Varieties of Neoliberalism:

Competition Paradigms, Jurisprudential Regimes and the Atlantic Divide in Antitrust

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Abstract

European rules against the abuse of a dominant position are now more intensively enforced than anti-monopoly rules in the United States, in contrast to the historical pattern. In this article, I evaluate the reasons why, using a combination of historical analysis of legal developments and empirical analysis of the pattern of enforcement and judicial review. Economic patriotism, business capture, and the relative power of economists cannot account for the divide. American and European antitrust policy is structured by distinct competition paradigms which have been institutionalized by courts through case law. In the United States, a *laissez-faire* jurisprudential regime makes it difficult for regulators to win anti-monopoly cases in courts. In Europe, an *ordoliberal* jurisprudential regime has facilitated a more intensive enforcement program. In highlighting the divergent judicial construction of competition law within two multi-level, liberalized market economies, the analysis shows how jurisprudence shapes the policy paradigms used by regulators.

Keywords: competition, regulation, neoliberalism, economic thought, Europe, North America

1. Introduction

While U.S. anti-monopoly enforcement has fallen to record lows, Europe has recently experienced a competition law renaissance. Since the year 2000, the European Commission has finalized more than 75 infringement and commitment decisions under the European Treaties' prohibition against the abuse of a dominant position. These cases have involved a wide range of economic sectors, many with sweeping implications for the world's most highly valued markets. By contrast, the U.S. Department of Justice's (DOJ) last, only partial, major victory in a monopolization case was against Microsoft, an investigation that began in the early 1990's. Since then, the DOJ has successfully prosecuted only a handful of unilateral conduct cases, all within regional markets.

Why are antitrust rules now more intensively enforced in the European Union than the United States, in contrast to the historical pattern? Over the last few decades, European and American regulators have confronted monopolistic or exclusionary practices by dominant companies within many of the same economic sectors. PhD economists, who conduct extensive micro-economic analyses of the likely effects of exclusionary practices on consumer interests, are now employed in both European and American investigations. In a few instances, regulators have even investigated some of the same companies, sometimes reaching similar substantive conclusions. Yet, despite these similarities, what Gifford and Kudrle (2015) term the "Atlantic Divide in Antitrust" shows little sign of narrowing.

The purpose of this article is two-fold. First, I closely compare American and European antitrust policy and enforcement in cases involving unilateral practices by dominant or monopolistic firms. By aggregating enforcement statistics from both the central and state levels of government, I provide a more detailed and comprehensive comparison of enforcement output than found in previous studies. The analysis shows that European enforcement levels are now significantly higher than the United States, and that the

longitudinal enforcement pattern in each system has changed dramatically over a relatively short period time.

Second, I develop a theoretical framework to explain why the pattern of competition enforcement differs in the EU and the US and why it has changed over time. Empirically examining the pattern of enforcement and judicial review, I show that existing explanations rooted in the logic of industrial policy, the permeability of regulatory institutions, or the professional influence of economists can neither fully account for the Atlantic Divide nor explain the pattern of longitudinal change. Building on previous work that examines how social scientific paradigms shape economic policy (Blyth 2002; Hall 1993), I argue that enforcement variation stems from the *competition paradigms* that have been institutionalized into the law. However, in contrast to previous studies that explain ideational change as generated by the relative power of professional communities within regulatory agencies (Eisner 1991; Ergen and Kohl 2019), I argue that courts are the institutions which have the most important and lasting effect on the economic ideas that guide antitrust enforcement.

In highly juridified areas of policy such as antitrust, courts determine the policy paradigm that is used by regulators to understand and enforce the law. While regulators can influence legal developments through their investigations and enforcement actions, courts, ultimately, decide what the law means and how it can be applied. As 'sticky' institutions that enjoy significant political independence within liberal democratic systems, courts can adopt or maintain economic frameworks that are orthogonal to prevailing scientific paradigms or the preferences of elected officials (Novkov 2008; Pierson 2011: 158-62; Smith 2008). Thus, to understand the economic ideas that guide competition enforcement, we must look not only to the "knowledge regimes" that shape policymakers' causal understandings of a particular problem (Campbell and Pedersen 2015; Hirschman and Berman 2014), but also to the "jurisprudential regimes" that structure regulators' enforcement authority through "rules,

concepts, doctrines, precedents, and tests" (Gillman 2006: 114; Richards and Kritzer 2002). By examining courts as sites where particular policy paradigms are institutionalized into the law, we can better understand why competition enforcement varies across jurisdictions and why it has changed over time.

To develop this argument, I closely examine the development of competition law in the United States and European Union, two multi-level systems where competition policy is enforced directly by both central- and state-level regulators, under rules and standards that are determined by a common high court. First, I examine the evolution of competition law jurisprudence in the European Union and the United States from the 1960's until the present, drawing from an extensive secondary literature in law. I then empirically assess the influence of jurisprudential developments on the pattern of competition enforcement, using a combination of statistical analysis of enforcement output and textual analysis of competition decisions. The historical legal analysis demonstrates that courts in both systems have institutionalized distinct competition paradigms into case law, which are linked to different schools of neoliberalism. The empirical analysis suggests that these jurisprudential developments have had a lasting effect on the pattern of competition enforcement, shaping the kinds of remedies that can be successfully pursued under the law.

In the United States, beginning in the 1970's, the US Supreme Court integrated elements of a *laissez-faire* competition paradigm into its jurisprudence, which presumes the exploitation of private economic power by dominant players is mostly benign and government antitrust enforcement either unnecessary or economically harmful (Easterbrook 1984; Posner 1979; Van Horn 2009). Under the rules and standards that now structure antitrust enforcement in unilateral conduct cases, courts defer to the private status quo unless those challenging the conduct can definitively demonstrate that the conduct in question has precipitated an increase in short run consumer prices or a reduction in economic output (Caves and Singer 2018: 3).

Although there is now renewed interest in developing a more robust approach to anti-monopoly enforcement (Khan 2018), existing case law has so far maintained a strong presumption against regulatory intervention, making it difficult to win unilateral conduct cases in federal court even when there is strong economic evidence in support of such interventions.

By contrast, in the EU, the Court of Justice of the European Union (CJEU) has institutionalized an *ordoliberal* conception of competition into some areas of jurisprudence, which views the exploitation of economic power as economically harmful in some cases and a strong competition state as a *sine qua non* for a free market economy (Gerber 1994). Under the rules and standards that now structure antitrust enforcement in unilateral conduct cases, the CJEU presumes that certain exclusionary practices by dominant players are economically harmful (Behrens 2018). Although the CJEU now demands that regulators support their decisions with economic evidence, unlike the U.S. judiciary, the European Court has not established strong legal presumptions against intervention. Consequently, under the current European jurisprudential regime, regulators can both draw upon a wider number of substantive remedies and meet lower evidentiary tests than allowed by federal courts in the United States. This, in turn, has facilitated an intensive enforcement program, empowering the European Commission and national regulators to enforce unilateral conduct rules in a range of areas.

In addition to providing new empirical insight into the sources of the 'Atlantic Divide,' the comparative case studies also make several theoretical contributions to current debates in comparative political economy and economic sociology. The first contribution relates to how the "rebirth of the liberal creed" (Fourcade-Gourinchas and Babb 2002) has affected the state's regulatory role in the economy. The common view in comparative political economy is that "freer markets" require "more rules"—i.e. that economic liberalization leads

to an increase in pro-competitive re-regulation (Vogel 1996). While this pattern can certainly be seen in the European case, where the single market project has corresponded with an expansion of the scope of competition law and an increase in competition enforcement, it is less evident in the United States, where the neoliberal turn in public policy is associated with a significant reduction in antitrust enforcement and a narrowing of the scope of antitrust authority. This divergent pattern highlights an important dimension of variation within marketization processes that has not been explored in recent comparative studies (Ban 2016; Schmidt and Thatcher 2013; Thelen 2014). It also points to the need to develop theories of economic liberalization that more fully account for variation in the state's role constituting and managing competition within liberalized markets.

Second, I contribute to the 'ideas and policy' literature by highlighting the independent role played by courts in institutionalizing the policy paradigms that structure regulatory enforcement. Political economists have developed rich frameworks to explain how social scientific paradigms can shape policymaking processes and outcomes across a range of state institutions on the national and supranational levels (Abdelal et al. 2011; Ban and Blyth 2013; Ban 2016; Blyth 2013; Braun 2014; McNamara 1998). The relationship between courts and policy paradigms, however, has been less of a focus within this subfield. Although the relative role of courts may be minimal in monetary or fiscal policy, in highly juridified areas of economic policy such as antitrust, courts determine many of the rules that govern economic life. By examining how court-made jurisprudence can shape the practices of regulators, I highlight the importance of examining jurisprudential regimes as sites where policy paradigms are developed, institutionalized and politically contested (Britton-Purdy et al. 2019; Deakin et al. 2017; Pistor 2019).

1.0 Comparing Antitrust Enforcement in Europe and the United States

Before developing the theoretical argument, it is helpful first to describe precisely the pattern of competition enforcement in the United States and the European Union and how it has changed over time. Competition law is often divided into three categories: horizontal restraints of trade agreed to by competitors (i.e. horizontal cartels); restrictive practices or agreements imposed by dominant or monopolistic firms (i.e. unilateral conduct); and mergers. Although differences in policy and enforcement can be observed across all these three areas of the law, the most pronounced area of divergence between the United States and Europe—and the focus of most legal scholarship on the Atlantic Divide in Antitrust—relates to unilateral practices by dominant or monopolistic firms (Gifford and Kudrle 2015).

In both the U.S. and EU, undertakings that control a significant portion of commerce in a given market are subject to antitrust rules that prohibit or limit certain kinds of unilateral practices by dominant firms. In the U.S., under Section 2 of the Sherman Act, conduct that monopolizes or attempts to monopolize a relevant market is prohibited. Additionally, the Clayton Act outlaws a number of specific unilateral practices such as exclusive dealing, tying, and price discrimination insofar as they harm competition. In the EU, under Article 102 of the Treaty on the Functioning of the European Union (TFEU), undertakings who hold a dominant position are prohibited from abusing that position insofar as it affects interstate trade within the EU. Like the United States, the TFEU also forbids exclusive dealing, tying, price discrimination, and unfair competition by dominant players under certain conditions. However, as we will see, the judicial construction of these prohibitions and restrictions is different across the two systems and has changed in important ways over time.

To assess the comparative and longitudinal pattern of change, I have collected enforcement data from each of the main public regulators charged with antitrust enforcement.

While quantitative measures of enforcement should never be seen as dispositive indicators of the effectiveness of a regulatory regime, when combined with qualitative insight, enforcement output can be helpful for comparing broad patterns as well as within-unit change over time. In the United States, anti-monopoly litigation can be initiated by two federal regulators, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC). Additionally, state Attorneys General can enforce federal antitrust law on behalf of consumers through *parens patriae* lawsuits. In the European Union, the European Commission has historically been the primary enforcement authority for European competition rules and national governments have enforced their own competition laws. However, since the 1990's, many governments have aligned their laws with the European Union (Waarden and Drahos 2002). Since 2005, all national competition authorities (NCA's) can also enforce EU competition law, a process that is coordinated through the European Competition Network (ECN).

For each regulator, I have identified the cases involving unilateral conduct which have been successfully finalized at the first level of decision-making—in most cases through a formal decision by federal district courts in the U.S. or regulatory agencies in the European Union. In the U.S., I count all legal victories or formal settlements involving monopolization or exclusionary practices by single firms. In the EU, I count all prohibition decisions, interim measures, and commitment decisions finalized by regulators that are primarily based on Article 102 of the TFEU [ex Article 82 and Article 86]. The time span examined—2005-2019—is based on the availability of enforcement data for national-level jurisdictions in Europe, where comprehensive data reporting only commenced in 2005. A full description of the methodology used to identify cases, as well as links to all data sources, is available in the online Appendix.

[Insert Table 1 and Figure 1 about here].

Table 1 reports the number of successful formal infringement decisions or commitments, the number of penalties, and the average penalty amounts that resulted from legal action taken by public regulators in each system. The data shows that there are significant differences in how often unilateral conduct rules are enforced. In the United States, regulators finalized fewer than two dozen settlements or legal injunctions over the 15-year time span analyzed. The DOJ filed just one new lawsuit under Section 2 and won a total of three monopoly cases in court, all of which involved regional markets and did not result in monetary penalties. The FTC has been slightly more active, filing a total of six lawsuits involving single-firm conduct since 2005, five of which resulted in settlement agreements. Additionally, state Attorneys General won judgments or settlements in 15 cases involving monopolization or unilateral conduct, a few of which involved substantial penalties.

European regulators rendered a significantly higher number of abuse of dominance decisions over the same period: 380 in total, or roughly 25 per year. From 2005 to 2019, the European Commission completed 56 prohibition or commitment decisions involving Article 102 and imposed more than €12B in penalties. Unlike the United States, where most Section 2 decisions involved regional markets, many of the European cases tackled global industries and large multi-national corporations. These include major car manufacturers such as Daimler AG and Peugeot, pharmaceutical companies such as Astra Zeneca and Servier, beer manufacturers such as AB InBev, and information technology giants such as Microsoft and Google. Collectively, the 32 national competition authorities were even more active, rendering 324 separate decisions that involved the abuse of a dominant position, many of which also resulted in substantial penalties against well-connected firms.

The pattern of enforcement has also changed substantially over time. Figure 1 reports the number of prohibition decisions taken by the Commission under Article 102 as well as the DOJ's legal victories (at the district court level) involving civil monopoly lawsuits from 1970-

2019. Here, I exclude commitment decisions and settlements since these are not reported consistently across the five decades examined. We can see that the number of legal victories has noticeably dropped in the United States since the 1970's. While the US DOJ won 48 anti-monopoly cases during the 1970's, since 1980, the DOJ has successfully prosecuted just 13 cases, most of which involved regional markets.

In the EU, by contrast, we observe the opposite pattern of change. During the 1960's and 1970's, the abuse of dominance article was almost never enforced. However, since the mid-1980's, the European Commission has issued more than 70 prohibition decisions, many involving the world's largest companies operating in the most highly valued global markets.

2. Explaining Variation in Competition Enforcement: Alternative Explanations

Why do European regulators now prosecute unilateral conduct rules more intensively than regulators in the United States? And why have we seen significant shifts in enforcement over a relatively short period of time? Before developing my argument about the policy paradigms institutionalized in jurisprudential regimes, I first consider several alternative frameworks developed by economists, political economists and economic sociologists.

2.1 Economic Patriotism

The shared perspective of many policymakers and businesses in the U.S. is that the intensification of European competition enforcement is driven by "techlash": reflective of a concerted political effort to undercut the U.S. competitive advantage in information technology and other leading industries (Keyte 2018). Some legal scholars have echoed this critique, suggesting that rigorous European enforcement is being used as an "adjunct to industrial policy" (Forrester 2004: 920), or an effort to protect the *Mittelstand* and other SMEs from competition (Gifford and Kudrle 2015: 22). Industrial policy arguments have also

been used to explain the *lack* of antitrust enforcement in the United States. Christophers (2016), for instance, argues that the decline of U.S. anti-monopoly enforcement since the 1980's reflects the concerted efforts of policymakers to bolster the competitiveness of domestic firms in the face of increased competition from Japanese and European companies.

The aim of improving economic competitiveness and increasing economic growth has certainly contributed to longitudinal change in American and European competition policy. But inasmuch as contemporary enforcement patterns are related to economic developmentalism, it is of a qualitatively different character than the raw mercantilism suggested by these observers. Far from seeking to promote economic advantage by harming foreign companies, most European competition enforcement is aimed at facilitating internal structural adjustment (Lawton 1999). More than three-quarters of abuse of dominance fines have been imposed on *European* companies for their conduct in *European* markets. And while the lack of U.S. enforcement may well reflect policymakers' concern for the competitiveness of American business, there is little indication of selective forbearance in the enforcement pattern. Since the 1970's, foreign and domestic companies alike have benefited from the dearth of anti-monopoly prosecutions.

2.2 Business Capture

Philippon (2019) has recently argued that the Atlantic Divide in Antitrust stems from differences in regulators' susceptibility to outside influence. Whereas the European Commission's supranational structure limits opportunities for political control, in the United States, many of the leadership positions at the DOJ and FTC are filled by political appointees who serve at the pleasure of the President. Such a permeable institutional design, he argues, has created opportunities for large companies to block enforcement actions through lobbying and political campaign contributions.

While the rising power of organized business interests has affected public policy in a number of important respects, antitrust enforcement remains a largely technocratic enterprise that is insulated from direct political and business pressures. Business lobbying may well shape outcomes in occasional cases, but it is less plausible that such advocacy would systematically affect enforcement patterns across multiple presidential administrations, much less the practices of state Attorneys General and private plaintiffs, which can pursue cases independently of federal agencies. Equally problematic for business capture theories is the fact that the DOJ continues to actively litigate cartel cases, including many against politically well-connected companies such as JP Morgan, Bank of America, and Dupont Dow (Werden et al. 2011). Without taking into account other factors such as ideas, it is difficult to see how capture theories can explain the pattern of change in the United States.

2.3 The Role of Economists

A final set of explanations center on the institutionalized role of economists within enforcement agencies. In a persuasive, but non-comparative account of the transformation of antitrust in the United States, Eisner (1991) argues that the gradual expansion of the authority of economists at the U.S. antitrust agencies during the 1960's and 1970's led to a shift in enforcement priorities. As agency economists realized that most exclusionary practices were economically beneficial, they used their newfound influence to reduce unilateral conduct enforcement. Ergen and Kohl (2019) have recently expanded on this thesis by contrasting the "economization" of antitrust in the United States with that of Germany. They argue that the empowerment of PhD economists at U.S. antitrust agencies led regulators to adopt an "effects-based" approach, which resulted in a dramatic drop in enforcement. By contrast, in Germany, where lawyers retained the upper hand, enforcement remained "form-based," leading to a more active enforcement program. Similar arguments have been made about the

European Union. While European regulators now also place emphasis on economic efficiency in both official policy and speeches, some observers contend that such analysis is "flawed" and "incomplete" (Neven 2006) and that European enforcement continues to be driven by "political" rather than objective efficiency considerations (Forrester 2004).

Much explanatory traction can be gained by considering how the power of economists within the state affects public policy outcomes (Christensen 2017; Hirschman and Berman 2014). There is little doubt that the increase in the number of PhD economists at competition agencies around the world has made economic efficiency a more important factor in enforcement (Eisner 1991; Wigger 2007). However, it is difficult to see how differences in the professional authority of economists within competition agencies could account for the Atlantic Divide in Antitrust. Unlike the German *Bundeskartellampt* in the 1970's and 1980's, the European Commission has been a champion of the economization of antitrust, institutionalizing a "more economic approach" that requires "effects-based" analysis in most competition decisions (Patel and Schweitzer 2013). An Office of Chief Economist, which employs primarily PhD economists of industrial organization, now conducts independent reviews as part of all competition investigations (Van den Bergh 2017). As can be seen in Table 2, which reports the number of PhD economists at American and European antitrust agencies whose work focused on competition enforcement in 2016, economists are now well represented at both the European Commission and national competition agencies. In fact, the nearly 200 PhD economists working at European competition agencies exceeded the 132 employed at the US DOJ, FTC and U.S. Attorneys General offices. Yet even as economists have gained new gatekeeping power in European competition investigations, abuse of dominance enforcement has intensified.

[Table 2 about here]

To understand transatlantic policy differences, we do need to account for the role of economic ideas. However, in a highly judicialized area of policy such as antitrust, an ideational analysis requires not only examining the role of economists within agencies but also the economic frameworks adopted by courts. By investigating how courts use their control over jurisprudence to institutionalize particular policy paradigms into the law, we can better understand how and why competition enforcement varies across time and space.

3. Jurisprudential Regimes, Policy Paradigms and the Atlantic Divide in Antitrust

A rich literature in political economy and socio economics has highlighted the many ways that economic ideas structure policymaking (Abdelal et al. 2011; Béland and Cox 2010; Blyth 2002; Campbell 2002; Hall 1993; McNamara 1998; Schmidt 2008). Central bankers may wish to maintain a stable currency, treasury officials to foster economic growth, but which specific policies should be employed to achieve a given goal is never self-evident. How policymakers understand the world depends on the cognitive or causal ideas that provide the "recipes, guidelines and maps for political action" as well as the normative ideas that connect these understandings of the world to societal norms and values (Schmidt 2008: 306-07). Within many domains of economic policy, these cognitive ideas are organized through a cohesive framework, or "policy paradigm," that serves as a "prism through which policymakers [see] the economy as well as their own role within it" (Hall 1993: 279). By structuring "not only the goal of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be addressing," (Ibid) policy paradigms can provide "contingent stability" for understanding how the economy works and the likely effects of policy interventions on a range of outcomes of interest (Blyth 2011: 94).

Courts, through their power of jurisprudence, have long set the rules that regulate many aspects of economic life, particularly the rules governing private economic

relationships (Horwitz 1976; Renner 2009). In many liberal democracies, courts also help shape the framework of public economic regulation, defining the scope of regulatory authority and the rules, standards and presumptions that delimit public intervention in the marketplace (Britton-Purdy et al. 2019; Deakin et al. 2017; Gillman 1993; Grewal and Purdy 2014; Hovenkamp 1991, 2015; Maduro 1998; Novak 2010; Pistor 2019). The concept of *jurisprudential regimes* provides a helpful way to understand how judiciaries can use their power of review to institutionalize policy paradigms into the law, and how these paradigms, in turn, structure how a law is enforced by regulators. Jurisprudential regimes refer to "the set of rules, concepts, doctrines, precedents and tests" that judges create to structure future decisions (Gillman 2006: 114). More specifically, they establish "which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors" (Richards and Kritzer 2002: 305). Although the concept of jurisprudential regimes was devised in studies of the US Supreme Court, it can also be applied to the CJEU and other courts where decisions are based, in part, on prior precedents developed through case law.

Competition law, like other areas of policy, has always depended on economic theory. Regulating competition necessarily entails defining certain economic practices or structures as pro-competitive and certain other practices or structures as anti-competitive. It also requires setting presumptions and baselines in situations of uncertainty, which is a common occurrence in complex antitrust cases. For instance, in U.S. antitrust jurisprudence, some restrictive practices are held to a "per se" rule, which makes the activity illegal in all cases, while others are held to a "rule of reason," where a practice is presumed to be legal unless plaintiffs can demonstrate economic harm. To answer these questions in a coherent way, courts draw upon, and help develop, normative and causal understandings of market competition and its regulation that can be labeled *competition paradigms.*

The competition paradigms employed in competition law have varied substantially across time and space (Ergen and Kohl 2020). In the United States, courts have, at various times, institutionalized paradigms based on conceptions of rivalry, economic liberty, fair competition, structuralism and total welfare (Bork 1978; Peritz 2000; Wu 2018). Historically, many European courts and regulators viewed horizontal cartels as beneficial economic institutions that stabilized "destructive competition" (Schröter 1996). At the EU's competition authority, paradigms have sometimes reflected neo-mercantilist and Keynesian frameworks (Buch-Hansen and Wigger 2010), the political imperative of European integration (Sauter 1997), ordoliberal concerns with concentrated power (Gerber 1998), and productive efficiency (Akman 2009).

In both the United States and the European Union, competition rules are rooted in laws enacted by democratically elected governments. In the U.S., the Sherman, Clayton, and FTC Acts were all passed into law by the Congress, while in the EU, the competition provisions were initially written and adopted by the six founding members of the European Economic Community. However, the meaning of these provisions in practice has been determined by courts, with elected institutions playing at most advisory and accountability roles. In the U.S., the antitrust laws are widely considered to be "common law statutes" and federal courts have defined the substantive meaning of competition as well as the procedural rules that guide its enforcement (Bork 1978; Peritz 2000). In the EU, competition law has also experienced juridification. Traditionally, European competition enforcement was governed through a flexible "administrative control model." However, since the 1970's, the European Commission and CJEU have used their jurisprudential authority to establish a detailed body of substantive and procedural rules which competition authorities across Europe must follow (Gerber 1998; Wilks 2005).

As I will show through the case studies that follow, in both the US and the EU, courts have used their review authority to institutionalize particular competition paradigms into the law. To be sure, jurisprudence in each system has been shaped by a range of economic schools (Kovacic 2007; Warlouzet 2019). Nevertheless, in both the US and EU, we can trace a genealogy between the ideas articulated by specific schools of neoliberal thought and developments in case law since the 1970's. By closely examining these ideational influences, we can better understand both why competition enforcement has dramatically changed in each system, and why the two systems remain far apart today on key questions and concerns.

4.0 The Development of a Laissez-Faire Jurisprudential Regime in the United States

Historically, U.S. antitrust has been shaped by a variety of competition paradigms, including some that sought to limit the exploitation of economic power and preserve a rivalrous system of competition (Kovacic and Shapiro 2000; Peritz 2000; Sawyer 2019). During the postwar period, federal courts institutionalized a structuralist understanding of monopoly into jurisprudence and established a number of 'per se' rules, in areas from vertical restraints to tying arrangements, that lowered the evidentiary standards required to pursue cases (Kovacic and Shapiro 2000: 49-50). This case law, in turn, made it possible for the DOJ and FTC to actively enforce laws placing limits on monopoly and exclusionary conduct.

However, beginning in the mid-1970's, U.S. courts began to gradually narrow regulators' authority to pursue unilateral conduct cases. Many of the 'per se' rules that had been established during the postwar period were reversed and replaced with the more restrictive 'rule of reason' (Kovacic and Shapiro 2000). At the same time, courts established new procedural rules and tests that made it more difficult to bring forward cases: increasing standing requirements, demanding more extensive proof of market power in monopolization cases, and requiring more evidence of economic effects before a case could move forward

(Kovaleff 1994). In some areas, courts even created "safe harbors" that effectively immunized certain conduct from scrutiny, including unilateral refusals to deal, coordination in joint ventures, certain kinds of market foreclosure; patent licensing and settlements, predatory pricing above cost, product innovation, and monopoly pricing (Crane 2007; Edwards and Wright 2015: 1205-07). Each of these precedents reinforced the law's presumption against regulatory intervention and toward the private status quo. In doing so, the Court institutionalized, in effect if not always intent, a *laissez-faire* competition paradigm into jurisprudence.

Much of the intellectual impetus for this shift came from the University of Chicago, which had developed a persuasive critique of postwar antitrust during the 1950's and 1960's (Van Horn 2009). Committed to what Foucault characterized as a philosophy of "anarcho-capitalism," members of the Chicago School defined competition largely in negative terms: as the absence of government restraints on private business behavior (Bork 1978). In contrast to the early Chicago school and most European variants of liberalism which viewed a strong competition state as necessary to maintain the conditions of free market competition, members of the Chicago school viewed competition as a phenomenon that emerged spontaneously and was largely self-sustaining. Consequently, they advocated a non-interventionist approach to antitrust enforcement, especially regarding monopoly and unilateral conduct (Cerny 2016; Posner 1979). In the rare instances when private monopoly did occur, it was viewed as a temporary phenomenon held in check by the potential for competition (Friedman and Friedman 1962). Where monopoly occasionally proved more intractable, the state was so congenitally prone to error that antitrust enforcement would still usually be the wrong course of action, since it would disincentivize the 'creative destruction' at the heart of capitalist innovation (Easterbrook 1984).

Although initially ignored by most policymakers, the Chicago School of Antitrust

gained significant traction during the 1970's and 1980's (Posner 1979). One reason for this was the rapid growth of the law and economics movement which had started at the University of Chicago during the 1950's. Backed by significant financial support from business foundations, law and economics programs were established at leading law schools, and hundreds of federal judges completed business-sponsored law and economics programs, diffusing the Chicago viewpoint throughout the judiciary (Teles 2012). A second reason was the steady increase in the number of economic conservatives sitting on the federal bench. From 1969-1992, Republican presidents appointed ten Supreme Court justices as well as hundreds of appellate and district court judges (Keck 2010). Although not uniform in their beliefs, these judges were more skeptical of federal regulation and therefore more open to a competition paradigm that presumed market competition was self-sustaining and regulatory intervention usually harmful (Hutchison 2017).

Examining case law during this period, we can see a clear shift in jurisprudence toward the Chicago School of Antitrust. In a seminal 1977 case that reflected the influence of the Chicago paradigm, *GTE Sylvania v. Continental TV*, the Supreme Court reversed a longstanding 'per se' rule for nonprice vertical restraints, replacing it with the 'rule of reason,' which required that regulators and other plaintiffs provide causal evidence that a dominant company's practices had led to a consumer price increase or reduction in output before the merits of a case could be considered. Two years later, the court declared the Sherman Act to be a "consumer welfare prescription," shifting the multi-part tests that had evolved over decades to a single criterion of short-term wealth maximization that was clearly linked to the Chicago School (Kovacic 1989; Orbach 2011).

Over the ensuing decades, as more conservatives were appointed to the appellate courts—including leading figures in the law and economics movement such as Frank Easterbrook, Richard Posner, and Robert Bork—the scope of antitrust has been narrowed

further. Empirical studies of appellate court decisions demonstrate that, since the late 1970's, the US appellate courts have increasingly sided with antitrust defendants (Hutchison 2017). Since the early 1990's, the US Supreme Court has ruled in favor of antitrust plaintiffs on only two occasions in unilateral conduct cases. In the vast majority of decisions, the Court has narrowed the scope of antitrust, raising evidentiary standards and applying the 'rule of reason' to nearly all unilateral practices (Khan 2016).

Economics has certainly played a role in these jurisprudential developments. In justifying these decisions, the Court has made frequent reference to economic concepts and economic theory (Hutchison 2017). However, this jurisprudence should not be understood as the straightforward application of economics into the law (Fox 1986; Kaplow 1987). In expanding the rule of reason and applying a consumer welfare test to the law, U.S. judges did not merely require regulators to back their enforcement actions with stronger economic evidence—as European and other courts around the world have also done. Rather, US judges institutionalized a particular understanding of competition associated with the Chicago School, one that presumes the contestability of private monopoly, the efficiency of private contracts, and the tendency of government to be error-prone and captured (Orbach 2011; Pitofsky 2008).

Moreover, judges, by shifting the burden of proof under the law, have made it more difficult to win unilateral conduct cases even when the evidence of economic harm is strong. Under the rule of reason that now guides nearly all unilateral conduct enforcement, the presumption of the law is that the practice is legal unless those challenging the conduct can definitively demonstrate its economic harm in terms of consumer welfare. To succeed, regulators must "rigorously and causally connect the challenged conduct to some measure of consumer welfare loss, typically in the form of a short-run price or output effect" (Caves and Singer 2018: 3). Given the complexity of markets, the vagaries of economic efficiency, and

the difficulty of definitively proving causation before a court of law (Fox 2006), burden shifting has the effect of deferring to the private status quo. As Richard Posner (1977) has explained, the "content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability (14)."

5.1 Laissez-Faire Jurisprudence and the Pattern of Enforcement

The gradual movement of Supreme Court jurisprudence toward a *laissez-faire* understanding of monopoly and exclusionary behavior has had a clear effect on the incidence of successful unilateral conduct enforcement. Returning to Figure 1, which reports the number of Section 2 legal victories at the federal district court level, we can see a strong association between the number of successful cases before and after 1979, the year the Court declared "consumer welfare" to be the purpose of antitrust (Orbach 2011). From 1970-1979, the US DOJ won a total of 48 monopoly cases in federal district court after completing 231 investigations. In the ten years after this change, only five cases were successful following a total of 296 investigations.

Notably, this enforcement record is not simply the result of a lack of prosecutions. From 1970-1980, the US DOJ initiated 296 investigations into monopolistic practices, and pursued a litany of high-profile monopolization cases against IBM, Exxon Mobile, Xerox, Good Year Tires, AT&T, food manufacturers, and chemical companies (Kovacic 1988). But in the wake of the shift in the jurisprudential regime, with the exception of AT&T, all of these cases were terminated or lost in court (Ibid).

During the 1990's, the Clinton administration sought to revive unilateral conduct enforcement, initiating 100 investigations under Section 2 of the Sherman Act (Litan and Shapiro 2001). Although the Clinton administration's Antitrust Division had the benefit of strong leadership, significant resources and sophisticated 'post-Chicago' economic theory to

support many of their cases, the difficulty of winning cases under the competition paradigm established in U.S. jurisprudence limited their success. With the partial exception of Microsoft, nearly all of the administration's investigations were either terminated, resulted in narrow settlement agreements, or lost in court.

The U.S. jurisprudential regime has been even more constraining on state Attorneys General and private litigants. Carrier (1999, 2008) has analysed all district court antitrust cases where a Rule of Reason was demanded between 1977-2009. These include lawsuits related to monopolization, vertical restraints, refusals to deal, exclusive dealing arrangements, tying arrangements, unfair competition practices, and association rules and practices. In his first survey of nearly 500 federal court decisions from 1977-1998, Carrier found that plaintiffs succeeded in around 3% of cases. However, as courts have continued to raise evidentiary standards and expand the scope of the Rule of Reason, the number of successful cases has fallen further. In a repeat of the study from 1999-2009, the success rate of plaintiffs was less than one-half of one percent. As can be seen in Table 3, from 1999-2009, where the Rule of Reason applied, in only one instance did plaintiffs win an antitrust case at the district court level—out of more than 200 cases pursued by private, state and federal plaintiffs.

[Insert Table 3 about here].

In sum, U.S. anti-monopoly law, under prevailing jurisprudence, now presumptively treats exclusionary practices by dominant players as benign or even pro-competitive. This jurisprudence, in effect if not intent, has institutionalized a *laissez-faire* competition paradigm into the law. The difficulty of winning cases within this jurisprudential regime can explain

why successful unilateral conduct enforcement is now much lower than in Europe and why U.S. enforcement output has precipitously declined since the 1970's.

5.0 The Development of an Ordoliberal Jurisprudential Regime in Europe

Established in the 1950's as a core component of the European Economic Community, European competition law has diverse intellectual, national, and political influences (Buch-Hansen and Wigger 2011). The broader scheme was intended to complement the creation of a common market, establishing a mechanism to prevent private restraints of trade from undermining the benefits of economic cooperation. However, the meaning of each of the provisions were underspecified, reflecting the delicate compromises involved in negotiations over the Treaty of Rome, which required agreement from six national delegations representing a range of economic interests and ideological positions (Gerber 1998).

Consequently, it was left to the European Commission and the CJEU to give specific definition to the Treaty's competition provisions. In developing its meaning under the law, both bodies considered but ultimately rejected an alternative paradigm, pushed by high-ranking French officials, that would have institutionalized Article 102 [ex Article 86] as a flexible regulatory tool, to be used by the Commission on an ad hoc basis in response to exploitative behavior such as excessive pricing (Behrens 2018; Schweitzer 2008). However, such a system did not fit with the Commission and the Court's strong political commitment to facilitating "integration-through-law": establishing a politically insulated "economic constitution" that had primacy over national law (Joerges 2017: 189). Consequently, in developing the meaning of competition law, the Commission and Court opted instead to institutionalize a juridical, structuralist competition paradigm aimed at maintaining "undistorted competition" within the common market (Behrens 2018; Schweitzer 2008). The

European Commission was provided exclusive and direct control over enforcement, and the Court established hard, legal limits on exclusionary practices seen as distorting the competitive process (Gerber 1994).

Much of the intellectual impetus for the European economic constitution stemmed from the economic school of ordoliberalism that grew out of the University of Freiburg in Germany. The first to describe themselves as neoliberal, ordoliberals were, like the Chicago school, opposed to most forms of state planning and interventionism, believing that economic distribution and production should be organized through a price mechanism that reflected the choices of private producers and consumers (Ptak 2015). But unlike the Chicago School of Antitrust, ordoliberals viewed private economic power as a fundamental threat to both economic freedom and the process of competition (Crouch 2011; Gerber 1998). Left to their own devices, private actors would destroy the conditions of competition, forming exclusionary agreements, blocking rivals from entering the market, and conspiring with the government for protection (Cerny 2016: 85). Thus, a strong constitutionally-inscribed economic constitution, administered by independent courts and regulators, and which set strong limits on the exploitation of private economic power, was a *sine qua non* for a market economy and, more broadly, the preservation of economic freedom (Bonefeld 2012; Gerber 1994: 39).

Legal scholars have identified clear links between the ordoliberal economic thought that crystallized in Germany during the 1950's and 1960's and the Commission and Court's competition law jurisprudence, particularly around Article 102 [ex Article 86] (Behrens 2018; Gerber 1987, 1994, 1998; Patel and Schweitzer 2013; Schweitzer 2008). For instance, in its first abuse of dominance case, the European Commission drew heavily from economic ideas associated with the ordoliberal school, including the danger of exclusionary practices to the competitive process and the importance of protecting the economic liberty of producers

(Behrens 2018; Schweitzer 2008). This understanding was later affirmed by the CJEU in its first abuse of dominance decision in 1973. In *Continental Can Company vs. Commission of the European Communities,* the CJEU established a strong link between Article 102 and the development of a system of "undistorted competition" within the common market. The Court also made clear that abuse of dominance article covered not only exclusionary practices that directly harmed consumers but also those that caused indirect harm to consumers through "their impact on an effective competition structure" (Schweitzer 2007: 20).

Subsequent jurisprudence also drew heavily from economic concepts associated with the ordoliberal competition paradigm. The CJEU, for instance, has developed a distinction between meritorious methods of competition based on innovation or improved efficiency and unmeritorious ones that are designed to exclude rivals (Gerber 2007b: 42). And it has articulated a concern for protecting the individual liberty of both competitors and consumers, particularly their "freedom of choice" in the marketplace (Behrens 2018: 13). In developing these principles, the Court has sometimes made direct reference to economic theory developed by German economists associated with the ordoliberal school (Gerber 1998: 368).

Although the ordoliberal competition paradigm was well established in European jurisprudence by the end of the 1970's, it was not until the mid 1980's, that the European Commission began to actively enforce the abuse of dominance article. At this time, member states agreed to delegate additional authority to the European Commission, which was empowered to enact a sweeping single market project that liberalized large segments of European economies (Warlouzet and Witschke 2012). Toward the end of market liberalization, Article 102 [ex Article 86] proved remarkably useful, particularly for rooting out exclusionary practices by state-owned or recently privatized companies that had strong ties to national governments (Ehlermann 1992). Over the same period, the CJEU continued to expand the Commission's substantive authority in this area of the law, applying the abuse of

dominance provision to a wide range of exclusionary practices, including predatory pricing, margin squeezes, leveraging across markets, intellectual property and essential facilities (Keyte 2018; Lang 1994; Schweitzer 2007; Vickers 2010). The combination of renewed member state support for European integration with the Court's commitment to an ordoliberal competition paradigm in its case law resulted in a significant increase in the frequency of abuse of dominance enforcement beginning in the mid-1980's.

Since the 1990's, European courts have placed new constraints on the Commission, demanding that its reasoning be more transparent and better supported with economic evidence (Büthe 2007: 184-85). During the early 2000's, the Court even quashed several high-profile cases due to insufficient economic evidence (Kelemen 2011: 161). However, the Court's concern for improving the quality of economic evidence has had a different effect on enforcement than in the United States. While the CJEU has demanded more transparency and higher quality economic evidence, it has not narrowly redefined the purpose of competition as short-run "consumer welfare", maintaining a structural understanding of consumer interests (Patel and Schweitzer 2013: 209). In fact, in certain areas, the CJEU continues to presume that certain exclusionary practices are economically harmful unless dominant players can demonstrate their economic benefit or necessity (Ibid: 218). As important, the Court has maintained all of its prior precedents, including those with clear links to the ordoliberal school (Ibid: 215). Consequently, even after the EU's adoption of a "more economic approach" in the early 2000's, enforcement continues to be structured by a competition paradigm that sees the unmeritorious exploitation of private power as a fundamental threat to individual economic liberty, the competitive process, and ultimately consumer interests (Behrens 2018; Schweitzer 2008).

5.1 Ordoliberal Jurisprudence and the Pattern of Enforcement

Evidence for the effect of the ordoliberal competition paradigm on the pattern of European competition enforcement can be seen in an analysis of recent competition cases finalized after the adoption of the Commission's new guidelines for abuse of dominance cases in 2009, which applied the 'more economic approach' to unilateral conduct cases for the first time. For each Article 102 case finalized between 2009-2019, I have coded the main remedy involved in the case. Table 4 reports the results. Of the 39 formal prohibition or commitment decisions rendered between 2009-2019, 46% involved facilitating access for a competitor to an "essential facility," resource, or other infrastructure controlled by a dominant player; 21% involved stopping a dominant company from leveraging its power in one market over another one in a way that limited consumer choice or opportunities for competitors to compete; and 15% involved preventing predatory behaviour that was seen as foreclosing the competitive process. Within the Chicago paradigm, all three of these remedies are seen as unnecessary interventions that protect 'competitors more than competition' (Khan 2019). In most instances, they are now disallowed by contemporary U.S. antitrust jurisprudence (Keyte 2018).

[Table 4 about here].

In pursuing these cases, the European Commission also appears to frequently draw from concepts strongly associated with the ordoliberal competition paradigm. For each decision involving either a formal infringement or commitment, I have coded whether or not the decision or the public communication summarising the decision references three terms identified by legal scholars as reflecting the ordoliberal genealogy of European competition law jurisprudence: "rivalry" or a "competitive market structure" (Fox 2008), the "freedom to

compete" (Schweitzer 2008), and the "special responsibility of dominant players" not to exploit their economic power in a way that undermines the competitive process (Larouche and Schinkel 2013). To assess the potential effect of the Chicago School, I have also counted references to "consumer welfare," an output-based understanding of consumer interests that is strongly associated with the Chicago School of Antitrust (Orbach 2011), as well as "consumer choice," an articulation of consumer interests that is more in line with the ordoliberal paradigm (Behrens 2014).

As can be seen in Table 4, between 2009-2019, the Commission finalized 18 prohibitions decisions and 21 commitment decisions involving Article 102 TFEU. Of these, all of the prohibition decisions and all but four of the commitment decisions referenced one of the four terms associated with the ordoliberal genealogy of competition. Nearly three quarters of decisions mentioned the 'freedom to compete' or a close variant. Around half articulated a structural definition of competition as a process requires rivalry between different economic players, while just over one third referred to the special responsibility of dominant players not to exploit their economic power. Notably, the term "consumer welfare," which is strongly associated with the Chicago school, and often referenced in US jurisprudence, was only mentioned in 2 of the 39 cases. The Commission was far more likely to conceive of consumer interests in terms of "choice," often in conjunction with a statement about how protecting the opportunity for companies to compete on the merits maximized "consumer choice."

All in all, the enforcement pattern and language used in decisions suggests that, even after adopting the 'more economic approach', European regulators draw from a competition paradigm that is starkly different from the one used in the United States. In terms of the language used in decisions and public communications, and the remedies pursued, the European Commission continues to operate within a policy paradigm that reflects the

ordoliberal conception of market competition established in CJEU jurisprudence: as a process that, under certain circumstances, can be distorted by the exploitation of private economic power.

6. Conclusion

In this article, I have pointed to an important dimension of variation in how the concept of market competition has been institutionalized within two of the world's most important regulatory systems. Aggregating enforcement statistics from the central and state levels of the United States and European Union, I have shown that regulators have approached the problem of exclusionary practices by dominant firms differently during the neoliberal era. In the United States, unilateral conduct enforcement has fallen to a trickle. In Europe, by contrast, enforcement remains robust: each year, regulators finalize scores of abuse of dominance cases, many of which shape the structure and character of competition within the world's most highly valued markets.

As I have shown through careful qualitative and quantitative empirical analyses of enforcement actions and judicial review, the primary reason for these differences is not that one system is more concerned with economic efficiency or gives PhD economists more power in case determinations. Nor can it be entirely explained by economic patriotism or the permeability of regulatory institutions. The most important reason for the Atlantic Divide in Antitrust is the fact that distinct competition paradigms have been institutionalized in court jurisprudence. By shaping the substantive remedies available under the law, and the presumptions of the law for or against intervention, these paradigms have delimited how the law is applied in practice.

Influenced, in part, by the Chicago School's understanding of market competition as a process that is mostly robust to the private exploitation of economic power, the American

jurisprudential regime now presumptively views most exclusionary practices by dominant players, even those that prevent rivals from competing or limit consumer choice, as *a priori* efficient. Only if regulators can clearly demonstrate that such practices have reduced overall economic output and/or increased consumer prices, will courts sustain antitrust lawsuits involving unilateral practices. Influenced, in part, by ordoliberal understandings of competition as a process that can be fundamentally threatened by the exploitation of economic power, European courts, on the other hand, have institutionalized a jurisprudential regime that presumptively views certain exclusionary practices by dominant players as *a priori* inefficient. Such restraints are only permissible if dominant players can demonstrate their technical necessity or overall benefit to the economy—and in some cases they are not permitted at all.

In certain respects, the divergent approaches in Europe and the United States reflect a long-standing and unresolved tension within liberal economic theory regarding the threat that concentrated private economic power poses to the competitive process and the appropriate role of the state in placing limits on the exertion of such power (Cerny 2016; Schmidt and Woll 2013; Stahl 2019). From this vantage, the divergent competition paradigms highlighted in this article reflect different approaches aimed at the same neoliberal goal: both envision a liberal market economy characterized by robust competition between individuals and limited state intervention (Amable 2011). Moreover, both systems contain diverse elements that make them better understood as 'hybrids" than pure manifestations of a particular school of neoliberalism (Ban 2016). In other areas of competition law such as horizontal cartels or mergers, the law in each system is structured by competition paradigms that would not be appropriately characterized as either "laissez-faire" or "ordoliberal."

These caveats notwithstanding, European and U.S. courts have taken divergent positions on the danger posed by private economic coercion to market competition and the

capacity of the state to effectively manage such risks. The persistence of this 'variety' within neoliberal political economies is both underappreciated and undertheorized within the existing literature, which tends to emphasize the graduate convergence of European competition policy toward the U.S. paradigm (Buch-Hansen and Wigger 2010; Christophers 2016; Crouch 2011; Kelemen 2011). By examining this small but important difference in the judicial construction of liberalized markets, we can gain new insight not only into variation in competition policy, but also the sources of other differences in the organization of the political economy on each side of the north Atlantic, from the level of inequality between firms (Schwartz 2016), to the relative power of platform companies to set the rules of the marketplace (Rahman and Thelen 2019).

Locating the source of the "Atlantic Divide in Antitrust" in the policy paradigms institutionalized by courts also has important implications for the prospect for policy change. Although the independence of courts can make their doctrines 'stickier' than those found in non-judicialized areas of economic policy (Novkov 2008; Pierson 2011: 158-62), jurisprudence, like all institutions, can, of course, evolve. However, the fact that jurisprudential change must occur through slow moving case law, which is based, in part, on prior precedent, leads the process of change to be comparatively sluggish. While non-juridified areas of policy can sometimes adjust quickly to new economic circumstances or political pressures, areas of policy that are heavily structured by court jurisprudence often lag new scientific or political developments (Smith 2008).

Consequently, short of a new political settlement that replaces the existing jurisprudential regime, we should expect any shift in competition enforcement to be incremental. If supported by intellectually sophisticated and well-funded political movements with long time-horizons, small changes in case law may add up to a wholesale "conversion" in policy paradigm (Streeck and Thelen 2005) as seen with the success of the 'law and

economics' movement in the United States during the 1970's and 1980's (Teles 2012). However, in the absence of significant and sustained political pressure, courts are more likely to adopt 'innovations' that maintain core aspects of the existing competition paradigms, as seen with the competition law reforms pursued in the EU during the 2000's (Gerber 2007a). As a greater number of public policies become judicialized (Hirschl 2009; Shapiro and Sweet 2002), it is all the more important to understand how the institutionalization of policy paradigms through jurisprudence conditions the politics of policy continuity and change.

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Appendix 1: Tables

Table 1: Key Metrics of Antitrust (Monopoly/Abuse of Dominance) Enforcement, 2005-2019

	Number of Formal Judgments or Commitments/ Settlements	Number of Penalties	Average Penalty Size
US DOJ	3	0	n/a
US FTC	5	2	$63.4M
US AGs	15	13	$16.8M
EU	56	25	€480.2M
EU National Regulators	336	Data unavailable	Data unavailable

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

Table 2: Full-time Employees at Competition Agencies in 2016, US and EU

Jurisdiction	*Number of FTE Positions*	*Number of PhD Economists*	*PhD Economists as % of Staff*
European Commission	742	24	3.2%
European Competition Network	2,600	175	6.7%
US DOJ -Division of Antitrust	697	51	7.3%
Federal Trade Commission	1,165	81	6.9%
US Attorneys General Offices	151	0	0%
EU Total	3,342	199	5.9%
US Total	1,862	132	7.1%

Source: Global Competition Review, Government Reports.

Table 3: U.S. Court Decisions in 'Rule of Reason' Antitrust Cases, 1999-2009

Antitrust lawsuit dismissed	No anticompetitive effect demonstrated	215	96.8%
	Unrebutted procompetitive justification	1	0.5%
	No less restrictive alternative	1	0.5%
	Balancing: Benefits of restriction outweigh the costs	4	2%
Restraint invalidated	Balancing: costs outweigh the benefits	1	0.5%

Source: Carrier (2008: 829).

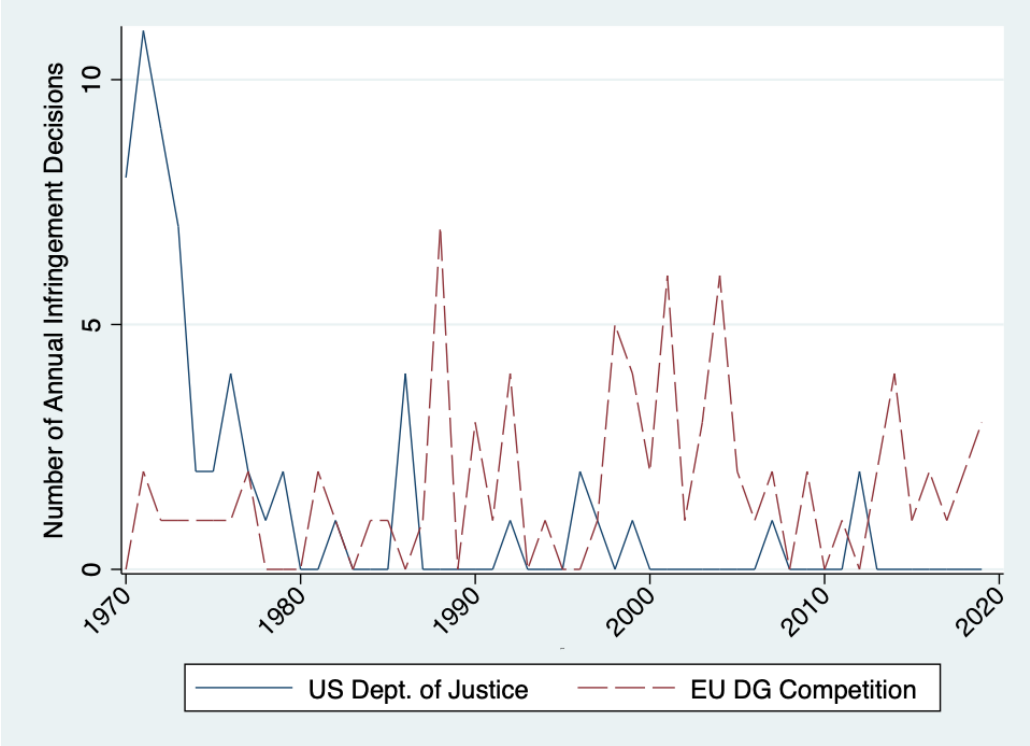
Table 4: Number and percentage of EU cases that apply certain remedies or referenced certain phrases

	Infringement decisions	Commitment decisions	Overall Percentage
Leveraging	7/18	1/21	21%
Predatory Pricing	3/18	3/21	15%
Essential Facilities	6/18	12/21	46%
Structural conception of competition as "rivalry"	11/18	9/21	51%
"freedom to compete"	14/18	15/21	74%
"special responsibility of dominant players"	12/18	2/21	36%
"consumer choice"	13/18	7/21	51%
"consumer welfare"	1/18	1/21	5%

Source: Author's calculation using reports from DG Competition, European Commission.

Appendix 2: Figures

Figure 1: Number of Successful Anti-Monopoly/Dominance Lawsuits or Prohibition Decisions, US DOJ and European Commission, 1970-2019



Sources: US Department of Justice, European Commission.

Appendix 3: Data Sources and Coding Methodology

This online appendix provides additional information about the data sources and coding used in the manuscript entitled "Varieties of Neoliberalism: Competition Paradigms, Jurisprudential Regimes and the Atlantic Divide in Antitrust." Below, I include a description of data sources and measurements for each of the tables and figures found in the paper. For each one, I include a description of the data that is used, as well as a link to the data source. Where applicable, I also provide a summary of the methods used for categorization or classification.

For the United States, I have attempted to identify the full universe of unilateral conduct cases pursued by each regulator. However, there may be differences in how unilateral conduct cases are categorized across different enforcement agencies as well as some cases where there is disagreement about how a case should be classified. Due to differences in the scope of Section 2 of the Sherman Act and Article 102 of the TFEU, the types of cases falling under the umbrella of unilateral conduct also differs. I have personally corroborated each of the datasets twice. Additionally, an independent proof-reader has rechecked the database compared to original sources, looking for errors of transposition. In the European Union, for ease or reference, I refer to the abuse of dominance article as Article 102, rather than its previous incarnations (for instance, Article 86 under the Treaty of Rome).

I should also note that differences in the organization of enforcement in the U.S. and the EU have led me to employ different methodological choices. In the United States, I have focused on federal district court victories since this is the first level of decision-making, determining the final outcome in the overwhelming majority of cases. However, in the EU, where the European Commission and national regulators can pursue administrative enforcement actions, I have analyzed Commission or national regulatory administrative decisions—the first level of decision-making which is most approximate to the federal district court level in the United States. For European Commission decisions, I have also conducted a qualitative analysis of the kinds of remedies pursued and the conceptions of competition that are utilized in these decisions. In the United States, I have chosen not to employ text analysis of U.S. district court decisions since the vast majority of unilateral conduct lawsuits are rejected at an early stage, before any substantive determination is made. Since only a handful of cases have been successful in the last two decades, the more interesting aspect to explore is how and why courts reject such a high proportion of the unilateral conduct cases which are filed.

Table 1: Key Metrics of Antitrust (Monopoly/Abuse of Dominance) Enforcement, 2005-2019

Table 1 reports the number of successful formal infringement decisions or commitments, the number of penalties, and the average penalty amounts that resulted from legal action taken by public regulators in each system. The time span examined—2005-2019—is based on the availability of enforcement data for national-level jurisdictions in Europe, where comprehensive data reporting only commenced in 2005. For the European Union, this includes the number of prohibition decisions, interim measures, or commitment decisions involving Article 102, which were finalized during from 2005-2019 by the European Commission and national-level regulators. For the United States, the figures reflect the number of district court wins and settlements involving Section 2 of the Sherman Act (DOJ), single firm conduct (FTC), or monopolization (NAAG). For both polities, cases that

were closed or terminated by the regulator or rejected at the first level of decision-making are not included.

Department of Justice, Antitrust Division.

Numbers were generated from the Division of Antitrust's "Workload Statistics," and "Historic Workload Statistics," accessible at < https://www.justice.gov/atr/division-operations>. Total figure refers to number of annual civil monopoly victories filed under Section 2 of the Sherman Act where the DOJ is listed as winning the case at the district court level during the years 2005-2019.

Federal Trade Commission.

Figures reference the number of single-firm conduct cases pursued by the FTC that resulted in either a settlement or district court victory by the end of 2019. Data is available at < https://www.ftc.gov/enforcement/cases-proceedings>. The listed cases are based on an advanced search for all cases falling under the competition topic "single firm conduct." All case listings involving "unfair methods of competition" or filed under "Section 5" of the FTC Act were also examined. However, no new unilateral conduct cases were identified through these alternative searches.

National Association of Attorneys General. NAAG State Litigation Database. Accessible at < http://app3.naag.org/antitrust/search/>.

Figures reference the number of multi-state antitrust lawsuits involving monopolization or exclusionary behavior that resulted in either a settlement or a district court win. Cases that were terminated, dismissed, or already counted in the FTC and DOJ totals were not included.

European Commission.

Figures reflect the number of prohibition decisions, interim measures, or commitment decisions rendered by the European Commission between 2005-2019. The cases were identified using a comprehensive database of all publicly listed antitrust and cartel cases initiated since 1998. Data was downloaded from the DG Competition "case search" website accessible at < https://ec.europa.eu/competition/elojade/isef/>. The download occurred on May 20, 2020. To identify Article 102 cases, I performed an advanced search for Article 102 on the Commission website. I then read the decisions in each of these cases, keeping only cases where the final decision was based on Article 102, and identifying all cases where a fine had been assessed and the amount. Decisions that primarily relied on Article 101 TFEU were excluded. To corroborate the categorizations, I compared my figures to the European Commission's annual reports, which reports the number of cartel and antitrust decisions. Because my interest is only in abuse of dominance cases, I examine a smaller number of cases. Since the judicial review process can take as long as 10 years to resolve in the European system, I do not assess whether a case was upheld in the courts.

European Competition Network.

Figures refer to the number of envisaged decisions involving Article 102 reported to the European Competition Network. Data accessible at < https://ec.europa.eu/competition/ecn/statistics.html>. Cases involving both Articles 101 and 102 were excluded from the count.

Figure 1: Number of Successful Anti-Monopoly/Dominance Lawsuits or Prohibition Decisions, US DOJ and European Commission, 1970-2019

Department of Justice, Antitrust Division.

Numbers were generated from the Division of Antitrust's "Workload Statistics," and "Historic Workload Statistics," accessible at < https://www.justice.gov/atr/division-operations>. Total figure refers to number of annual civil monopoly victories filed under Section 2 of the Sherman Act where the DOJ is listed as winning the case at the district court level during the years 1970-2019.

European Commission.

Reported statistics refer to the annual number of Commission prohibition decisions or interim measures decisions from 1970-2019. Because of a shift in how cases were classified in 2005, I exclude all commitment decisions finalized since this period. This results in a more consistent estimate of the number of cases. Data from 1999-2019 refers to data was downloaded from the DG Competition "case search" website accessible at < https://ec.europa.eu/competition/elojade/isef/>. Numbers from 1970-1998 were generated from the European's Commission's archive of competition cases decided 1964-1998, accessible at < https://ec.europa.eu/competition/antitrust/cases/older_antitrust_cases.html>. Only cases listed as an infringement of Article 102 (formerly Article 86 or Article 82) were counted.

Table 2: Full-time Employees at Competition Agencies in 2016, US and EU

Figures refer to the number of staff and PhD economists in 2016. For most jurisdictions, the data comes from the "Global Competition Review," a subscription-based news organization that specializes in competition law, accessible at < https://globalcompetitionreview.com/static/about-us>. As part of their annual review of national competition policy, the Global Competition Review publish personnel information for competition agencies in the United States and most European countries. For European countries that were not included in the GCR report, I have consulted annual competition reports for 2016, which are accessible at < https://ec.europa.eu/competition/ecn/annual_reports.html>. For a few countries, data was not available. Consequently, the personnel figures listed in Europe should be seen as a minimum estimate.

Table 3: U.S. Court Decisions in 'Rule of Reason' Antitrust Cases, 1999-2009

Table reports the results of a study by Carrier 2009 that analyzed district court outcomes in antitrust cases involving the U.S. Rule of Reason, accessible here. For more information on the results and methodology used to conduct the analysis see Carrier 2009: 828-830.

Table 4: Number and percentage of EU cases with reference to certain phrases

This table reports the number of European Commission decisions where a key term or concept was used in either a Commission decision or a public communication about the decision. The development of the list of key terms was based on an extensive survey of legal scholarship that identifies the ordoliberal genealogy of European competition law, as described in the text. I examined each of the Commission's prohibition decisions, interim

measure decisions, or commitment decisions involving Article 102 that were rendered between 2009-2019. In nearly all cases, both the press release and decision were referenced. For each case, I have coded whether the Commission employed a particular conception of competition associated with the ordoliberal or Chicago schools. The coding occurred in two stages. First, I coded each of the remedies and competition concepts based on a close reading of each of the press releases and prohibition or commitment decisions. I then hired a research assistant to conduct an independent second coding of the competition conceptions employed in Commission decisions, providing guidance on the methodology I used to conduct my original coding. The student, however, was not provided my coding results. For 87% of the codes, the student and I made exactly the same choices. For the 30 instances where we differed, I re-read the cases and reconciled our results. After this process, I decided to change my original coding in 14 instances. The full coding data used to develop Table 4 is available upon request.