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Varieties of economization in competition policy: institutional change in German and American antitrust, 1960–2000

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ABSTRACT

This paper explains the different trajectories of German and American competition policy and its permissiveness toward economic concentration in the last few decades. While the German political economy had moved to a stronger antitrust regime after 1945 and stuck to it even after the economic governance shifts of the 1980s, the traditional antitrust champion, the United States, has shed considerable parts of its basic governance toolkit against anticompetitive conduct since the 1960s. Drawing on theories of institutional change driven by bureaucratic and professional elites, the paper claims that different pathways of professional ideas in competition policy can account for the cross-country differences. In the 1960s and early 1970s, movements to strengthen competition policy enforcement emerged in both countries. While German as well as American professionals reacted to the seemingly increasing encroachment of societal concerns into antitrust with economized notions of the policies' goals, they did so in fundamentally different ways. Whereas US professionals proposed an effect-based approach in which consumer welfare and gains in efficiency may justify less competition, the more strongly law-based profession in Germany to a degree strengthened a form-based approach aiming at the preservation of competitive market structures. Such extrapolitical pathways of ideas, we argue, provide important guidelines for the implementation of competition policy by administrations and courts, whose decisions can have a far-reaching impact on industries and political economies as a whole.

KEYWORDS Competition; institutional change; professions, ideas; governance; liberalization

1. Introduction

When do concentrations of power in the economy become a problem for capitalism and democracy? When industrial capitalism matured during the late nineteenth century, intellectuals, social movements and legislators intensely debated this basic political question. While some countries, like the United States, settled on a skeptical position toward corporate power and on regulation of anticompetitive conduct, others, like Germany, followed a more permissive stance and appreciated the

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advantages of big corporations and cooperation between competitors. Since the 1960s, however, the cards in the antitrust debates have been reshuffled. While the German political economy incrementally developed a stronger antitrust regime in the control of concentration and anticompetitive conduct after 1945 – and stuck to it even through the 1980s and 1990s – the traditional antitrust champion, the United States, has moved toward a more lax position on corporate power since the 1970s (Gutiérrez & Philippon, 2018).

This paper tries to explain why these two countries have been diverging cases in competition policy. Drawing on public debates, secondary literature and reports by competition authorities in the US and Germany, we claim that the different developments on the two sides of the Atlantic cannot be understood through the three dominant explanations, business power, varieties of capitalism (VoC) and legal systems. Rather, we argue that ideological orientations that gained the upper hand in the respective national regulatory and intellectual communities are an important and overlooked factor in understanding the differences across countries and time. As we document, there were similarly inspired intellectual movements to push back against increasingly vocal progressive interpretations of competition policy in both countries since the late 1960s. Yet, the intellectual moves by reformers in the US allowed for an incremental weakening of the regime over time, while the reaction in Germany locked the regime into a more robust path. While both regimes moved away from the explicit consideration of overall societal goals and were hence changed in the spirit of neoliberal ideas (Buch-Hansen & Wigger, 2010), they diverged in their enforcement norms concerning industrial concentration. Reacting to calls for a more effective US competition policy that would actively reduce concentration in American industry, institutional entrepreneurs in the US pushed for economization, a reorientation of the regime from broad societal considerations toward purely economic goals – 'consumer welfare' above all. This *effect-based approach* to competition regulation, inspired by the Chicago school, allows for business cooperation and concentration if it is in the interest of economic goals, notably overall efficiency and consumer welfare. Compared to the 1950s and 1960s, enforcement norms in virtually every field of antitrust except pure price-fixing between competitors have been weakened. German antitrust elites, by contrast, rejected early progressive calls for a more instrumental competition policy by questioning in principle the practical, goal-directed application of the law as such – irrespective of whether these goals were economic or noneconomic in nature. Instead, their *form-based approach* to competition regulation, inspired by the Ordoliberal school, maintains that rule-based state intervention in favor of competitive pluralistic market structures is a safeguard against economic and political abuse as well as inefficiencies.

The two countries under study are largely dissimilar in terms of the most frequent typologies in political economy, not least with regard to the trajectory of their competition policies. Starting in the late nineteenth century, when the concentration of industry became subject to debate and regulation, the United States' antitrust policy established a tradition of populist protest and public regulation against monopoly power (Letwin, 1965). At the same time, significant parts of German intellectual and political discourse considered the cartelization of the economy to be a more efficient means of coordinating economic development and nurturing domestic – a tradition that, with few interruptions, persisted throughout the Third Reich (Ambrosius, 1981). The power of big business and cartels was considered to be one of the factors behind German military aggressiveness and fascism, and the

Allies transplanted American antitrust ideas and regulation after the war (Quack & Djelic, 2005). These ideas fell on fertile grounds in Ordoliberal thought, which rose to dominance in Germany during the postwar years and shaped such important economic institutions as the Bundesbank, the German Council of Economic Experts and, most relevant here, the antitrust authorities (Hien & Joerges, 2017). These views, entrenched in regulatory authorities and reproduced through the legal profession, remained an ideological bulwark against the diffusion of the 'more economic' or effect-based approach to antitrust.

Our focus on ideational and professional changes intends to complement a range of alternative explanations for institutional differences between the German and American political economies. It contributes to the comparative study of institutional inertia and change across countries by highlighting the important role that different professional ideas can play. It shows within the American case how the zeal of charismatic movements, such as the anti-monopolist Populists, can become disenchanted in bureaucratic bodies where original ideas can even be perverted. It thus contributes to the growing literature on economic professions in the making of modern capitalism (Seabrooke & Henriksen, 2017) and the literature on bureaucratic institutions (central banks, regulatory agencies, competition authorities in our case), whose *Eigenlogik*, at times beyond democratic control, can have an important impact on political economic outcomes. Overall, we break new ground in the neglected comparative study of antitrust in comparative political economy (CPE). Given the importance of market structures for consumers, workers, political systems, and societies as a whole, this particular policy field has been largely overlooked or all too often subsumed under countries' general type of capitalism.

The remainder of the article is divided into three parts. We *first* situate our analysis in the literature on institutional change through professional ideas and bureaucratic agencies and in the general political science literature on competition policy. *Secondly*, we review changes in American antitrust since the 1960s. The reorientation of US antitrust, we argue, resulted from an intellectual opposition movement against activist tendencies in the 1960s that championed a narrowing of the objectives of competition policy and a strictly economic consequentialist reasoning in antitrust enforcement. Opposition against similar activist tendencies took a very different form in Germany. In a *third* step, we show how the German opposition movement was led by legal rather than economic thinking, which questioned the legitimacy of effect-oriented reasoning in competition policy in general. The paradoxical effect of this movement was that even though the reaction against activist competition policy in Germany was intellectually more radical in the beginning, German antitrust enforcement became partly immune to the incremental economic appreciation of the potentially beneficial effects of anticompetitive behavior that happened in the United States. *Finally*, we conclude by highlighting the relevance of the study of bureaucratic agencies as forgotten drivers of large-scale institutional change that can have an explanatory say beyond institutional VoC.

2. Antitrust regimes and extrapolitical institutional change

To lay the ground for our comparative historical analysis, this section establishes three points. First, we argue that prominent explanations of institutional change in competition policy fail to comprehensively account for decisive historical turning

points as well as international variation. Second, we connect conceptual arguments from political economy, institutional theory, and political sociology to demonstrate that analyses of bureaucracies and professional communities can explain path-breaking change in situations of low politicization and issue salience. Third, we argue that competition policy as a regulatory field is vulnerable for change on the level of enforcement.

2.1. Weaknesses of alternative accounts of institutional change in competition policy

Debates on the causes of institutional change in competition policy over the last 50 years have not been settled conclusively. While the literature in the antitrust field itself is vast and of great historical depth, it rarely aims at systematic explanation and theoretical generalization. By contrast, in-depth studies of antitrust regimes are rare in the political economy literature, while there are plenty of passing generalizations about the drivers of institutional change in competition policy – especially for the American case. We review three types of explanations of changes in competition policy – accounts highlighting business pressures, national institutions, and legal systems. Our aim is not to outright reject these perspectives, but to demonstrate that they have difficulties to make sense of the historical record and the larger comparative picture, which can be remedied by an examination of the intersections between professional communities and bureaucracies.

Accounts of economic policy change since the 1960s in the United States often locate the origin of path-breaking policy initiatives in the troubling situation of American business in the 1970s and early 1980s. In this view, domestic and international pressures on economic activity and profits led to a concerted countermovement by business and its political allies to improve American firms' standing at home and abroad. The most elaborate version of this argument applied to competition policy is Christophers' recent study of twentieth century competition and patent policy in Great Britain and the United States (Christophers, 2016). Drawing heavily on economic historian Galambos (2004), Christophers argues that laxer antimonopoly enforcement and more permissive merger and takeover policing since the 1980s were essentially industrial policies, meant to hasten restructuring and revitalize American industry in international competition. Attacks on rigorous antitrust enforcement on revitalization grounds were indeed common in the 1970s and 1980s – as undertaken by both progressive as well as conservative thought leaders (Graham, 1992), the business community (Driggs, 1985), parts of the Congress (US Congress, 1985), and the Reagan administration (DPC/EPC, 1985).

While the political significance of revitalization pressures cannot be denied, we see two problems with this explanatory strategy. First, institutional change in competition policy has not been implemented in a comprehensive manner, but through piecemeal precedent and experiments. In consequence, political economic interests with respect to individual cases and enforcement practices were much more heterogeneous than business pressure-accounts make them out to be. To give just a single example, the landmark 1983 permission of the Federal Trade Commission to let General Motors and Toyota jointly operate their NUMMI-plant in Fremont, California, was fiercely attacked by their American competitors (New York Times, 1984). In more abstract terms, issue- and case-specific changes in competition

policies almost as a rule divide the business community internally into short-run winners and losers, which arguably makes business an unreliable driver of institutional change. Second, relaxing antitrust enforcement is not a natural reaction to depressed business activity. To the contrary, as Galambos (2004, p. 155) recognizes, just a few years earlier, the natural competition policy strategy to spur industrial growth was stepping up enforcement to eliminate what New Deal antitrust champion Thurman Arnold called the *Bottlenecks of Business*. Furthermore, although revitalization via more permissive competition policies was a prominent strategy in the United States in that specific historical period, other countries with large-scale industrial restructuring and revitalization needs lacked similarly vigorous movements. Economic pressures have to be 'channeled' into specific policy action or inaction (Gourevitch, 1986). As we argue in this article, a critical channeling mechanism making sense of our comparative-historical puzzle consisted of the workings of ideas, professional communities, and enforcement agencies.

The fact that different states pursued different strategies in antitrust enforcement despite similar economic challenges of course does not imply that ideational processes played a critical role. As antitrust regimes significantly impact the structure of the supply side of economies, a second straightforward candidate for explaining divergence is the institutional setup of different political economies. The CPE literature dedicated to antimonopoly policies is surprisingly limited, which makes it difficult to derive clear-cut theoretical predictions from this line of research. Building on the logic of institutional complementarities, the original 2001 volume on VoC contains sparse remarks that the US political economy is characterized by 'rigorous antitrust regulations', while coordinated models of capitalism lean toward laxer enforcement (Hall & Soskice, 2001, p. 31; Tate, 2001). Especially for the period between World War II and the early 1980s, this is a fitting observation. Often discussed examples of German and Japanese business practices foreign to the American competition policy regime were intensive intra-industry collaboration in research and development, extensive cross-shareholding in certain industries and business groups, interfirm cooperation in skill-formation, and the use of rationalization and crisis cartels (Dore, 1986; Streeck, 1991). Since the 1970s, however, the institutional trajectories of the German and the American competition policy regimes moved in the opposite direction. Orthodox readings of the original VoC-formulation are a poor guide to understand key developments in competition policy. Good examples are the movement against resale price maintenance in Germany, while US administrators stepped away from their traditionally strict policing of such restrictions on wholesalers and retailers or the increasing appreciation of consortia and growing friendliness toward large-scale mergers and acquisitions in the US.

There exists a more refined argument applying a comparative institutionalist framework to explain international differences of antimonopoly policies. This argument does not primarily focus on substantive differences in antitrust, but on differences of enforcement procedures. In an article criticizing European Commission efforts in the early 2000s to move European antitrust enforcement practices closer to American conventions, Wigger and Nölke (2007) argue that Continental European procedural codes and legal traditions historically supported 'Rhenish' models of capitalism. Two traditions in particular strike them as supportive of a 'long-term orientation' and of 'long-term investments' by curbing legal

uncertainties. The weakness of private competition policy enforcement in Europe means that businesses have to deal with challenges from a limited set of relatively transparent state agencies. The existence of advance notification systems, which allow corporations to gain certainty about the legality of business practices before committing to them, furthermore, may decrease legal uncertainties. While their argument about the homologies between production and legal systems is illuminating, Wigger and Nölke's enforcement system characteristics leave a number of significant historical developments unexplained. As documented in our comparative analysis in Section 3, German attempts to reform antitrust enforcement in consideration of broader societal values in the late 1960s proposed more, not less, case-specific flexibility, while the ensuing Ordoliberal rejection of more flexible enforcement practices tried to block, rather than preserve, the influence of wider societal concerns on competition policy. Equally problematic, the Common law based US competition policy regime produced a large number of structure-oriented *per se* rules until the 1960s, which only later came under increasing fire. Similar to the under-determination of policies through economic pressures, institutional regimes leave considerable room for conflicts, deviating policies, and institutional experiments.

A third alternative explanation would see change in the US and resistance in Germany as consequences of the respective legal regimes. The general resistance of the German legal profession against the more recent economic arguments is also an expression of its more general skepticism against 'law and economics' – i.e. the application of economic theories and principles to the analysis of law (Kirchner, 1991). In Common law systems economic approaches were often seized by the judiciary in its struggle for a balance of power. The German judiciary has historically been much more confined to interpreting the laws as set by the legislature or to interpreting cases as defined by existing legal doctrines (Kirchner, 1991). Emblematically, although the subject of law and economics is taught at universities in Germany, it is not a required part of German lawyers' training. Furthermore, Continental European legal regimes are often characterized as inquisitorial, in contrast to Anglo-American adversarial regimes (Rueschemeyer, 1976). While the former rely more heavily on justices and state officials as neutral participants in trials, the latter give more room to the contending parties to introduce evidence and structure trials. Modern economic antitrust thinking, with its emphasis on complex economic modeling and on questions of quantitative trade-offs, seems to be more fitting for an adversarial system in which there are extensive possibilities for the parties involved to present expert assessments of the given case. While both dimensions of institutional difference have undoubtedly contributed to the trajectories of antitrust thinking, we would caution against a monocausal institutional explanation. Widespread beliefs in underlying systems of thought are not a necessary condition for the adoption of certain doctrinal elements, as Germany's immediate postwar legal history documents. In addition, state agencies and courts around the world have tried to keep up with the increasing technical demands of modern antitrust prosecution, which shows that the skills necessary are in no way exclusive to contending parties.

While legal traditions certainly influence pathways of legal change, they as well leave room for deviant actors and processes, which may culminate in institutional

change. The purpose of the following section is to suggest that changing ideas in bureaucracies and associated professions can shape such deviations.

2.2. Bureaucracies and professional ideas as sources of institutional change

Our paper draws on two strands of literature to understand the phenomenon of cross-country and over-time differences in antitrust enforcement practices: the political sociology of bureaucracies and research on the role of ideas in shaping institutional change. At the latest since Evans, Rueschemeyer, and Skocpol (1985) call to bring the state back in, CPE has come to pay attention to the structure of state institutions to explain country-specific political economic pathways. The institutions covered range from parliaments, governments, and regulatory agencies to entire political systems. As pointed out by a number of recent disciplinary surveys, however, the comparative institutionalist literature has less frequently analyzed the intricacies of political economic change generated *after* major laws have been implemented and major political battles have been settled (Hacker, Pierson, & Thelen, 2015; Mahoney & Thelen, 2010, pp. 13–14; Patashnik & Zelizer, 2013). In this implementation phase of policies and regulations, the semi-autonomous nature of bureaucracies and related professional communities can become a major driver of large-scale institutional change.

2.2.1. Study of state bureaucracies

The role of bureaucracies in institutional change has often been described as one of incremental state-building. Almost as a rule, more encompassing regulations and state functions emerge with low levels of specification and practical enactment. Past research has traced how bureaucracies, in interaction with societal forces and professional discourse, translated vague regulatory missions into full-blown regulatory regimes – for example in Equal Opportunity regulation or in environmental policy (Dobbin, 2009; Uekötter, 2014). The often-implicit model of institutional change underlying accounts of incremental state-building locates political conflict and actual change in policies and thereby belittles implementation as a process of translating vague regulatory missions into practice. Policy implementation regularly appears as a technical matter that, even if riddled with professional fads and mission creep by concerned agencies, is less consequential for institutional development than political processes. Related to this understanding of policy implementation are strong distinctions between 'settled' and 'unsettled' social formations (Swidler, 1986), the latter giving rise to fundamental institutional change.

We suggest going beyond such an – admittedly highly stylized – understanding of the role of bureaucracies in institutional change in two respects. *First*, we argue that the technical implementation of policies has a politics of its own – with possibly equally far-reaching institutional effects. *Second*, we argue that the sharp divide between bureaucratized and politicized institutional realms is misleading. The common idea that ideological conflicts, clashes of interest, and social movement-like fads are largely confined to the sphere of the political system whereas bureaucratized fields grow through technical processes can leave important changes in modern political economies unexplained. As our comparative study shows, antitrust 'as a technique' was no less shaped by value-laden, 'non-rational' factors than

antitrust as a political creed. The difference is one of the type, rather than the intensity, of political challenge.

Belittling the 'implementation' of legal rules or social norms in favor of emphases on their emergence or change is a longstanding deficiency in the social sciences – especially in macro-sociology and political economy. Great legislative victories or defeats, battles of grand ideologies, and mass mobilization obviously strike observers as much more relevant for societal development than changes in the nitty-gritty of administrative procedures or in the day-to-day enforcement practices. There are, however, notable exceptions to the focus on legislative politics in the investigation of institutional change – especially in various more recent institutionalist literatures (a useful overview of earlier studies is in Evans et al., 1985).

2.2.2. Institutional change through bureaucracies

Two main types of argument as to why bureaucracies can be at the origins of processes of institutional change are especially relevant for our comparative case study. The *first* stresses the ambiguity of legal provisions and describes bureaucracies as the agents, which bring certain interpretations into practice. The *second* builds on the idea that bureaucracies are the institutional 'bridges' between professional ideas and the state, which enable policy change through ideational change without overt politicization.

The first perspective has been worked out in detail by Lauren Edelman. In a number of studies, she has advanced a perspective called the *endogeneity of legal regulation*. In what might in part be an outgrowth of her research focus on a Common law system and a comparatively weak state,[1] she demonstrates how diverse organizations influence the interpretation of legal rules by establishing dominant forms of compliance, by lobbying for favorable jurisdiction and enforcement practices, and by contributing to professional networks' activities (Edelman, 1991, 1992). For the American context, policy analyses in the 1970s and 1980s stressed that governance evolves in issue-specific networks between specialized state agencies, parts of the legislature and government, courts, and dominant interest groups.[2] In a similar vein, Streeck and Thelen made the interpretative flexibility of rules a starting point to theorize institutional change in general: 'the meaning of a rule is never self-evident and always subject to and in need of interpretation,' they assert (Streeck & Thelen, 2005, p. 14). Therefore, the 'real meaning of an institution … is inevitably … subject to evolution driven, if by nothing else, by its necessarily imperfect enactment on the ground, in directions that are often unpredictable' (Streeck & Thelen, 2005, p. 16). The more recent institutionalist literature in political science has identified bureaucracies and courts as the main arenas for such forms of incremental change. Hacker et al. (2015, p. 189) argue that institutions vary in their 'precision.' Hence, one may expect different political processes around policies laying out clear enforcement criteria and policies 'whose provisions are ambiguous and whose effects depend on interpretation and discretion' and thereby 'offer fertile terrain for strategies of conversion' (ibd.). The latter are subject to challenges through 'backroom' strategies by state agents, organized interests, and professional groups and generally involve a high degree of what Culpepper (2011) has called 'quiet politics.'

The second perspective on institutional change through bureaucracies builds on the fact that bureaucratic agencies work at the intersection of professional communities and the state, which strengthens the role of ideas in institutional change and persistence (Evans et al., 1989). Bureaucratic agencies are staffed with professionally trained officials – in most developed countries predominantly by lawyers, social scientists, and engineers – who can become the institutional carriers of ideas in policy-making. This can happen both through ideological conversion and through personnel replacement, and often takes place gradually. Hence, new ideas are often only realized when the existing staff of regulatory bodies makes an ideological shift – or, more likely, when it is replaced by a new generation of bureaucrats trained within a new ideational current. Both processes can give rise to country-specific pathways in policy and regulation as they are shaped by the structures of the respective agencies and communities. Comparing the diffusion of Keynesian ideas into US and UK economic policy-making since the Great Depression, Margaret Weir, for example has shown how, contingent on the structure of the respective bureaucracies, demand management diffused slowly but in a resilient way into the hierarchical official apparatus in the UK, while it gained quick support in the open and fragmented US administration without taking a longer-term hold (Weir, 1989). With a similar theoretical outlook, Christopher Allen has claimed that ideational resilience at the German Bundesbank – which since the 1970s maintains its own university – helped to undermine the diffusion of Keynesian ideas into Germany's economic policies (Allen, 1989). Pierre Bourdieu analyzed the change from capital-heavy 'stone-based' housing subsidies to individually tailored housing allowances in France in the 1970s as caused by the econometric ideas brought in by a new generation of technocrats (Bourdieu, 2005). Similar processes of ideational infusion at the level of bureaucracies are at play when new state capacities are built up. Thus, the influence of interest groups like realtors in the creation of the New Deal housing administration, made up in large part by former realtors, was key to creating an industry-friendly housing policy and keeping the US from supporting public housing more systematically (Mason, 2014). In France, by contrast, the inflow of former public works engineers from the *Pont-de-Chaussée* school into the newly formed ministry of housing led to the infamous state *Grands Ensembles* constructions (Thoenig, 1973).

2.3. Implementation of competition policies and incremental change

Competition policies are paradigmatic cases of the two openings for incremental change outlined above. First, they are characterized by widely acknowledged ambiguity with regard to enforcement practices and enforcement goals. In the above-mentioned terminology, they have a very low degree of institutional precision. Second, they are significantly shaped by national and transnational professional communities in legal studies and economics.

The far-reaching susceptibility of competition policy regimes to processes of reinterpretation has often been pointed out (Fligstein, 1990, p. 213; Gerber, 1998). During the first years of its existence, the American antitrust regime, for example, changed from being essentially a dead letter to being used to prosecute labor unions – and from there to the basis for the breaking up of Standard Oil. Whether caused by cynicism or by the genuine substantial puzzlement of legislators

(Hofstadter [1964] 1996, pp. 191–192, 198–200), early American antitrust statutes consisted of an odd mix of potentially very far-reaching prohibitions and vague specifications. In effect, it was up to administrators and the courts to translate general regulatory principles into enforcement practices. What is more, far-reaching ambiguity and ambivalence marked competition policy as a regulatory field. Depending on business context and theoretical sensemaking, one and the same business activity – for example, undercutting one's rival – can have radically different meanings for antitrust objectives. There exists a long history of different methods, conventions, and theories to categorize competitive conduct with regard to antitrust objectives. In addition, competition law, since its inception, has been plagued by ambivalence regarding the exact nature and interrelationships of its principles and goals. To give just one example, the Sherman Act was passed in a time of intense popular critique of 'bigness' in economic life – especially with regard to the consequences of monopolies for the political arena – while at the same time the economics profession began to favorably reinterpret the causes and consequences of economic concentration in a 'new economy' characterized by the giant corporation and oligopolistic competition.[3] Over the last 130 years, competition policy was pursued for a number of – sometimes complementary, sometimes conflicting – goals, like consumer sovereignty, consumer welfare, democracy, geographical decentralization, or national economic development. Again, it was regularly up to the enforcement layer of antitrust, and only occasionally to that of its design, to come up with specifications and trade-offs for competing objectives.

The vulnerability of competition policy to institutional change through spillovers between professional communities and bureaucracies is an equally well-established finding. Particularly Eisner has worked out a comprehensive account of institutional change in American antitrust enforcement standards that advances the claim that in antitrust 'politics … lagged behind policy' (Eisner, 1991, p. 233). He documents how the so-called Reagan Revolution in antitrust was 'at most a coup' (Eisner, 1991, p. 189): the administration merely reaffirmed changed enforcement practices in the antitrust agencies and at many courts which were caused by changed thinking about competition policy. Similar assessments about the root causes of institutional change in American antitrust are advanced by legal scholars and industrial economists (Kovacic, 1990, 2003; Pitofsky, 2008). What distinguishes these accounts from the traditional view of the role of bureaucrats in institutional change cited above is that state agents and professional communities do not just extend or implement policies in a path-dependent manner, but are themselves responsible for incremental, but quite drastic, changes of policy course. Such accounts hardly fit a standard model of bureaucratic activity in which bureaucracies serve as agents taking care of the straightforward application of policies to practice. Our cross-country comparison serves to illustrate exactly that point. State agents and professional communities reacted to similar perceived challenges with fundamentally different intellectual currents, which led to diverging trajectories of incremental change in competition policy.

3. Varieties of economization in competition policy

Our comparative historical analysis reconstructs the historical origins of what commentators have called the 'Atlantic divide' in antitrust (Gifford & Kudrle, 2015;

Gutiérrez & Philippon, 2018). Competition policy regimes are complex regulatory structures, composed of a loosely coupled multitude of regulations and multiple enforcement layers. Today, most competition policy regimes in advanced countries are roughly composed of four main regulatory areas – the prosecution of cartel activities, the policing of attempts to monopolize markets, the control of merger activity, and the enforcement of statutes against deceptive and unfair trade practices. The diagnosis of an 'Atlantic divide' is a widely shared professional generalization based on observations of diverging enforcement practices, in particular with respect to attempts to monopolize markets and mergers. Antitrust scholars speak about these historically highly flexible parts of competition policy as 'antitrust law other than cartel law,' as the prosecution of 'hard-core cartels,' fixing prices, output, or structures of distribution, has rarely been contentious and in need of interpretation and might even have been strengthened across the globe during the last 50 years (Fox, 2008, p. 98, Fn. 18).

Despite being widely shared among antitrust scholars, the exact parameters of divergence between Europe and the US – of policy change in either region as well as in comparison – are notoriously difficult to pin down with precision. It is generally difficult to estimate the effects antitrust policies have on the overall structure of industrial organization. Effective competition policies would, to a large degree, prevent actions in restraint of competition *before* the fact. It is equally difficult to quantify the effects of new doctrines on the activity of state agencies. Rising or falling case numbers, for example, say very little about the direction of enforcement practice, both because cases vary widely in their scope and depth and because numbers of cases are contingent on agency activity *as well as* economic activity. Moreover, as complex regulatory structures as a rule involve decentral experiments, there are numerous cases deviating from the more general pattern of regime development. These measurement problems are at the core of fundamentally different views of how American antitrust enforcement has changed since the 1960s. What for some amounts to a 'corporate takeover of the market' (Crouch, 2011, Ch. 3) or 'a return to the period of neglect of the 1920s' (Pitofsky, 2008, p. 5), represents a healthy dose of self-questioning and analytical sharpening for others (Kovacic, 2003; Scherer, 2008).

Scholars often resort to key cases and decisions in Europe and the US to make the case for divergence. One example is the European blocking of the merger between *GE* and *Honeywell*, which had passed US enforcement agencies without problems, another one the European tendency to enforce rules against price discrimination and bundling by dominant firms. Finally, there are repeated European attempts to apply antitrust laws more aggressively to the IT and software sectors.[4] Another apparent indication of divergence is the fact that the European Commission, which until the 2000s took over leadership in significant parts of EU Member States' enforcement functions, faced outright hostility from professionals and national antitrust authorities when it since the late 1990s tried to implement conventions firmly established in American enforcement (Buxbaum, 2005; Gerber, 2007). What the extensive conflicts over the 'modernization' of European antitrust law brought to the fore was that significant parts of European doctrine and enforcement practice were incompatible with the way the antitrust enterprise had changed across the Atlantic.

We argue that the major fault lines of the Atlantic divide can be made explicit through a focus on the German antitrust doctrine and hence German–American comparison. For once, the German antitrust authorities were originally as much an institutional blueprint in the set-up of the European ones as was the Bundesbank for the European Central Bank. Then, it was German professionals and agencies, which were at the forefront of critique of the EU's 'modernization' initiatives since the 1990s. Among European nations, Germany sticks out, due to the size of its economy and its importance for antitrust in Europe. More than 50% of all European merger and acquisition cases since 1991, for instance, included a German company (own calculation). Finally, from a structural-economic perspective, Germany could arguably have been a likely nation to follow Chicago School doctrines given its strong restraint of trade-friendly stance in the past.

In fact, our analysis shows that core parts of the incompatibilities between European and American antitrust enforcement can be traced back to the specific way in which the German antitrust profession reacted to progressive reform proposals in the 1960s and 1970s. The German profession incrementally developed beliefs about the proper goals and procedures of competition policy enforcement that – like its American counterpart – sought to push back against the influence of broader societal concerns. But, it did so in a way that shielded its enforcement system from the lowering of enforcement standards seen across the Atlantic.

As growing incompatibilities between doctrines are difficult to describe comprehensively, we resort to an analysis of the language used by competition policy authorities to describe their activities and goals. An indication of the diverging trajectories of German and American enforcement can be found in the annual activity reports antitrust authorities produce for their supervisory bodies. In contrast to content analyses of more explicit political documents, like manifestos and speeches, the more procedural nature of competition policy reports makes an analysis of the implicitly used categories more suitable to uncover changes over time than a classical discourse analysis.

To this purpose, we constructed a dictionary for the typical vocabulary associated with the more traditional form-based approach (and hence not the more recent effect-based approach). We expect documents to be more likely of the form-based orientation if they refer to economic concentration as a problem, if economic freedom is an ideal, and if small- and medium-sized enterprises facing monopoly power are a concern.[5] The over-time trend of the terms (and their variants) making up this dictionary is depicted in Figure 1 for the American case. The relative frequency of all terms tends to decline over time, which we take as supportive evidence for a decreasing importance of the form-based approach in the US. The concern for free competition and small enterprises or the fear of monopoly power was very present from the 1940s to 1960s, as when a report stated in 1947 that the 'democratic political structure upon which this country is based requires a system of free competitive enterprise to sustain it industrially and to realize its fullest economic potential.' By 1994, in turn, the language had shifted as when the respective report claimed that 'competitive markets serve consumers by fostering innovation and efficient resource allocation.'

Quite a different picture over time is found in the reports of the German antitrust authorities, as shown in Figure 2. There the occurrence of references to concentration and freedom remain important through time, while the concern about

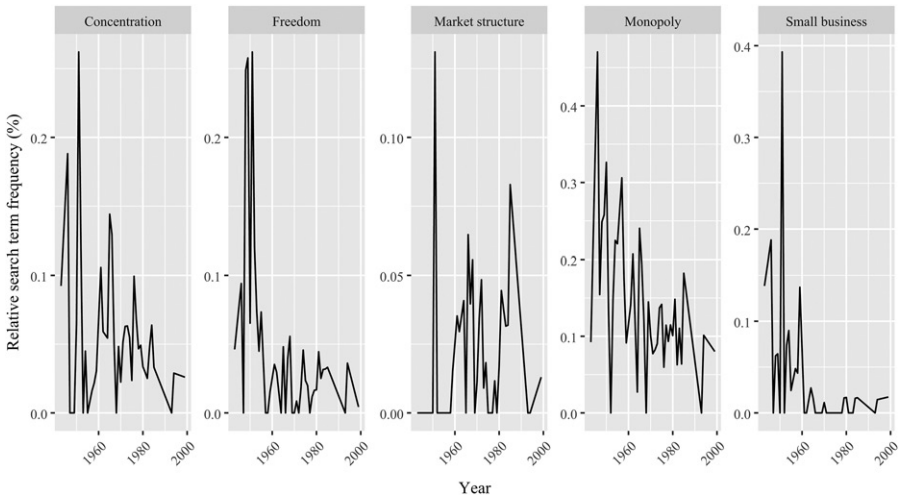

Figure 1. Relative frequency of form-based dictionary terms in US antitrust reports. Source: Extracted from the annual antitrust reports of the Attorney General from 1945 to 1999. See Department of Justice (1982/1986).

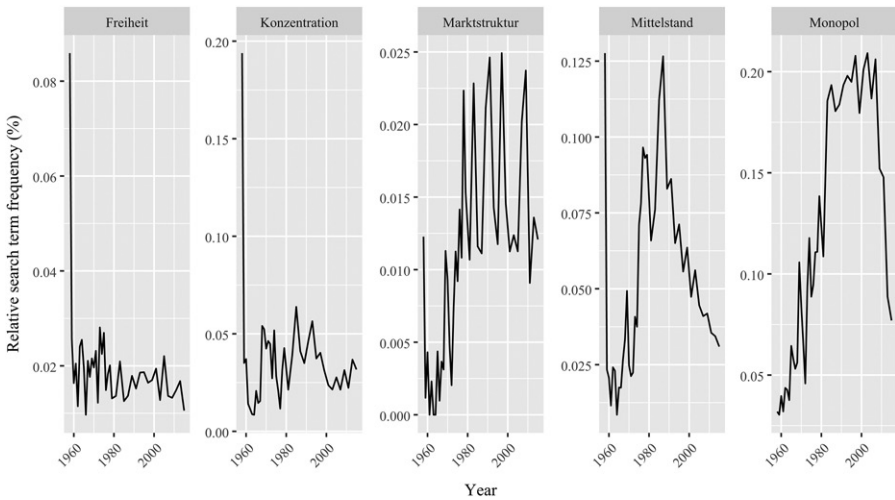

Figure 2. Relative frequency of form-based dictionary terms in German antitrust reports. Source: Bundeskartellamt, Tätigkeitsberichte. See Bundeskartellamt (1959/1978/1982/1984/1987/2000/2001).

monopolies and a proper market structure even increases. Only references to small businesses and – very recently – monopolies decrease, although later and less severe than in the US. An explanation for this finding might be that, compared to the US, European antitrust institutions were more heavily involved in the *de novo* creation of Union-wide markets. The focus on nation states' established restrictions of trade often referred to formal and quasi-monopolies or monopoly like structures, which have been reduced significantly in the construction of the European Common Market. Despite this, the general picture of diverging antitrust vocabularies reveals sufficient variation to justify our comparative focus on the evolution of professional doctrines.

3.1. The administrative economization of American antitrust

Compared to the German case, the historical literature on institutional change in American competition policy since the 1960s is large and well developed. We present a highly stylized historical account of that process, highlighting the main programmatic cleavages at the core of debates about the direction of US competition policy in the formative period between the late 1960s and the mid-1980s. The goals of our analysis are twofold: We document the emergence and structure of enforcement doctrines that enabled substantial institutional changes and lay the ground for understanding the alternative path of German doctrines.

3.1.1. Strengthening antitrust

The vulnerability of the American antitrust system for processes of incremental change has important institutional determinants. It formally operates largely independent from the political system. American antitrust is jointly enforced by the Department of Justice Antitrust Division and the Federal Trade Commission, subject to extensive judicial review, and relies heavily on litigation by private parties. Estimates for the share of private initiative in American antitrust suggest that 'private cases filed annually in US District Courts ranged from 83 to 96 percent of the total from 1975 to 2003' (Gifford & Kudrle, 2015, p. 18). The DOJ and the FTC share many authorities, cooperate in investigations, and traditionally specialize by sectors or industries. While both bureacracies' heads are appointed by Administrations, commentators usually credit them with substantial independence and discretion (Kovacic, 2011).

This institutional embedding was at the core of the dramatic incremental expansion of enforcement activity between the 1920s and 1970s, largely in the absence of momentous legislative changes (Hofstadter, [1964] 1996). With regard to enforcement practices, the American antitrust bureaucracy since the New Deal has usually been characterized as an entrepreneurial driver of expansion in the direction of early populist understandings of the antitrust laws. Without further qualifications, Richard Hofstadter was able to claim that antitrust in his time was 'essentially a political rather than an economic enterprise' (Hofstadter, [1964] 1996, p. 200). Even though the history of governmental attempts to use the antitrust laws as a tool to lower the concentration of American industry after the fact is, with few exceptions, a history of costly failures and misses (Kovacic, 1989), deconcentration for economic, political, and cultural reasons has been a centerpiece of the antitrust agenda since the 1930s. In many high-profile cases before the 1970s, it was officially recognized by American courts (Gifford & Kudrle, 2015, pp. 12–13). Court opinions and politicians' speeches before the 1970s contained references to small businesses as 'worthy men', warned against the political ramifications of corporate concentration, and quoted the 'social and moral effects' of economic independence (Pitofsky, 1979). The 'political content of antitrust' (ibid.) pervaded large parts of post-New Deal enforcement and jurisdiction, often with a good amount of enthusiastic 'overshooting':

> … tiny mergers that could not seriously be viewed as challenges to a competitive market were consistently blocked, abbreviated (so-called per se) rules were introduced to outlaw behavior that rarely produced anticompetitive or anticonsumer effects, and licensing practices were challenged, which were little more than efforts to engage in aggressive

> innovation. All of this was accompanied by an almost total disregard for business claims of efficiency. (Pitofsky, 2008, p. 4)

The intellectual bases of much of this activist style of enforcement stemmed from what came to be called the Harvard School of industrial economics – a school of microeconomic analysis with a longstanding interest in systematizing the structural preconditions of anticompetitive behavior.[6] In effect, many of the activist enforcement policies of the postwar decades were legitimized by the belief that the preservation of certain industry *structures* would render future anticompetitive behavior more unlikely. Both the profession's focus on structure and its pursuit of the deconcentration agenda in many ways culminated in the report of Lyndon Johnson's Task Force on Antitrust Policy, the so-called *Neal Report*. The experts suggested the passage of what they called the *Concentrated Industries Act*, a measure that would allow administrators to force firms in concentrated industries to divest structures to limit their market share to 12% (Neal, 1968).[7]

3.1.2. The effect-based revolution

While the administrative movement against such activist tendencies came to formally dominate the field during the presidency of Ronald Reagan, conclusive evidence exists that the so-called Reagan Revolution in competition policy was merely part of an official acknowledgment of changes already firmly anchored among professionals, bureaucrats, and in the judiciary (Eisner, 1991; Eisner & Meier, 1990). The original doctrinal challenge carrying that movement is captured in Robert Bork's dissenting statement to the *Neal Report*. Bork, who in many ways led the intellectual assault on structure-focused activist antitrust, was a member of the Neal Commission and criticized the proposed deconcentration initiative on the basis of a then comparatively extreme faith in market processes that widely diffused into US antitrust thinking during the following decades,

> When firms grow to sizes that create concentration or when such a structure is created by merger and persists for many years, there is a very strong *prima facie* case that the firms' sizes are related to efficiency … If the leading firms in a concentrated industry are restricting their output in order to obtain prices above the competitive level, their efficiencies must be sufficiently superior to that of all actual and potential rivals to offset that behavior. Were this not so, rivals would be enabled to expand their market shares because of the abnormally high prices and would thus deconcentrate the industry. Market rivalry thus automatically weighs the respective influences of efficiency and output restriction and arrives at the firm sizes and industry structures that serve consumers best (Bork, 1969, p. 54).

There was both an analytical and a normative side to critiques like Bork's. Analytically, they challenged established views of what certain market structures and processes 'actually meant' in economic terms. Many theoretical attacks revolved around the question of whether certain business activities formerly categorized as attempts to restrict competition – like extensive conglomerate mergers, price wars, or tie-ins, for example – could really be understood as directed against competition on the basis of neoclassical microeconomics. In rebutting theories of 'predatory pricing' (firms' attempts to undercut rivals at a loss, in order to profit from increased market power after the rivals' exit), for example conservative thinkers made reference to turn-of-century arguments about the disciplining role of 'potential competition' and to the long-run rationality of businesses to discredit

the view that aggressive underselling could at any time be interpreted as an attempt to achieve market power:

> Selling below cost in order to drive out a competitor is unprofitable even in the long run, except in the unlikely case in which the intended victim lacks equal access to capital to finance a price war. The predator loses money during the period of predation and, if he tries to recoup it later by raising his price, new entrants will be attracted, the price will be bid down to the competitive level, and the attempt at recoupment will fail. Most alleged instances of below-cost pricing must, therefore, be attributable to factors other than a desire to eliminate competition (Posner, 1979, p. 927).[8]

Such analytical rebuttals of earlier thought about anticompetitive conduct appeared for almost every target of postwar antitrust enforcement during the 1970s and 1980s – notably for vertical integration, many kinds of vertical restraints, and persistent high concentration (Bork, 1954; Burns, 1993; Hovenkamp, 2009).

The accompanying normative assault on antitrust enforcement practices targeted the question of the legitimate aims of competition policy. Conservative thinkers and practitioners in the 1960s and 1970s directly reacted to the multitude of values and political objectives in antitrust enforcement:

> That amalgam of muddled thinking, social mythology, and sentimental rhetoric known to its intimates as "the social purposes of antitrust," however sonorously it may ring upon ritual occasions for mock-Jeffersonian oratory, must be excluded from judicial and prosecutorial decisions about actual cases (Bork, 1970, p. 666).

In favor of antitrust as a political *common carrier* (Pierson, 2004, pp. 109–110) that reacted to a multitude of political objectives, efficiency in the service of consumer welfare came to be the dominant criterion to judge whether business activities fell into the purview of antitrust agencies. In practice this meant a decline of *per se* reasoning by the bureaucracy and by courts, a higher technical threshold for charging businesses with anticompetitive conduct, and the extension of thinking in terms of 'welfare trade-offs' between the negative effects of concentration and anticompetitive conduct and the efficiency advantages of certain restraining activities and structures (Williamson, 1968). Most important, perhaps, Chicago antitrust thinkers openly stated that their intellectual attacks had a political economic objective to push back against what they perceived to be increasingly interventionist tendencies in the deconcentration movement:

> A further aspect of the Chicago–Harvard difference on deconcentration arises from the difference between the deep distrust of government intervention that is associated with the Chicago School of Economics … and the (rapidly diminishing) complacency toward such intervention associated with traditional Harvard-M.I.T. economic thinking. Deconcentration is a more ambitious form of public control than is usually involved in antitrust enforcement, so one's attitudes toward the capabilities of regulatory-type governmental interventions naturally come into play (Posner, 1979, p. 948, Fn. 67).

It is difficult to unbundle the historical causes of the spectacular success of efficiency criteria in American antitrust. In the last three decades it was, it seems, overdetermined. There certainly has been executive sanctioning of the new doctrine by the Nixon, Carter, and Reagan administrations, as visible, for example, in Nixon's installation of his own task force on the state of antitrust headed by Chicago economist George Stigler; in the Carter administration's experimentation with supply side economic revitalization policies; in several nominations, guidelines, and statements by the Reagan administration; or in the extension of

intellectual property protection since the 1970s. In the academy, the more rigorous approach to industrial economics revived academic interest in thinking about competition, while the earlier, more empirical Harvard School of microeconomics was a relatively marginalized field. Within the rising Chicago School itself, there had also been a shift from a previous anti-monopoly stance to a much more permissive position toward concentration in business (Van Horn, 2011). Furthermore, as is visible in the success of the law and economics movement, the legal profession in the United States was remarkably open to economic reasoning and an instrumentalist logic in enforcement. To give just one example of how far thinking about monopoly in the American political economy changed with the prominence of welfare economics, Robert Crandall, a consultant to Microsoft during the failed governmental attempts to break up the corporation, after reviewing the welfare effects of structural remedies in American history, concluded that

'"a number of empirical studies suggest that the total cost of monopoly is very small indeed. [One study, TE/SK] found that the social cost of monopoly is only 0.1% of gross national product … If monopoly is not much of a problem in the first place, it is understandable that Section 2 cases are rare and Section 2 remedies are not very effective' (Crandall, 2001, pp. 196–197) (Section 2 of the Sherman Act covers attempts to monopolize a market).

The change in enforcement doctrines was not so much about a switch from unfocused or habitual types of enforcement toward a more reasoned and goal-oriented approach, as Chicago school representatives often had it, but about the incremental replacement of the mission of the regime – with quite drastic changes for the character of the institution of antimonopoly policy. To reiterate, measuring the precise impact of these changes on enforcement activity and industrial organization is inherently difficult. There is, however, scattered evidence that antitrust enforcement became more permissive since the 1960s – that it changed course from decades of activist expansion. It is uncontested among both proponents and critics of the Chicago revolution in antitrust thinking that the regulation of both horizontal and vertical mergers has been more lax since the early 1980s, when the William Baxter-led Antitrust Division codified many of the new efficiency-focused ideas in revised merger guidelines in reaction to what it described as 'changes in economic analysis and judicial precedent' (Department of Justice, 1982, p. 135). To give another example of the entrepreneurial activities of the new generation of bureaucrats to disseminate the new ideational current in merger control, the Antitrust Division helped prepare legislative proposals for an overhaul of the Clayton Act regulating mergers in 1986, promising 'to distinguish more clearly between procompetitive mergers and mergers that create a significant probability of increasing prices to consumers' (Department of Justice, 1986, p. 112). During the 1980s antitrust division repeatedly pushed for legislative reform, for example in intellectual property right protection, as these would 'promote consumer welfare, enhance the ability of U.S. firms to compete in worldwide marketplaces, and stimulate productivity and efficiency' (ibd.). The prosecution of predatory competition has, after a brief revival during the 1980s, virtually been abandoned in the early 1990s. In fact, the 1986 Antitrust Division of the Department of Justice (DOJ) voluntarily filed a Supreme Court amicus brief to push back against a lower court's decision that might have allowed competitors to challenge mergers based on the possibility that the post-merger firm would engage in predatory pricing, citing 'the strong

incentive of competitors to block procompetitive transactions …, the rarity of actual predation and the ease with which intense competition may be characterized as predation' (Department of Justice, 1986, p. 113). Several high-profile cases against dominant firms were settled during the 1980s, notably those against IBM and AT&T. In many fields of enforcement, courts have denied the applicability of *per se* rules. And the 'efficiency-defense' for anticompetitive conduct has been firmly established in both the bureaucracy and the judiciary.[9]

3.2. Impaired 'modernization' in Germany

In the larger historical picture, the main puzzling fact about German competition policy might be its similarity to American antitrust in the postwar era, rather than the remaining institutional differences which concern us here (see Djelic, 2002). After all, until the late 1950s when the German antitrust law was passed, the German political economy was the prime example of an advanced political economy organized by doctrines revolving around sectoral organization, coordinated industrial upgrading, and horizontal agreements, rather than by American ideals of oligopolistic competition.[10]

A few decades after the end of the Second World War, however, the German and other European nations had full-blown antitrust regimes in place, considerable parts of which were either directly transferred from or modeled after the American doctrinal and institutional system. In terms of codified legal rules, European and American antitrust regimes are remarkably similar – in both content and structure. Still, there always have been significant remaining institutional differences. Even though the European Court of Justice, for example, has shown a strong tendency to extend its own reach and thereby 'drive' rather than 'interpret' the law (Scharpf, 2016), the US and many European nations still have different legal regimes with respect to case law or the adversarial design of trials.

With regard to its institutional structure, German competition policy is embedded in the multilevel EU governance regime. The original German antitrust authority, the *Bundeskartellamt* founded in 1957, from the beginning enjoyed far-reaching independence from the political system. Like in the US, the German cartel office independently investigates cases and is subject to extensive judicial review by both district and national courts and since the 1960s by the European Court of Justice. German states (Länder) maintain additional cartel offices, which are less independent, but usually perceived to work in tandem with the federal agency (Fiebig, 1993). Different from the United States, antitrust enforcement responsibilities in the executive are not located in the German Ministry of Justice, but in the Ministry of the Economy, which has the (in practice limited) ability to block enforcement in cases of overarching public concern. The relationship between national competition authorities and the European Union since the Treaty of Rome of 1957 is contentious, complex, and constantly evolving. For a long time, specific sectors, like steel and coal, were handled at the EU-level. European governance in principle is based on subsidiarity, so that national authorities are in charge of national cases and prosecution. From certain relevance thresholds of European activities and revenues onwards, however, the European Commission usually takes over investigations.

With regard to substance, European enforcement for a long time seemed to be more lenient toward restraints on trade than that of the United States during its activist enforcement era. For a long time, European and German competition policy was seen to be an 'incomplete' institutional transfer (good overviews are Hesse, 2016a; Quack & Djelic, 2005). Until recently, German and European competition law contained quite far-reaching explicit exceptions with respect to various economic sectors and various types of horizontal cooperation (Hardach, 2016, pp. 223–226), such as the 1957 field exemption of banking and insurance that was repealed only in 1998. Formal merger control was only added to German antitrust in 1973. Private litigation is still underdeveloped in Europe and is bound to public authorities' discovery of wrongdoing (Gifford & Kudrle, 2015, p. 20). And Europeans displayed a general hesitance when it came to activist antitrust and deconcentration in the private sector – notwithstanding the bureaucracy's later enthusiasm for using competition law to go against state interference in the economy and limited support for American decartelization initiatives in the immediate postwar time, which were organized by temporary special laws.

During the last two decades, institutional divergence in the opposite direction has occurred. European antitrust agencies still prosecute predatory competition, they go after numerous types of vertical restraints, they are still more open to *per se* reasoning and, for a long time at least, they stuck to more form-based stances in merger control (Gifford & Kudrle, 2015). In the following section, we argue that more hesitant enforcement during the American activist era and more strict enforcement during the era of American leniency have a common and underappreciated cause – professional identities and doctrines in German legal thinking about competition and the role of the state that to a large degree solidified in reaction to an activist challenge similar to the one in the United States. [11]

3.2.1. Resisting activist antitrust

The German and European antitrust agencies have a strong non-economic legal tradition, and even though they have hired increasing numbers of economics professionals since the early 1970s, legal professionals still make up about half of their bureaucrats today (Buch-Hansen & Wigger, 2011; Ortwein, 1998).[12]

The resistance to American enforcement standards is not the first case in which German Ordoliberal legal elites resisted economic definitions of the goals of competition policy and in which they had a hard time bringing a policy in line with liberal convictions that made deep state interventions into the economy the norm. Ordoliberalism, a loose network of intellectuals that emerged in the 1920s, is a typically German variety of liberal thought that came to dominate postwar debates about the economy (Hien & Joerges, 2017). Ideologically situated between a rejection of state planning and the idea that competitive markets need sustaining state institutions, this school came to shape many postwar economic institutions in Germany and Europe.

While Ordoliberal elites certainly were the driving domestic forces for the adoption of both the European and German antitrust regimes (Quack & Djelic, 2005), they had difficulties coming up with a conception of the new law that was compatible with their political guiding principle of process-neutral 'framework policies' from the very beginning. The enforcement of 'perfect competition' – or the

enforcement of behavior of powerful firms as if they were in 'perfect competition' – would mean that the state had to push the economy into an arbitrary and artificial state of organization. At the latest during the 1960s, Ordoliberals converged on an ideal conception of the new law that limited it to 'negative' state interventions, meaning that it was only to 'prevent' but not to 'prescribe' economic activities in the service of the maintenance of market structures that would limit market power. The core purpose of such a system was not the creation of a specific form of competition, but something Ordoliberals early on called 'competitive freedom.' German cartel law was intended to protect the freedom to engage in competition and the freedom of sellers and buyers to choose among competing offers. Thus, the first annual report of the antitrust agency emphasized that

' the law is not supposed to punish but to create order. It leaves every possible freedom to the entrepreneur, as long as he does not attempt to arbitrarily alter the economic conditions through distortions of and obstacles to competition. Thus, the law not only serves an economic, but a societal purpose'(Bundeskartellamt, 1959, p. 11; our translation).

What sounded like an odd legalistic formalization of an institutional transfer led into heated debates about enforcement practices in the 1960s and 1970s that came to be known as the Hoppmann-Kantzenbach controversy. This intellectual battle was triggered by a series of publications in which Erhard Kantzenbach, a microeconomist whose ideas were closely related to the American Harvard School and who became chairman of the German Monopoly Commission between 1979 and 1986, tried to develop a system of desirable functions of economic competition as a guideline for antitrust enforcement (Kantzenbach, 1968). As such, these functions were largely uncontentious – improving factor allocation, stimulating technological change, and enhancing the adaptability of the industrial system, for example. What triggered the fierce attack by Erich Hoppmann, the successor to Friedrich Hayek at the Ordoliberal bastion, the Walter Eucken Institute at the University of Freiburg, were policy prescriptions formulated by Kantzenbach to allow certain 'limited' restraints on trade in antitrust enforcement if these served his system of the desired effects of competition – temporary cartels and the stimulation of mergers, for example – and his openness toward a more active deconcentration agenda.

In a series of publications, Hoppmann violently attacked Kantzenbach's plea for a more instrumental approach to antitrust in its infancy. First, Ordoliberals seemed to be concerned about the political economic consequences of Kantzenbach's vision for antitrust. They feared a slippery slope which would turn competition policy into another tool of state intervention and planning. After all, the late 1960s and 1970s were the high time of experimentation in industrial policy in rich Western nations. Moves away from *per se* restrictions toward increasing consideration of individual cases could have further opened the regime up to the increasing influence of interest groups on cartel policy, undermining the central bank-like independent status of the cartel office. Second, Hoppmann fundamentally doubted the claim that there were conflicts between Kantzenbach's functions of competition and a formalistically enforced 'freedom to compete' which could be known to bureaucrats before the competitive process unfolded. Most distinctive, perhaps, Hoppmann took up the early Ordoliberal notion of 'competitive freedom' and emphasized that it should have a certain *non-teleological* character – it

> is about competition as an end in itself, as certain forms of economic freedom are manifested in it. Freedom of competition means: freedom of initiative, freedom to advance into new technical, organizational, and economic territories, to create new goods, new processes, new markets, freedom of economic progress. On the other side of the market there is a corresponding freedom to choose among alternatives … Restraints of the freedom of competition are identical to the artificial creation of market power and vice versa. The norm of competition policy must be that kind of competition that results if the freedom of competition is secured against restraining business practices (Hoppmann, 1966, p. 19; our translation).

The doctrine of competitive freedom developed in two important strands of thought. On the one hand, the epistemological argument against instrumentalist antitrust enforcement became one of the main arguments for a form-based and rule-oriented approach. If the results of competition were known in advance, an often-cited 1969 quip by Friedrich Hayek went, capitalist societies would not have to rely on it to organize their economies in the first place:

> Competition is thus, like experimentation in science, first and foremost a discovery procedure. No theory can do justice to it which starts from the assumption that the facts to be discovered are already known. There is no predetermined range of known or "given" facts which will ever all be taken into account. All we can hope to secure is a procedure that is on the whole likely to bring about a situation where more of the potentially useful objective facts will be taken into account than would be done in any other procedure which we know. It is the circumstances which makes so irrelevant for the choice of a desirable policy all evaluation of the results of competition that starts from the assumption that all the relevant facts are known to some single mind (Hayek, [1979] 1998, p. 68).

3.2.2. From resisting activism to blocking economization

In such a view, early German deconcentration debates, proposed merger control (on which Hoppmann later revised his views), and Kantzenbach's instrumental vision for antitrust enforcement became just another hopeless exercise in central planning, in which state agents tried to come up with optimal firm sizes, proper market shares and desirable rates of industrial adjustment. While radical arguments like Hayek's never came to dominate the German and European antitrust profession, they made generations of practitioners more hesitant when it came to more 'rational', 'modern', and 'goal-oriented' enforcement standards.

Subsequently, the idea that competition policy protects competitive freedom 'in itself' proved to be widely influential in legal thought. In part, the allergic reaction of legal scholars to welfare goals in antitrust was a symptom of a more general distrust of postwar legal thought with positivist, instrumental interpretations of the rule of law. In the hands of one of the most influential legal scholars in the German antitrust profession, Ernst-Joachim Mestmäcker, the 'value-rational' protection of competitive freedom came to symbolize the autonomy of the law. In an attack on the law and economics movement, he lamented,

> Cost-benefit analysis is end-neutral. It can be applied to any given purpose. Constitutions, statutes and precedents, however, are as a rule not end-neutral. The question then is how to accommodate the normative implications of economic analysis with diverse non-economic legal purposes. In law, the relation of ends to means is more than a pragmatic methodological operation … Wealth maximization is no substitute for the purpose of law in general (Mestmäcker, 2007, p. 13).

Such debates were not exclusive to academia. As Hesse (2016b, pp. 443–446) documents, they were at the core of conflicts between key actors in economic policy during the first Grand Coalition in Germany (1966–1969). Eberhard Günter, a key bureaucrat behind the original 1957 German antitrust law and until 1976 the first President of the German antitrust authority, publicly subscribed to Kantzenbach's general plea in 1967, what led ordoliberal intellectuals to send protest-notes to the economics ministry. Karl Schiller, progressive economics minister from 1966 to 1972, had his bureaucracy work toward a far-reaching amendment of German antitrust law 'to stimulate structural change in industry and productivity growth' since 1968 and tried to steer the scientific advisory board of the economics ministry toward the development of an accompanying new mission statement for German antitrust (Hesse, 2016b, p. 445). These plans were blocked when key legal members of the board, such as Franz Böhm, diverted discussions from different theories of competition toward the problem of 'instrumentality,' as discussed by Hoppmann and Mestmäcker. In general, personnel and ideational spill-overs between ordoliberal intellectuals and the political sphere can be observed over the entire history of German antitrust. Mestmäcker, for example became the first president of the antitrust- commission *Monopolkommission* an expert council, which advises the government on antitrust matters and annually publishes general and special reports on the state of competition in Germany that was instituted to accompany German merger control in 1973.

As a whole, the professional doctrines around competitive freedom, as refined in the 1960s' and 1970s' debates, worked as a strong barrier to the transatlantic 'harmonization' of antitrust enforcement. Since the early 2000s, the EU Commission's Directorate-General for Competition launched a campaign to bring EU member states' enforcement practices into line with modern American standards (Gerber, 2007). Through a series of discussion papers, conferences, court decisions, restructuring moves, and guidelines worked out since the late 1990s, the Commission tried to institutionalize new, more welfare-focused tests of abusive behavior, the efficiency defense in merger control and abuse cases, and a focus on consumer welfare in the multi-level EU antitrust regime. While many of the proposed changes have affected antitrust practices across the EU in one way or another, almost all of them met with staunch resistance from significant legal intellectuals and antitrust practitioners and ended up in hybrid practical manifestations (Buxbaum, 2005; Gerber, 2007). Compared to the spectacularly far-reaching economization of US competition law since the 1960s, 'modern' economic thinking in European antitrust enforcement has been markedly impaired by systems of ideas and doctrines.

These doctrines were not simply detached from the enforcing agencies, but are referred to in their commentary, mission statements, and advocacy output. Thus, the aforementioned Hayek is often cited in general commitments to competition as a method of discovery (Bundeskartellamt, 1982, p. 6), and legal professionals like Mestmäcker and Ulrich Immenga led influential antitrust commissions in the 1970s and 1980s. One of the main representatives of the legal doctrine of competitive freedom, Immenga, resigned as head of the German *Monopolkommission* in 1989 in a public battle about the merger of *Daimler* and *MBB* as part of the *Airbus* project, which was blocked by antitrust authorities but subsequently allowed by the German economics ministry on industrial policy grounds (for a richer account of

the battle of German Ordoliberals against the 'industrial policy relativization' of competition policy, see Monopolkommission, 1992). In the process, Immenga declared that the passage of the merger would 'give insights into conflicts between industrial policy and competition policy, especially if one understands competition not just as an economic phenomenon, but recognizes its function in society to safeguard freedom' (quoted in Ortwein, 1998, p. 231; our translation).

A closer look at the annual reports of the German antitrust agency reveals that the discourse in favor of continuing form-oriented interventions promoting competition remained prominent in the 1980s (cf. Figure 2), even though the general perception of increasing international competition made this a contested policy issue. When German corporations seemed to maintain international competitiveness in the 1980s, the antitrust agency even claimed credit, arguing that it enhanced companies' international competitiveness by cultivating competition in the home market (Bundeskartellamt, 1984, p. 4) – a striking difference from US reformers' catering to the 1980s' industrial policy debates in praise of more lenient enforcement standards (see, e.g. Baxter, 1985). Another frequent argument mentioned in administrators' self-descriptions is support of small and medium-sized enterprises for whom, unlike for big ones, certain forms of horizontal cooperation were a traditionally permitted means to survive in competition with big corporations (Bundeskartellamt, 1987). Along similar lines, the institutionalization of merger control in Germany and the establishment of an independent agency monitoring concentration in German industry, the *Monopolkommission*, were accompanied by pleas to simultaneously ease cooperation between small and medium enterprises (Brandt, 1969). The high inflation period of the 1970s raised the specter of less competition driving prices even further (Bundeskartellamt, 1978, p. 6). Finally, in the pro-market atmosphere of the 1980s, the antitrust agency successfully sold its activity to safeguard the competitive process – not distributional results – as furthering a common cause.

By the end of the 1990s, the antitrust agency more frequently discussed the 'more economic approach,' which by then had been adopted more broadly in the US. These discussions were triggered by initiatives by the European Commission's DG for Competition under Mario Monti (1999–2004) and successive European Court of Justice case law, which were favoring the American effects-based approach to competition law. Significant parts of the German antitrust profession reacted adversely to reform proposals. In a 2000 discussion paper, for example, a softening of basic enforcement principles in cases of horizontal cooperation between companies was basically rejected by the German antitrust agency (Bundeskartellamt, 2000), a position shared by the German government in its commentary on the annual antitrust report:

> From the point of view of the federal government, the consideration of economic insights may not counteract the basic principles of competition policy. The core and agreed-upon goal of competition law, to work toward the long-term interests of consumers by structurally safeguarding dynamic competition, should not be called into question in the process of adapting to analytical methods in industrial economics. Hence, the "economization of competition law" should not lead to a replacement of the practice of antitrust enforcement in Germany that has been developed and proven for decades (Bundeskartellamt, 2001).

Similar resistances to change at the European level can be found in the process of merger guideline revision and in the German positioning against the immediate introduction of tests of market dominance that were common in the US and in Canada (Buch-Hansen & Wigger, 2011, pp. 112–13).

While changing doctrines in the American antitrust profession have certainly left their mark on German competition policy and agency practices, administrators over the years have reaffirmed their suspicion of 'modern' enforcement practices. The 'welfare standard,' former cartel office president and trained economist Bernhard Heitzer still emphasized in a conciliatory speech to EU professionals in 2008, appeared to be 'a perfect servant for *theoretical* analysis. But it is a very poor master for law enforcers' (Heitzer, 2008, p. 9; emphasis in the original).

4. Conclusions

In the 1960s, Hofstadter ([1964] 1996) observed a bureaucratic routinization of antitrust enforcement in postwar embedded liberalism. While his diagnosis that competition policy had been transformed from an issue relevant for mass mobilization and contentious politics to a professional enterprise turned out to be highly accurate, the amount of policy change through processes within that routinized system was beyond his grasp. All four regimes of antitrust enforcement described above – the activist and economized US regimes and the postwar German regimes – did not just exist in states of rule-bound 'implementation.' They were driven by ideational fads and systems of professionally negotiated beliefs and values. In our discussion of alternative approaches to explain change in competition policy, we highlighted the fact that structural determinants of economic regulation underdetermine policy trajectories. This is what the trajectories of American and German enforcement doctrines reveal. Switches from form-based to effect-based approaches within legal regimes, from deconcentrating agendas to efficiency enhancing ones and vice versa within established *Varieties of Capitalism*, and diverging trajectories despite similar economic pressures are examples of how changing ideas can alter policy directions in 'imprecise' institutional regimes.

A note on the comparative dimension of our study: as it should not *per se* be considered surprising that different national bureaucracies maintain indigenous practices over time, we want to highlight that the two national pathways we described are, at their core, not stories of mere cultural persistence or institutional path dependence. It was the decade-long struggle on the level of enforcement to enact the antitrust laws – to act on the challenge to deal with concentrations of private economic power – that made the American regime vulnerable to a change in enforcement doctrines that would eventually counteract some of the core ideas of the laws themselves. In the German context, the ideas that impaired American-style economization since the 1990s emerged in conflicts about how to implement competition policy – they were to a certain degree endogenous to the regime and a contingent outcome of ideological battles between professionals. The goal of looking at two – historically intimately related – cases was to demonstrate that alternative politics on the enforcement level of competition policy led to alternative regime characteristics, not directly to highlight national characteristics as decisive factors in policy design. Our study suggests that rule-enforcement practices are not

time-invariant structures but must be constantly upheld by the respective professional groups in order to retain stable characters (Stinchcombe, 1997, p. 9).

Our findings have broader implications for debates on neoliberal ideas and on technocratic liberalization. The discussion of the antitrust case reveals that competition policies cut across simple classifications into left and right, into neoliberal and non-neoliberal ideas. Both the Ordoliberal and the Chicago-school ideas on competition are part of the economics profession and both embrace free-market ideas to the fullest, albeit with different views on what a free market actually is (Wigger, 2017). Ordoliberals have thus been far from letting broader societal goals intrude into the shaping of market structures and cannot simply be equated with a non-market liberal or left-wing movement favoring a 'social market economy'. The paper thus highlights the need to distinguish between sweeping claims about neoliberalism from more fine-grained accounts of economization through economic professionals which, as we have seen, can differ across time and countries. It thus speaks to the rather underdeveloped comparative empirical study of the economic profession (Fourcade, 2009), not only in its academic ramifications but also among practicing professionals in their often 'performative' institutional work (Eberle & Lauter, 2011; MacKenzie, Muniesa, & Siu, 2007; Seabrooke & Henriksen, 2017). While there exist excellent case studies of individual antitrust authorities, doctrines, and cases, truly comparative antitrust is still largely absent from the IPE or CPE literature.

Finally, our analysis points to important country differences in regulatory bodies that are not directly and democratically elected, whose decisions can still have lasting impacts on consumer welfare and economic structure. The neglect of these technocratic agencies – general bureaucracies, central banks (Braun, 2016), courts (Höpner, 2011), or consumer protection agencies (Prasad, 2012), to name just a few – results from the idea that their role is restricted to implementation and following of the rules of a delegating principal. With parliamentary capacity being restricted by supranational powers, ideological stalemates, or global pressures, these agencies are becoming more powerful actors than was previously thought (Quinn, 2010). Freed from overt political struggles, under day-to-day pressures to solve immediate problems, under loose democratic monitoring, and organized around homogeneous professional corps, these agencies can in part pursue their own agendas.

Notes

1. For a comparative institutional specification of such a perspective, see Dobbin (2009).
2. Good early overviews of that literature are Rourke ([1969] 1976) and Sabatier and Mazmanian (1980).
3. A good overview of that movement and its relevance for the competition policy debate is Morgan (1992).
4. For a brief overview of the relevant cases and literature, see Gifford and Kudrle (2015, ch. 1).
5. We chose these terms because they approximate the form-based tenets best and because they are most unambiguously associated with it in the texts. Moreover, an automated text analysis (topic-model) did not produce sensible topics for our purposes, possibly due to the reports' strong focus on individual cases. We

constructed the dictionary by starting with the most basic keyword and their variants which we then checked in its context of occurrence, using R's quanteda package (Benoit et al., 2018) and an annotation tool of our own (Düsterhöft & Kohl, 2019). To exclude non-matching contexts, we refined the keyword and added further variants. We iterated this process up to the point where a random sample of 100 keywords in context yielded more than 95 correct matches. As the document type and language are different across countries, we only compare trends, not absolute levels. The dictionaries for English and German are (all used as regular expressions): 'concentrat', ('free to', 'freedom', 'free compet', 'free market', 'free-market', 'free choice'), ('small business', 'small enterp', 'small comp', 'small and medium'),('monopol', 'oligopol', 'market power'), ('market structur', 'industry structur', 'share of'); 'konzentr', ('freiheit', 'frei zugang', 'frei wahl', 'frei wettbewerb', 'diskriminierungsfrei'), ('mittlere unternehm', 'mittelst', 'kleiner'), ('monopol','oligopol', 'marktbeherrsch'), ('marktstruktur', 'struktur voraussetzung', 'wettbewerbsstruktur', 'branchenstruktur').

6. See Mason (1939) for an early programmatic piece. See Bain (1951) and Scherer (1970) for examples of that school's thought at its height. Hovenkamp (1989) gives a historical overview of the parallel development of industrial economics and antitrust enforcement.
7. An overview of the history and fate of the deconcentration movement is provided by Hovenkamp (2009).
8. The history of thought and enforcement with regard to predatory pricing illustrates the complexities of the link between expertise and bureaucracies. The original Chicago attack on predation pushed by Posner had been published in 1958. Yet, it was only in the mid-1970s that courts started to put higher burdens on plaintiffs and only in the mid-1990s that such a fully sceptical reasoning made successful predation cases almost impossible to win. A full overview of the history of predatory pricing in economic thought and in American courts is provided by Giocoli (2013).
9. Balanced overviews of these and other changes in enforcement practices can be found in Kovacic (1990, 2003).
10. For a good overview, see Ambrosius (1981).
11. While the Americanization of German antitrust – and antitrust more generally in Europe – remained incomplete, the transfer of German legal ideas and practices to the level of the emerging antitrust commission of the European Union has also been said to be incomplete (Buch-Hansen & Wigger, 2011, p. 28). Though this transfer was originally also inspired by Ordoliberal thinking, some researchers claim that increasing international competition fueled a desire to enhance market power and promote 'Euro Champions', causing the Ordoliberal character of European competition policy to get watered down (ibid.).
12. Historically, state bureaucracies in Germany have been much more largely staffed by the legal profession, often in permanent civil service, while the later state-building in the US has led to more professional specialization in state employment (Rueschemeyer, 1976).

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References

Allen, C. (1989). 'The underdevelopment of keynesianism in the Federal Republic of Germany'. In P. A. Hall (Ed.) *The political power of economic ideas: Keynesianism across nations* (pp. 263–90). Princeton, NJ: Princeton University Press.

Ambrosius, G. (1981). Die Entwicklung des Wettbewerbs als wirtschaftspolitisch relevante Norm und Ordnungsprinzip in Deutschland seit dem Ende des 19. Jahrhunderts [The evolution of competition as a norm and principle of order of relevance to economic policy in Germany since the 19th century]. *Jahrbuch für Sozialwissenschaft*, *32*(2), 154–201.

Bain, J. S. (1951). Relation of profit rate to industry concentration: American manufacturing, 1936–1940. *Quarterly Journal of Economics*, *65*(3), 293–324. doi:10.2307/1882217

Baxter, W. F. (1985). Antitrust law and technological innovation. *Issues in Science and Technology*, *1*(2), 80–91.

Benoit, K., Watanabe, K., Wang, H., Nulty, P., Obeng, A., Müller, S., & Kuha, J. (2018). *Quanteda: Quantitative analysis of textual data* [R Package Version 1.2].

Bork, R. H. (1954). Vertical integration and the Sherman Act: The legal history of an economic misconception. *University of Chicago Law Review*, *22*(1), 157–201. doi:10.2307/1598229

Bork, R. H. (1969). Separate statement of Robert H. Bork. *Antitrust Law and Ecoomics Review*, *53*, 53–56.

Bork, R. H. (1970). Antitrust in dubious battle. *St. John's Law Review*, *44*(5), 663–676.

Bourdieu, P. (2005). Principles of an economic anthropology. In N. Smelser and R. Swedberg (Eds.), *The handbook of economic sociology* (pp. 75–89), Princeton, NJ: Princeton University Press.

Brandt, W. (1969). Regierungserklärung von Bundeskanzler Willy Brandt vor dem deutschen Bundestag in Bonn am 28. Oktober 1969 [Government declaration by Chancellor Willy Brandt in Bonn on October 28 1969], Presse- und Informationsamt der Bundesregierung. Bonn.

Braun, B. (2016). Speaking to the people? Money, trust, and central bank legitimacy in the age of quantitative easing. *Review of International Political Economy*, *23*(6), 1064–1092. doi:10.1080/09692290.2016.1252415

Buch-Hansen, H., & Wigger, A. (2010). Revisiting 50 years of market-making: The neoliberal transformation of European competition policy. *Review of International Political Economy*, *17*(1), 20–44. doi:10.1080/09692290903014927

Buch-Hansen, H., & Wigger, A. (2011). *The politics of European competition regulation. A critical political economy perspective*, New York: Routledge.

Bundeskartellamt. (1959/1978/1982/1984/1987/2000/2001) *Tätigkeitsberichte*. Bonn/Berlin: Deutscher Bundestag. Retrieved from https://www.bundeskartellamt.de/DE/UeberUns/Publikationen/Taetigkeitsberichte/taetigkeitsberichte_node.html.

Burns, J. W. (1993). Vertical restraints, efficiency, and the real world. *Fordham Law Review*, *62*(3), 597–651.

Buxbaum, H. L. (2005). German legal culture and the globalization of competition law: A historical perspective on the expansion of private antitrust enforcement. *Berkeley Journal of International Law*, *23*(2), 474–495.
Christophers, B. (2016). *The great leveler. Capitalism and competition in the court of law*. Cambridge, MA: Harvard University Press.
Crandall, R. W. (2001). The failure of structural remedies in Sherman Act monopolization cases. *Oregon Law Review*, *80*, 109–198.
Crouch, C. (2011). *The strange non-death of neoliberalism*. Cambridge, MA: Polity.
Culpepper, P. D. (2011). *Quiet politics and business power: Corporate control in Europe and Japan*. Cambridge, MA: Cambridge University Press.
Department of Justice. (1982/1986) *Annual report of the Attorney General of the United States*. Washington, DC: GPO.
Djelic, M.-L. (2002). Does Europe mean Americanization? The case of competition. *Competition & Change*, *6*(3), 233–−250. doi:10.1080/10245290215046
Dore, R. (1986). *Flexible rigidities. Industrial policy and structural adjustment in the Japanese economy, 1970-80*. Stanford: Stanford University Press.
Dobbin, F. R. (2009). *Inventing equal opportunity*. Princeton, NJ: Princeton University Press.
DPC/EPC. (1985). *Memorandum for the president*. Subject: antitrust review. Reagan Presidential Library, *S. G. McCaffrey Files*, Box OA 16079, Folder 2.
Driggs, M. A. (1985). *Memorandum for the cabinet council on commerce and trade*. Recommendations of the President's Commission on Industrial Competitiveness. Reagan Presidential Library, R. Porter Files, Box OA15009, Folder 1.
Düsterhöft, M., & Kohl, S. (2019). AnnotatoR: A manual support tool for quantitative text analysis in R. Version 0.1.
Eberle, D., & Lauter, D. (2011). Private interests and the EU-US dispute on audit regulation: The role of the European accounting profession. *Review of International Political Economy*, *18* (4), 436–459. doi:10.1080/09692290.2010.499798
Edelman, L. B. (1991). Review of The transformation of corporate control. By Neil Fligstein. Cambridge: Harvard University Press, 1990., *American Journal of Sociology*, *97*(2), 549–551. doi:10.1086/229796
Edelman, L. B. (1992). Legal ambiguity and symbolic structures: Organizational mediation of civil rights law. *American Journal of Sociology*, *97*(6), 1531–1576. doi:10.1086/229939
Eisner, M. A. (1991). *Antitrust and the triumph of economics. Institutions, expertise, and policy change*. Chapel Hill: University of North Carolina Press.
Eisner, M. A., & Meier, K. J. (1990). Presidential control versus bureaucratic power: Explaining the Reagan revolution in antitrust. *American Journal of Political Science*, *34*(1), 269–287. doi:10.2307/2111519
Evans, P. B., Rueschemeyer, D., Skocpol, T. (Eds.). (1985). *Bringing the state back in*, Cambridge, MA: Cambridge University Press.
Fiebig, A. R. (1993). The German Federal Cartel Office and the application of competition law in reunified Germany. *University of Pennsylvania Journal of International Law*, *14*(3), 373–408.
Fligstein, N. (1990). *The transformation of corporate control*. Cambridge, MA: Harvard University Press.
Fourcade, M. (2009). *Economists and societies: Discipline and profession in the United States, Britain, and France, 1890s to 1990s*. Princeton, NJ: Princeton University Press.
Fox, E. (2008). The efficiency paradox. In R. Pitofsky (Ed.), *How the Chicago school overshot the mark: The effect of conservative economic analysis on U.S. Antitrust* (pp. 77–88). Oxford: Oxford University Press.
Galambos, L. (2004). The monopoly enigma, the Reagan administration's antitrust experiment, and the global economy. In L. Lipartito & D. Sicilia (Eds.), *Constructing corporate America: History, politics, culture* (pp. 149–154). Oxford: Oxford University Press.
Gerber, D. J. (1998). *Law and competition in twentieth century Europe: Protecting prometheus*. Oxford: Oxford University Press.
Gerber, D. J. (2007). Two forms of modernization in European competition law. *Fordham International Law Journal*, *31*(5), 1235–1265.
Gifford, D. J., & Kudrle, R. T. (2015). *The Atlantic divide in antitrust: An examination of US and EU competition policy*. Chicago, IL: University of Chicago Press.

Giocoli, N. (2013). Games judges don't play: Predatory pricing and strategic reasoning in US antitrust. *Supreme Court Economic Review*, *21*(1), 271–330.
Gourevitch, P. A. (1986). *Politics in hard times. Comparative responses to international economic crises*. Ithaca: Cornell University Press.
Graham, O. L. (1992). *Losing time: The industrial policy debate*, Cambridge, MA: Harvard University Press.
Gutiérrez, G., and., & Philippon, T. (2018). *How EU markets became more competitive than US markets: A study of institutional drift*. NBER Working Paper 24700.
Hacker, J. S., Pierson, P., & Thelen, K. (2015). Drift and conversion: The hidden faces of institutional change. In J. Mahoney & K. Thelen (Eds.), *Advances in comparative-historical analysis* (pp. 180–210). Cambridge: Cambridge University Press.
Hall, P. A., & Soskice, D. (2001). An introduction to varieties of capitalism. In P. A. Hall & D. Soskice (Eds.), *Varieties of capitalism: The institutional foundations of comparative advantage (*pp. 1–68). Oxford: Oxford University Press.
Hardach, G. (2016). Wettbewerbspolitik in der Sozialen Marktwirtschaft [Competition policy in the Social Market Economy]. In W. Abelshauser (Ed.), *Das Bundeswirtschaftsministerium in der Ära der Sozialen Marktwirtschaft. Der deutsche Weg der Wirtschaftspolitik* (pp. 193–262). Oldenbourg: De Gruyter.
Hayek, F. A. V. [1979] (1998). *The political order of a free people. Law, legislation and liberty* (Vol. 3). London: Routledge.
Heitzer, B. (2008). *Economic assessment in competition enforcement: Developments in France and Germany*, Conference paper, Annual conference of CRA International 'Economic developments in European competition policy', Brussels, 3 December.
Hesse, J.-O. (2016a). Abkehr vom Kartelldenken? Das Gesetz gegen Wettbewerbsbeschränkungen als ordnungspolitische und wirtschaftstheoretische Zäsur der Ära Adenauer [Turning away from cartel thought? The law against restraints of competition as a political and theoretical break during the era Adenauer]. In H. G. Hockerts & G. Schulz (Eds.), *Der "Rheinische Kapitalismus" in der Ära Adenauer. Rhöndorfer Gespräche, bd* (Vol. 26, pp. 29–50). Paderborn: Ferdinand Schöningh.
Hesse, J. O. (2016b). Wissenschaftliche Beratung in der Wirtschaftspolitik [Scientific consulting in economic policy]. In W. Abelshauser (Ed.), *Das Bundeswirtschaftsministerium in der Ära der Sozialen Marktwirtschaft. Der deutsche Weg der Wirtschaftspolitik* (pp. 390–481). Oldenbourg: De Gruyter.
Hien, J. & Joerges, C. (Eds.). (2017). *Ordoliberalism, law and the rule of economics*. Oxford: Hart.
Hofstadter, R. [1964] (1996). What happened to the antitrust movement?. In R. Hofstadter (Ed.), *The paranoid style in American politics and other essays* (pp. 188–237). Cambridge: Harvard University Press.
Höpner, M. (2011). Der Europäische Gerichtshof als Motor der Integration: Eine akteursbezogene Erklärung [The European Court of Justice as driver of integration: An actor-based explanation]. *Berliner Journal Für Soziologie*, *21*(2), 203–229. doi:10.1007/s11609-011-0154-z
Hoppmann, E. (1966). Das Konzept der optimalen Wettbewerbsintensität: Rivalität oder Freiheit des Wettbewerbs: Zum Problem eines wettbewerbspolitisch adäquaten Ansatzes der Wettbewerbstheorie [The concept of the optimal intensity of competition: Rivalry or freedom of competition. On the problem of an approach to theories of competition that is adequate for competition policy]. *Jahrbücher Für Nationalökonomie Und Statistik*, *179*, 286–323.
Hovenkamp, H. (1989). The antitrust movement and the rise of industrial organization. *Texas Law Review*, *68*(1), 105–167.
Hovenkamp, H. (2009). The *Neal Report and the crisis in antitrust*. Legal Studies Research Paper (9). University of Iowa, Iowa City, IA.
Kantzenbach, E. (1968). Das Konzept der optimalen Wettbewerbsintensität.: Eine Erwiderung auf den gleichnamigen Besprechungsaufsatz von Erich Hoppmann [The concept of the optimal intensity of competition. A reply to Erich Hoppmann's review essay of the same name]. *JahrbüCher Für NationalöKonomie Und Statistik*, *181*, 193–241.
Kirchner, C. (1991). The difficult reception of law and economics in Germany. *International Review of Law and Economics*, *11*(3), 277–292. doi:10.1016/0144-8188(91)90005-X
Kovacic, W. E. (1989). Failed expectations: The troubled past and uncertain future of the Sherman Act as a tool for deconcentration. *Iowa Law Review*, *74*, 1105–1150.

Kovacic, W. E. (1990). The antitrust paradox revisited: Robert Bork and the transformation of modern antitrust policy. *Wayne Law Review*, *36*, 1413–1471.
Kovacic, W. E. (2003). The modern evolution of U.S. competition policy enforcement norms. *Antitrust Law Review*, *71*(2), 377–478.
Kovacic, W. E. (2011). Competition agencies, independence, and the political process. In J. Drexl, W. Kerber & R. Podszun (Eds.), *Competition policy and the economic approach* (pp. 291–311). Cheltenham: Edward Elgar.
Letwin, W. (1965). *Law and economic policy in America. The evolution of the Sherman Antitrust Act*, New York, NY: Random House.
MacKenzie, D., Muniesa, F., & Siu, L. (Eds.). (2007). *Do economists make markets*? Princeton, NJ: Princeton University Press.
Mahoney, J., & Thelen, K. (2010). *Explaining institutional change: Ambiguity, agency and power*. Cambridge: Cambridge University Press.
Mason, D. L. (2014). *The American savings and loan industry, 1831–1935. Volume 4. Serving the people: Women, immigrants, African Americans and the promotion of home ownership*. London: Pickering and Chatto.
Mason, E. S. (1939). Price and production policies of large-scale enterprises. *American economic review*, *29*(1), 61–74.
Mestmäcker, E.-J. (2007). *A legal theory without law: Posner v. Hayek on economic analysis of law*. Tübingen: Mohr Siebeck.
Monopolkommission (1992). *Wettbewerbspolitik oder Industriepolitik, Hauptgutachten IX [Competition policy or industrial policy, Main report IX]*. Baden-Baden: Nomos.
Morgan, M. S. (1992). *Competing notions of 'competition' in late-nineteenth century American economics*. Economic History Working Papers 1/92, Department of Economic History, London School of Economics and Political Science.
Neal, P. C., Baxter, W. F., Bork, R. H., Fulda, C. H., Jones, W. K., Lyons, D. G., & Posner, S. P. (1968). Report of the white house task force on antitrust policy. *Antitrust Law and Ecoomics Review*, *11*, 11–52.
New York Times. (1984). G.*M.-Toyota venture criticized by Iacocca*. February 9, 1984, D21.
Ortwein, E. (1998). *Das Bundeskartellamt. Eine Politische Ökonomie deutscher Wettbewerbspolitik [The federal cartel office: A political economy of German competition policy]*, Baden-Baden: Nomos.
Patashnik, E. M., & Zelizer, J. E. (2013). The struggle to remake politics: Liberal reform and the limits of policy feedback in the contemporary American state. *Perspectives on Politics*, *11*(04), 1071–1087. doi:10.1017/S1537592713002831
Pierson, P. (2004). *Politics in time: History, institutions, and social analysis*. Princeton, NJ: Princeton University Press.
Pitofsky, R. (1979). The political content of antitrust. *University of Pennsylvania Law Review*, *127*(4), 1051–1075. doi:10.2307/3311791
Pitofsky, R. (2008). Introduction: Setting the stage. In R. Pitofsky (Ed.), *How the Chicago school overshot the mark: The effect of conservative economic analysis on U.S. Antitrust* (pp. 3–6). Oxford: Oxford University Press.
Posner, R. A. (1979). The Chicago school of antitrust analysis. *University of Pennsylvania Law Review*, *127*(4), 925–948. doi:10.2307/3311787
Prasad, M. (2012). *The land of too much. American abundance and the paradox of poverty*. Cambridge: Harvard University Press.
Quack, S., & Djelic, M.-L. (2005). Adaptation, recombination, and reinforcement: The story of antitrust and competition law in Germany and Europe. In W. Streeck & K. Thelen (Eds.), *Beyond continuity. Institutional change in advanced political economies* (pp. 255–281). Oxford: Oxford University Press.
Quinn, S. L. (2010). *Government policy, housing, and the origins of securitization, 1780–1968*. ProQuest: UMI Dissertation Publishing.
Rourke, F. E. [1969] (1976). *Bureaucracy, politics, and public policy*. Boston, Toronto: Little, Brown.
Rueschemeyer, D. (1976). *Juristen in Deutschland und in den USA: Eine vergleichende Untersuchung von Anwaltschaft und Gesellschaft [Legal professionals in Germany and the US: A comparative study of attorney practice and society]*. Stuttgart: Enke.

Sabatier, P., & Mazmanian, D. (1980). The implementation of public policy: A framework of analysis. *Policy Studies Journal*, *8*(4), 538–560. doi:10.1111/j.1541-0072.1980.tb01266.x

Scharpf, F. W. (2016). *De-constitutionalization and majority rule. A democratic vision for Europe. MPIfG Discussion Paper 16/14*. Cologne: MPIfG.

Scherer, F. M. (1970). *Industrial market structure and economic performance*, Chicago, IL: Rand McNally&Co.

Scherer, F. M. (2008). Conservative economics and antitrust. A variety of influences. In R. Pitofsky (Ed.), *How the Chicago school overshot the mark. The effect of conservative economic analysis on U.S. antitrust* (pp. 30–39). Oxford: Oxford University Press.

Seabrooke, L., & Henriksen, L. F. (2017). *Professional networks in transnational governance*. Cambridge: Cambridge University Press.

Stinchcombe, A. L. (1997). On the virtues of the old institutionalism. *Annual Review of Sociology*, *23*(1), 1–18. doi:10.1146/annurev.soc.23.1.1

Streeck, W. (1991). On the institutional conditions of diversified quality production. In E. Matzner & W. Streeck (Eds.), *Beyond Keynesianism. The socio-economics of production and full employment* (pp. 21–61). Aldershot: Elgar.

Streeck, W., & Thelen, K. (2005). Introduction: Institutional change in advanced political economies. In W. Streeck & K. Thelen (Eds.), *Beyond continuity: Institutional change in advanced political economies* (pp. 1–39). Oxford: Oxford University Press.

Swidler, A. (1986). Culture in action: Symbols and strategies. *American Sociological Review*, *51*(2), 273–286. doi:10.2307/2095521

Tate, J. (2001). National varieties of standardization. In P. A. Hall & D. Soskice (Eds.), *Varieties of capitalism: The institutional foundations of comparative advantage* (pp. 442–473). Oxford: Oxford University Press.

Thoenig, J.-C. (1973). *L'ère des technocrates. Le cas des ponts et chaussées [The era of the technocrats. The case of the ponts de chaussées]*, Paris: Les éditions d'organisation.

Uekötter, F. (2014). *The greenest nation? A new history of German environmentalism*, Cambridge, MA: MIT Press.

US Congress. (1985). *Review of findings of the President's Commission on Industrial Competitiveness*. Hearing before the Committee on Finance, US Senate. March 29.

Van Horn, R. (2011). Chicago's shifting attitude toward concentrations of business power (1934–1962)., *Seattle University Law Review*, *34*, 1527–1544.

Weir, M. (1989). Ideas and politics: The acceptance of Keynesianism in Britain and the United States. In P. A. Hall (Ed.), *The political power of economic ideas: Keynesianism across nations* (pp. 53–86). Princeton, NJ: Princeton University Press.

Wigger, A. (2017). Debunking the myth of the ordoliberal influence on post-war European integration. In J. Hien & C. Joerges (Eds.). *Ordoliberalism, law and the rule of economics* (pp. 161–78). Oxford: Hart Publishing.

Wigger, A., & Nölke, A. (2007). Enhanced roles of private actors in EU business regulation and the erosion of Rhenish Capitalism: The case of antitrust enforcement. *Journal of Common Market Studies*, *45*(2), 487–513. doi:10.1111/j.1468-5965.2007.00719.x

Williamson, O. E. (1968). Economies as an antitrust defense: The welfare tradeoffs. *American Economic Review*, *58*(1), 18–36.