities for the Commission to assert a semi-autonomous role in the competition field, using its authority to shape member state preferences and to apply competition policy in ways that reflected its own integrationist preferences.

Conclusion

Returning to the Microsoft case outlined in the introduction, we can now more clearly understand why the ultimate outcomes were different in each system. While both American and European regulators concluded that Microsoft's software bundling strategies violated antitrust rules, and courts in both systems largely concurred, European regulators possessed more capacity to demand changes to Microsoft's behavior. To analyze the case in terms of the theoretical framework of the dissertation: In Europe, regulators possessed a wider zone of discretion—that is, they had more *ex ante* authority while being subject to fewer ongoing controls. In the US, by contrast, bureaucratic discretion was more limited, characterized by a narrower scope of authority and more significant ongoing political controls.

The European Commission could draw upon its broad, flexible powers to investigate Microsoft's alleged violations. The initial ruling could be made largely on the basis of the Commission's own actual record and investigation. And following its judgment, it could actively monitor the company's compliance without concern of political intervention. Only after the initial administrative decision, did a court become involved, and even then, the ECJ scrutinized procedure more than the Commission's substantive determinations.

By contrast, US antitrust regulators had to prove their case, not through a vertically-organized administrative process where the government possesses official responsibility for fact finding, but in the adversarial federal courts, a forum that provided a large corporation such as Microsoft with extensive procedural tools to delay action and challenge the government's claims. Finally, the US DOJ, though staffed with many competent, mission-driven professionals, was still directly accountable to an elected president, creating an opportunity for partisan considerations to influence decision-making within the Department of Justice. After the election of George W. Bush in 2000, and the replacement of multiple leadership positions within the Antitrust Division with

Republican appointees more supportive of Microsoft's position, the Division largely stopped monitoring the company's compliance with previous orders, calling off investigations into reports that Microsoft had established new barriers to competition.

In both cases, the organization of bureaucratic discretion was the result of delegation choices made decades earlier. The systematic differences the result of the distinct political origins of each system's competition policy, and the ways in which the constitutional organization of policymaking structured each regime's long-term institutionalization. In the US, the judicial system and the high degree of private enforcement stemmed from its late 19th century origins, as a regime established in response to the demands of the radical agrarian movement in the context of a weak administrative state and strong judiciary at the federal level. It was also highly affected by the structure of the US constitution: specifically, the primacy of Congress in lawmaking, the President over administration, the states in economic regulation, and the courts in adjudicating the relationships between each institutional actor. Similarly, in the EU, the Commission's broad authority and orientation toward market integration was the legacy of the origins of European competition law as part of a credible commitment to economic cooperation, while the administrative enforcement system, the lack of private enforcement, and the political insulation of the competition-directorate was shaped by the executive-dominated pattern of policymaking.

Taking Stock

I have argued in the dissertation that the Microsoft cases are far from exceptional. Rather, they reflect systematic trends in competition policymaking and enforcement in the recent period. In Chapter One, I detailed the empirical pattern of competition policy and enforcement over the past thirty years. The analysis demonstrates that, across multiple dimensions of regulatory output, and within many different economic sectors, European competition enforcement is now more

intensively and extensively applied than American antitrust. In Europe, the Microsoft cases represented just two of more than 100 market abuse investigations that the Commission has pursued in the 21st century, many of which involved core economic sectors and the world's largest corporate enterprises. The DOJ's prosecution of Microsoft, by contrast, was one of only a handful of major monopoly cases pursued by US antitrust officials over the last forty years. Moreover, the case illustrated the limitations as much as the strengths of the US antitrust system.

In Chapter Two, I provided evidence from the formal analysis of the law and the examination of enforcement patterns that these divergent outcomes are rooted in differences in the zone of bureaucratic discretion within each system: in the US, in an adversarial legal system of enforcement that is marked by narrow independent decision-making authority for regulators and extensive political controls; in Europe, in an expansive zone of discretion that provides the Commission with the power to apply competition law across the European economy with minimal political intervention. And in Chapter Three, I discussed some of the theoretical reasons the systems have organized differently bureaucratic discretion, highlighting the importance of political origins and the constitutional organization of powers.

In three historical chapters, I identified the political-historical roots of these differences in the construction of administrative power. Specifically, I argued that differences in the political coalitions establishing each regime, and the constitutional organization of political power led to distinct institutional designs and trajectories. In Chapter Four, I detailed the political origins of the American regime out of political coalitions demanding economic justice at the end of the 19th century. And I showed how the design of the antitrust regime—and its long-term institutionalization—were shaped by a Madisonian constitution that separated legislative and executive power, creating incentives to limit bureaucratic authority and impose extensive ongoing political controls on regulatory behavior. In Chapter Five, I provided evidence that the primary

political actors shaping the establishment of European competition law were state officials seeking to establish an institutional structure that would credibly commit governments with distinct interests to economic cooperation. And I detailed how the dominance of executive actors within the European constitutional system—with an unelected supranational bureaucracy responsible for all law writing and representatives of national governments serving as the most important veto player—helped to maintain and expand the Commission's broad zone of discretionary power.

Finally, in the empirical analysis of the role of competition policy in the liberalization of regulated industries and the reform of state aid undertaken in Chapter Six, I explored some of the consequences for politics and public policy of the differences in bureaucratic discretion. In particular, I highlighted how the Commission's broad zone of discretion allowed it use its control over policymaking and enforcement to systematically direct competition law toward the goals of economic integration and economic policy reform, while also evading efforts by some member states to assert political control.

Contributions of the Study

The analysis of the design and practice of regulatory institutions as a question of delegation is hardly unique. Indeed, in the United States, principal-agent theories of bureaucracy are arguably hegemonic. The literature analyzing American regulatory institutions in terms of the strategic behavior of political principals is vast (e.g. Miller 2005). Within the law and politics subfield, a number of scholars have put forward constitutional theories to explain American adversarial legalism and the heavy reliance on private litigation in the American regulatory state (Farhang 2010; Kagan 2003; Burke 2002). Such analyses have spilled over into EU studies, where a growing number of scholars have used principal-agent theory to analyze the design and practices of European regulatory institutions (Kelemen 2011; Franchino 2007; Pollack 2003; Thatcher and Sweet 2002).

The main contribution of the study is the project's comparison of the United States and European Union. With a few important exceptions (e.g. Huber 2000), most studies of delegation are focused on a single political system that analyzes within-country variation in institutional design (e.g. Pollack 2003; Epstein and O'Halloran 1999). Fewer studies have compared delegation across political systems, despite the fact that important aspects of delegation structures are consistent within a single political system, few studies have affecting delegation. This is no less true for the fields of American and European Union studies, where only a handful of political science works have examined European and American regulatory policymaking in comparative perspective.[1] The EU-US comparisons that have been conducted are predominated by legal analyses or policy studies, which, while informative, are mostly descriptive or normative in focus.

The comparative frame offered here has provided a number of different insights into the structure and operation of regulatory capitalism within both political systems. First, the comparison has prompted the puzzle of the dissertation: why competition policy enforcement outcomes have diverged in recent years, despite significant pressures for convergence, and why competition enforcement has been organized through different kinds of institutions. By comparatively examining the institutions and enforcement practices of European and American regulators, I have highlighted several important and consequential developments that, when seen in isolation, might not appear particularly notable or puzzling.

Second, the comparison has called attention to some of the most distinguishing institutional characteristics of each political system. In the US, these include but are not limited to the overlapping system of public regulation, the extensive limits on the scope of antitrust, the judicial enforcement system, and the high degree of private antitrust litigation. In Europe, they include the

[1] There are, of course, exceptions. David Vogel (2012) has provided helpful comparisons of environmental and consumer regulation in the EU and US.

significant expansive of competition law, the autonomy of the European Commission, the division of the European Council, and the weakness of the European Council.

In this same vein, I have also noted key moments of institutional developments that would have made the systems more alike, but which were ultimately abandoned because of the distinct histories and organizations of constitutional power within each system. For instance, the failure of statist or administrative management and cooperative industrial corporatism in the US is far more conspicuous when considered in the light of the bureaucracy-centered system of European regulation. Similarly, the European Commission's dominance of competition enforcement, and its unilateral policymaking powers are more striking when placed next to the fragmented American regulatory system.

Finally, the comparative frame has been helpful for thinking about the consequences of competition policy enforcement. In the close analysis of regulatory liberalization and public subsidy reform, we have seen the impact that competition policy enforcement (or the lack thereof) has had on key areas of the economy and important aspects of policy. This includes but is not limited to the structure of the telecommunications, transportation, and energy markets as well as the character of economic development policy. In future iterations of this study, I will also examine more closely the consequences of the distinct competition regimes on the practices of information technology companies and the economic structure of these markets.

A second contribution comes from the historical focus of the project. Many scholars have analyzed the development of competition policy over time (Buch-Hansen and Wigger 2010; Büthe 2007; Gerber 1998; Peritz 1996; Eisner 1991). However, most of these studies have emphasized historical change—the expansion of the capacities of regulators, the shift in the ideas governing antitrust, and the evolution of regulatory institutions. While contributing to the understanding of incremental change in regulatory institutions, the emphasis here has been on continuity. By analyzing

development over such a long period of time, I have been able to identify institutional regularities that have persisted across political epochs marked by distinctive economic ideas and interest constellations. These continuities in structure and orientation, even as economic theories have shifted, political coalitions have dissipated, old industries declined, and new industries emerged suggest that developments have been structured by deeply ingrained institutions that, short of a radical rupture or constitutional overhaul, will likely continue to structure regulatory enforcement for the foreseeable future.

For instance, in the US case, I have highlighted how the enforcement pattern has been highly tied to political administrations since the founding of the antitrust regime, fluctuating from presidential administration to administration over not only the regime's first half century, but also during the most recent four decades. And I have shown how courts have played an outsized role determining how the law applies in individual cases, and the general rules under which enforcement should be pursued. Even during the postwar, when antitrust was actively enforced across a number of different areas, politicians still shaped antitrust enforcement for the benefit of favored interests, and courts still sought to guide policy toward general economic rules. Moreover, across multiple periods, efforts to carve out more discretionary authority for administrators have been rebuffed by political actors, including at various times by the Congress, the President, and the courts.

Similarly, in the EU case, I highlight the continuity of the Commission's dominance over competition law, and the regularity of using enforcement to advance economic integration and the larger policy agenda of European officials. I showed that from the earliest days of competition law, the Commission has applied the law in a way that limited economic protectionism and encouraged market integration. While during the 1960's and 1970's, this approach often encouraged cooperation across firms and coordinated state aid, during the 1980's, the focus became more on supporting structural adjustment and liberalization. However, in both periods, the overall goal was the same: to

use competition policy to foster an 'ever closer union' between countries and economies.

While I have acknowledged and closely examined institutional evolution and change, even in the examination of institutional innovations, I have emphasized the ways even significant institutional expansions have reinforced established political logics. In the US, at various times new regulatory institutions have been created, enforcement budgets expanded, and the governing philosophy of antitrust transformed. But over more than century, the political logic of antitrust as a rigid law that can be enforced by multiple parties, where the ultimate substantive doctrine is determined by judges rather than bureaucrats has largely remained intact. Similarly, in the EU, the substantive doctrine has shifted from one that accommodated significant state industrial policy and state-run enterprise, to one that has actively sought to reform state involvement in the economy and target industrial policy toward narrowly defined market failures. However, the institutional logic of competition law as an instrument to foster economic cooperation and growth, to be enforced by an independent, supranational administration, has largely been maintained.

Generalizability of the Findings

One of the obvious questions stemming from the dissertation is the question of generalizability. While some effort has been made to contextualize developments in the wider design of each regulatory state, my analysis has been concerned almost exclusively with competition policy. To what extent are the findings applicable to other policy sectors? In what ways is the experience of competition policy development exceptional? And in what ways does it exemplify broader patterns of political development and regulatory institutional design within each system?

The American Case

The secondary literature on American regulation suggests that the core institutional characteristic of American antitrust agencies highlighted in the study—the narrow zone of bureaucratic discretion—is also seen within many other policy sectors. Whether writing rules to limit dangerous chemicals, investigating violations of labor rights, or prosecuting consumer fraud cases, American bureaucrats are subject to significant ongoing controls that limit their discretionary power. Kagan (2003) identifies 34 cross-national studies published between 1971-2000 that highlight the constraints faced by American bureaucrats compared to many OECD countries.[2] Compared to most European jurisdictions, American regulators must provide more evidence, more paperwork, conduct more studies, articulate more policy rationales, spend more time in court, and meet with a wider array of affected parties to achieve many of the same policy goals (e.g. Kagan and Axelrad 2000; Vogel 1986; Brickman et al. 1985; Badarraco 1985; Kelman 1981). Indeed, so pervasive are limitations on bureaucratic discretion across policy areas, that Kagan characterizes adversarial legalism as "the American way of law."

These studies also suggest that the Madisonian constitution is one of the reasons bureaucratic discretion remains limited in most areas. Much like antitrust, most federal regulation is enforced not through administrative processes but through the courts, as a result of design choices made by Congress, often following 'justice' demands coming from diffuse interests (Burke 2002; Melnick 1983). More broadly, the separation of powers structure has created incentives for political principals to compete for control of the federal bureaucracy. Congress has enacted hundreds of "fire alarms" across different policy sectors—incentives and opportunities for private actors to participate in policymaking, and to enforce the law directly (Farhang 2010; Kagan 2003). Farhang (2010) has

[2] See "Table 1: Cross-national studies" in Kagan 2003: 8.

identified more than 200 laws enacted by Congress, in policy areas ranging from copyright protection to civil rights, that have either enhanced damages for private enforcement or shifted fees onto defendants, thereby encouraging the private enforcement of public law. Finally, nearly all of the federal government's 250+ departments, agencies, and sub-agencies are run by politically appointed administrators—a number that now exceeds 4,000 positions (Davis and Greene 2017).[3] Such a politicized organization of administration has certainly been conditioned by the US constitution and earlier state developments.

We can briefly compare the organization of the Environmental Protection Agency (EPA) with the FTC to note some of the parallels between the construction of administrative power across two agencies with different regulatory mandates. Despite being created more than half a century late, and addressing a different set of policy problems, the EPA shares many of the FTC's discretion-limiting institutional features. Much like the FTC, the EPA was provided a broad, open-ended mandate, in this case to ensure the air would be breathable, the nation's waters swimmable and fishable, and manufactured products safe to use. However, as in the antitrust field, this expansive mandate was limited by a range of procedural requirements: timelines, evidentiary specifications, consultation requirements, and private enforcement, to name just a few examples (Andrews 2006; Vogel 1986; Brickman et al. 1985). Many of the foundational environmental laws, for instance, included "legally enforceable entitlements" that allowed citizen groups to both sue agencies if they did not enforce the law, and to sue companies directly in federal court (Andrews 1999; Melnick 1983). Additionally, courts have frequently interfered in the EPA's rulemakings, weighing in on many substantive regulatory questions, from the interpretation of complex scientific debates to the assessment of the quantitative risk of certain hazards (Jasanoff 1995).

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[3] There is no definitive count of federal regulatory agencies. However, in 2015, the Federal Register noted the existence of 257 administrative units in the federal government. See < https://www.federalregister.gov/index/2015>.

Finally, many scholars have highlighted how dueling attempts by political principals to control the agency's behavior has further circumscribed bureaucratic discretion. Congressional mandates have both forced action and made action more difficult—in both cases limiting the EPA's discretion (Lazarus 1991).[4] At times, different subcommittees have used budget appropriations processes to demand that the EPA meet what were sometimes contradictory or mutually exclusive goals (Ibid). And depending on which party was in power, presidential appointments have led to more or less stringent environmental programs. Even if certain aspects of the agency's culture and values have remained consistent, the intensity of enforcement has shifted from presidential administration to administration (Ringquist 1995).

Although there are important parallels in the design of the FTC and EPA, it should be emphasized that the structure of regulatory delegation does vary across institutions and policy areas. While they are the exception, some agencies have been delegated a broader zone of discretion than the FTC or EPA. The US Food and Drug Administration has been delegated the power to approve or deny the sale of most drugs *before* they are allowed to go on the market, through an administrative decision-making process. Moreover, the FDA can pursue this mandate largely autonomously from political principals (Carpenter 2010). Similarly, the Federal Railroad Administration possesses significant discretionary authority to suspend the use of equipment, and take other pre-emptive actions, generally without facing intervention by Congress or the courts (Kagan 2000). Finally, the Federal Reserve has the authority to set US interest rates and to conduct open market operations, largely without interference from courts, political actors, or organized interests. While political principals do continue to name the Board's leadership, the possibility of political control is limited by the Federal Reserve's reputation for expertise, relationships with the public, and established

[4] By 1989, Congress and the courts had imposed more than 800 deadlines on the EPA, only 14% of which had been met. Over the same two-decade period, 80-85% of EPA rules were challenged in court. See Lazarus 1991: 324.

epistemic community in the central banking world (Conti-Brown 2017; Adolph 2013; Holmes 2013). Consequently, one question for future research will be to explain why certain regulatory agencies in the US possess more bureaucratic discretion than others, and what impact, if any, these differences in design have on bureaucratic output and regulatory effectiveness.

The European Case

The design of bureaucratic discretion in European competition law is less generalizable to the organization of European regulatory policymaking. In many respects, the powers possessed by the Commission in the competition field are unique. Few policy areas have been so central to the establishment of the European Communities. In fewer areas still, have member states provided the Commission with the power to enforce European law directly on societal actors. In an analysis of the organization of delegation in the Treaty of Rome, Pollack (2003) notes that competition law is among just a handful of policy areas where member states provided the Commission with significant Treaty-based powers, which were not simultaneously subject to extensive constraints (91-101). While member states are constrained by the Commission's monitoring and the ECJ through the infringement procedure (Börzel 2003), the vast majority of European regulatory law is implemented by member states, providing them with significant leeway over its application (Héritier 2001). Furthermore, in recent decades, European principals have increasingly delegated policymaking powers to European regulatory agencies rather than the Commission (Kelemen 2002).

That said, competition law is not the *only* area where principals have delegated to European institutions semi-autonomous decision-making authority. As discussed at length in the previous chapters, the Commission retains independent agenda setting, legislative veto, and implementation powers across most areas of policy (Pollack 2003; Majone 2001). The Commission was delegated significant control over trade policy, in part because of concerns that national control would

undermine the common customs union (Moravcsik 1998). And needless to say, European monetary policy follows a credible commitment logic. The European Central Bank is widely considered to be one of the most independent central banks in the world, with a Treaty-based mandate that provides elected officials with little to no direct control over policymaking (Elgie 2002).

In addition to the Commission's formal powers, at least 29 European regulatory agencies have been established that, to differing degrees, possess rulemaking and standard-setting authority (Levi-Faur 2011). While most of these regulatory agencies, networks, and expert committees lack direct enforcement authority and play mostly a coordination, harmonization, and peer learning function, the reach and force of some agencies, such as the European Securities and Markets Association, is gradually increasing (Moloney 2016). With some variation, many of these agencies exhibit significant autonomy from political principals and organized interests in their decision-making processes (Busuioc 2009; Groenleer 2009).

If we examine the hundreds of independent regulatory agencies (IRAs) that have been established on the national-level over the past few decades, more parallels can be observed between the zone of bureaucratic discretion in the competition field and the broader organization of administration power within the European "regulatory state" (Majone 1994). Generally speaking, national-level agencies have been provided significant independent decision-making authority and subjected to relatively few ongoing political controls, a design that some scholars have theorized as following a credible commitment logic (Gilardi 2005; Gilardi 2002). Unlike the American regulatory state, national-level regulators generally do not face "fire alarms." Political principals have not encouraged the private enforcement of public law as much as the US Congress, and litigation rates remain well below those of the United States (Rodger 2014). Empirical studies of national regulatory agencies have found that agencies also enjoy significant political insulation in practice (e.g. Thatcher

2002). One study, for instance, found IRAs to be much less responsive to the preferences of political principals than bureaucrats located within executive ministries (Egeberg and Trondal 2009).

At the same time, without more extensive comparative analysis, it is unclear how these structures compare to the organization of American regulatory agencies, and how delegated authority varies across the European regulatory space. Within many spheres such as financial regulation and consumer protection, US agencies are likely more active. However, within other fields, they are arguably less so. Do environmental, financial, and consumer protection agencies on the national-level in Europe possess more legal discretionary authority than American regulators? In what observable ways do these regulatory designs appear to affect regulatory practices? To what extent does the design of delegation vary across Europe, and to what extent is institutional design harmonized through European institutions? As a way to ascertain the scope conditions of the theoretical argument developed in this dissertation, future iterations of this research project will address these questions and others.

The Implications for Public Policy

Finally, this study has implications for several policy questions of relevance to students of the American and European regulatory states. The traditional view among regulatory scholars in both the United States and Europe is that political control helps to increase democratic legitimacy. Among many Americanists, political control is seen as the only thing preventing regulatory capture and bureaucratic degeneration (e.g. Miller 2005; Epstein and O'Halloran 1999).[5] And much of the reform program of the last century has focused on the need to constrain federal bureaucrats in the name of democratic accountability—whether through procedural rights that mostly empower industry vis-à-vis government (Grisinger 2012) 'private attorneys general' provisions that allow

[5] For good overviews of the prominence of regulatory capture theories in the study of American regulation see Novak 2014 and Moss and Oey 2009.

citizen groups to participate in enforcement directly (Burke 2002), or cost-benefit analysis that structures decision-making (Sunstein 1993).

In a different vein, the European Union is seen as having a "democratic deficit", in part, because the Commission and other technocrats possess extensive discretionary authority. While it is recognized that technocratic policymaking can increase regulatory effectiveness, many reformers think this 'output legitimacy' is limited by the weak degree of 'input legitimacy.' Consequently, the institutional reforms most often proposed are to limit bureaucratic discretion and push European policymaking processes to look more like those found in the United States: to increase private enforcement opportunities (Kelemen 2006), to expand administrative procedure limitations (Meuwese et al. 2009), to enlarge the power of the European Parliament (Follesdal and Hix 2006), and to create a directedly elected European executive.

The findings of the dissertation provide some reason to challenge the presumption that constraining the Commission would lead to more democratic legitimacy. As we have seen in the analysis of US antitrust enforcement, extensive political controls over regulatory decision-making may, in some circumstances, undermine regulatory effectiveness, while providing little by way of increased democratic legitimacy. If there is one consistent theme across the long history of the US antitrust system, it is dissatisfaction, expressed by politicians and economic interests coming from a variety of ideological positions. While political controls have, on the one hand, ensured that antitrust regulators were not overzealous in their enforcement. On the other hand, it has arguably led to underenforcement, as regulators have found it too difficult to use the law to address a range of economic challenges. Even during periods when the law has been actively applied, the pattern of enforcement has been volatile, providing little by way of rationalization in the economy or consistent limits on corporate behavior.

Furthermore, as we have seen in the analysis of European competition policy, much of the regime's apparent success stems from bureaucratic discretion. Examining the competition policy field, I have shown that the Commission's broad discretionary authority has allowed it to apply competition law in ways that fostered economic cooperation, contributed to economic development, held companies accountable and benefited consumers.

At the same time, we have seen how the Commission's decision-making has, at certain moments, lacked political accountability. Additionally, in its eagerness to use whatever vehicle appears available to advance the integration project, the Commission may have over-emphasized liberalization at the expensive of other goals (Jabko 2006). Consequently, the focus on negative integration may, in certain respects, created a 'neoliberal' bias in policymaking (e.g. Höpner and Schäfer 2012).

Yet, in seeking to improve accountability, European policymakers should not throw out the bureaucratic baby with the neoliberal bathwater. As the "guardians of the Treaty", the Commission's agenda setting authority and monitoring powers, along with the European Court of Justice's power of judicial review, have arguably been the *sine qua non* for the process of European integration. As we have seen in the case of competition, the bureaucratic discretion and semi-autonomous structure of its decision-making process has, in certain respects, facilitated the regime's effectiveness, allowing the law to be applied to new economic challenges as they emerged. Increased accountability measures may be needed, but in pursuing these reforms, policymakers should be careful not to undermine the Commission's independence and the significant capacity and expertise that has been built up over the years.

The study also has policy implications for the design of the US antitrust system. As Robert Kagan has frequently emphasized, in addition to its myriad problems, American adversarial legalism also has strengths, not least the many opportunities the system presents to private actors who are

overlooked by the state to seek justice. Another "strength of the weak state," is the way it encourages a high degree of regulatory compliance (Dobbin and Sutton 1998). Cognizant that law can be enforced from all directions, companies may become more likely to comply with regulatory rules, and even go beyond them, internalizing regulatory norms in their own internal policies and procedures. Such a system has arguably worked quite well in the development of capital markets, the rooting out of foreign corruption, and the protection of consumers against fraud.

But within regulatory arenas such as antitrust where compliance is not usually a matter of following or not following hard-lined rules, the American structure is hardly ideal. As we have seen in this study, when applied to complex economic problems, the adversarial legal system is marred with problems. Whether addressing problems presented by economic concentration, regulatory liberalization, or new technologies, it has been difficult for antitrust authorities to direct the law toward a consistent, coherent purpose. And it has been far too easy for the regime to be deployed toward the self-interested goals of organized interests or the parochial concerns of Congress.

Consequently, within fields such as antitrust, reforms should be considered that increase bureaucratic discretion. One idea would be to increase the funding available to both antitrust agencies, so they can play a more active role studying new industries and monitoring new market developments. Another would be to make it possible to pursue some enforcement through administrative actions, which are not as easily gamed by large corporations armed with teams of lawyers. Political principals could also delegate to the FTC the authority to write competition rules to promote liberalization in markets dominated by incumbent companies or within other emerging sectors. Eliminating some of the exemptions for regulated sectors and state-sponsored activity, while reducing the number of incentives that encourage private litigation would also be salutary. Finally, Congress should do what it can, within its constitutional limitations, to reduce the 'race to the bottom' in public subsidies. As the European model demonstrates, state aid rules need not eliminate

public involvement in the economy. However, they can provide an important constraint on beggar-thy-neighbor policies that leave everyone but large companies worse off.

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