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Prisms of Distance and Power: Viewing the U.S. Regulatory Tradition

[AU: Please add an abstract of between 100 and 125 words.]

Keywords:[Distorted images of American regulatory ideas and practices frame foreign responses to these practices as well as foreign views of the economic policies of the United States. US power both embeds and contributes to these distorted images. This article highlights the evolution of these distortions and the ways in which business history has intertwined with legal and political history throughout the evolution, It focuses on a specific area of regulation – antitrust or competition law - in order to ground the more general discussion. The article provides insights into the relationship between cognitive distance and power and into its pernicious effects on transnational discussions and decisions involving competition law.

The American style of regulation often intimidates those who view it from the outside, in part because of distance and power—distance in the sense of cognitive distance and power as the frame in which that distance has been embedded. The importance of the United States in global economic and political relations requires that many try to interpret past regulatory decisions and predict future ones, but distance and power impede their efforts. This style of regulation is distinctive, evolving through strands of U.S. legal, political, and business history. It is both the product and the embodiment of the American regulatory tradition (ART). This article focuses on that tradition and the factors that influence foreign perspectives on it. It takes a close look at what others see when they look at the ART. The perspective can be of value for those viewing the ART as well as for

those viewing others from within it, and it may contribute to a richer account of the ART itself.

The central theme is that the cognitive distance between that tradition and others combines with U.S. power to shade and distort images of the ART. The objective is to identify key elements of these two shaping forces and their interactions and thereby gain insights into the dimensions and roles of the ART. We identify differences between ways of dealing with controls on business firms, but our primary concern is with perceptions of the distances those differences create. The late Thomas McCraw, whom one commentator described as a "prophet of perspective," developed perspectives on the relationship between government and business.[1] His sensitivity to issues of perception in relation to many areas of American history has been exceptionally influential. To my knowledge, McCraw did not apply his perspectival analysis to the specific subject of this article, but the use of a comparative perspective here in effect takes his analysis further and deploys it in a somewhat different way. We locate the external perspective in continental Europe, but the comparisons often apply to perspectives in other countries that have followed European patterns in law and economic regulation.[2]

Our analysis includes the role that power disparities can play in obscuring the ART. These disparities shape the visual field of the viewers as well as those viewed, and they configure the incentives of both to pursue corrections in their perceptions. This perspective leads to images of the ART that are clouded both for historians attempting to discern the effects of the ART during its evolution and for those who make decisions within it or with regard to it.

The article first defines how it uses the term "American regulatory tradition." What is it that the perspectives are trained on and used to view? Too often U.S. regulation is discussed outside the United States without a clear understanding of what it is, rendering comparison difficult and/or misleading. The article then views the ART from an internal perspective—What does it look like from the inside?—and sketches how other legal systems perform functions associated with "regulation" in the United States. We give additional texture to the comparison by looking more closely at a specific form of regulation that is referred to as "antitrust law" in the United States and "competition

law" in most of the rest of the world. This gives us a firmer basis for claims about the broader issues. Finally, we look at some ways in which the comparison may provide value for understanding both the ART and foreign perceptions of it.

What Are They Viewing? Identifying the Subject

In order to examine a perspective effectively, it is necessary to identify the subject of perception: what is being viewed. Fatal to many discussions is the use of a term, such as "regulation," embedded in one of the perspectives. The term may be understood in vastly different ways from each of the perspectives without clarifying the subject that it is being used to designate. A foreign viewer often does not know with any accuracy what the term means within the system in which it is used and is not likely to be aware of the discrepancy. In order to avoid this quagmire, the article uses "function-based" language: words that are as neutral as possible rather than language drawn from either of the perspectives themselves. This makes it possible to avoid the tangle of misunderstandings created when concepts that inhere in one perspective are used to refer to perceptions created from another perspective.[3] For our purposes, then, the "subject" that both are observing is *the use of political authority to control ongoing private economic conduct*. We look at how this subject is conceptualized and instrumentalized in the ART and in continental Europe.[4] The discussion can be seen as part of the debate about American exceptionalism in law and even the much larger debate about American exceptionalism in general.[5] We then sharpen the images by focusing on one specific use of this political authority: the use of law to shape market competition—that is, antitrust law, or, as it is generally known outside the United States, competition law.

Th The Focus on competition law also outlines the time frame of the article. Antitrust law in the United States and competition law in Europe emerge and develop in the 1890s and grow in importance throughout the twentieth century. Beginning in the 1990s, this form of law takes on increasing importance throughout the world. We focus here on the developments in Europe and the United States during their respective formative periods.

The term "American regulatory tradition" here refers to the relatively stable patterns of institutions, ideas, and practices through which the U.S. government controls ongoing market conduct. The key concept is regulation, because it gives shape to that use of political authority and configures the field of vision of those within it. The term is contested, but most observers would probably agree that it foregrounds the relationship between the decisions of administrators, which are discretionary and easily changed, and the decisions of courts, which are the realm of "law"—method based, disciplined, and more stable.[6] They are presented as separate, but related, domains.

In this relationship, administrators control the relevant conduct, but courts are entitled to control administrative decisions. Debates and conflicts over the extent to which courts should use their authority have pervaded thinking about "regulation" throughout its evolution, but we do not enter into that long dialogue.[7] Our concern is the basic structure of the relationship to which the term refers. Courts do not always or even frequently exercise their authority to control decisions of administrative bodies, but the ART has evolved within a dialogue that assumes the basic relationship and is confined to discussing how and when courts should exercise that control.

Courts serve to legitimize administrative decisions. Administrators make decisions, but courts must legitimate them—either actively or passively. Judges deal in "law" as opposed to action that is *merely* administrative.[8] This role reflects the assumption that courts embody higher values that entitle them to determine which uses of political authority are legitimate. These values are deeply rooted in U.S. legal traditions and constitutional structures, often often based on a distrust of the discretionary power of government.[9]

This relationship between courts and administrative agencies is a structural feature of American government. It is rooted in the perceived imperative of dividing responsibilities among governmental units: courts, the U.S. Congress, administrative agencies, and state institutions.[10] The U.S. Constitution provides the framework that

holds these separate units together. Each unit is expected to function in collaboration with private lawyers, who provide it with information, arguments and other forms of assistance.[11]

Contestation among these units is a basic dynamic of the structure.[12] It reflects the high value attached to competition as a tool for improving performance in any institution. During most periods of U.S. governmental history, it has been widely assumed that effective efforts by one institution will typically lead to higher performance from other institutions, whether public or private, that draw support and/or resources from the same source and that the contestation will be kept within bounds by the U.S. Constitution, primarily through litigation in the courts.

These dynamics are closely associated with a central feature of U.S. law that is referred to as "adversarial legalism."[13] Several elements of this legal style are central. First, it emphasizes the value of dispersing authority. In it, authority is not concentrated, but separated. It favors a structure in which more than one decision maker is involved in final decisions, and often multiple institutions or units of institutions. Moreover, the decision maker does not have responsibility for almost all elements of procedure, as is the case in many other traditions. Rather, private lawyers prepare much of the factual material used in procedures, and they control important elements of the procedure themselves, such as calling their "own" witnesses and posing most or all of the questions asked of the witnesses during the procedure. The judge basically plays the role of umpire during the proceedings. A second element is the high value placed on confrontational argument rather than a genteel search for a cooperative discourse. American lawyers are trained and acculturated to confront their "opponents" as forcefully as possible with minimal attention to constraint in argument. Court procedures foster this confrontational model through evidence rules, witness control practices, and similar devices.

Finally, conflict is itself considered a source of justice.[14] This valuation serves an important function: it justifies practices and procedures that often appear harmful to the cause of justice and the interests of clients and that many view as primarily designed to serve the interests of lawyers. Since the legal realist movement of the early decades of the twentieth century, a guiding idea in U.S. law has been that the process of finding "truth"

should not be left to a single decision maker, whose biases cannot easily be uncovered.[15] Instead, it is claimed, truth is best revealed by relying on the confrontation between two or more conflicting versions of the scenario and by allowing each source to present as much evidentiary material to the decision maker as is feasible under the circumstances.[16] These factors help to secure the assumption that courts can confer political legitimacy on decisions and that the exercise of administrative authority by itself cannot.

A collateral effect of this relationship is that judicial practices and the values on which they are based have influenced the evolution of administrative structures and procedures. Although administrative decision making retains its basic characteristics (for example, it must function as part of a political structure), additional features have been added over time that often resemble those of judicial decision making. Elements of "adversarial legalism" have become more prominent, especially since the 1950s and with the development of so-called process theories of law and government.[17] These approaches include, for example, frequent opportunities for hearings and increased emphasis on presentation of extensive data to decision makers. Confrontational argument is also more commonly on show.

Contrasting Shapes in Europe: Identifying Distance

The use of political authority to control ongoing private economic conduct is conceptualized and instrumentalized differently in continental Europe. There, the courts are seldom, if ever, seen as essential for legitimating administrative action, as they are in the ART. Administrative decision making tends to have at least as much status as decisions by courts; in some national systems (e.g., France), it arguably has more.[18] In general, courts have the authority to reject a decision by administrators only where the decision violates a constitutional provision or represents an abuse of its power or discretion. This responsibility is often taken seriously, but the scope of authority to control administrative actions is typically far narrower and more precisely defined than in similar contexts in the United States. The core idea is that the legislature provides legitimacy and judges and administrators must both adhere to its dictates.[19]

The perennial debates in the United States about the extent to which courts can and should control administrative decisions rarely find close analogs. There are, of course, differences of opinion regarding the interpretation of statutes and constitutions. However, they are confined by the need to follow textual guidelines and use legislative reference points. Particularly in recent decades, contests have arisen in some countries about the types of administrative decisions that are subject to review by courts and the extent of permitted review, but they have generally been less heavily laden with constitutional symbolism than those in the United States.[20]

This conception of the appropriate use of political authority tends to emphasize that both courts and administrative agencies are merely offices of the state. In contrast to the U.S. pattern in which administrative structures and procedures often reflect the influence of judicial procedures, courts in many countries follow procedures that more closely resemble those of administrative offices than of distinct and equal branches of government. They typically show, for example, fewer trappings of the adversarial function and less support for contentiousness.[21] Justice less often finds its source in adversarial confrontation and is more often seen as a function of the competence and specialization of officials, regardless of whether they are called some equivalent of judges or administrators.

The Example of Antitrust (Competition Law)

Focusing on a specific area of control—here, control over competitive conduct—provides a more granular view of this relationship, its influence, and its consequences. In the United States, this area is referred to as "antitrust"; in Europe and much of the rest of the world the term "competition law" is more common. The terms reflect and underscore the contrast outlined above. Antitrust is confrontational: it presents as a body of law combating particular forms of conduct engaged in by firms with specific market positions. Originally it was aimed at the trusts that were used to accumulate mega capital in the decades around the turn of the twentieth century, but it still reflects a stance of opposition to forms or structures of business that are

"anticompetitive." The term "competition law," on the other hand, merely refers to an area of legal competence.

On both sides of the Atlantic, the rapid industrialization of the late nineteenth century and its consequences led administrators and politicians to think about how to control competitive practices throughout an economy—that is, to create a general legal framework for competition.[22] The problems were new, and the responses to them differed in fundamental ways. In both contexts, they were filtered through and shaped by the respective legal and regulatory traditions. Identifying them throws light on the conflicts and misunderstandings that have shadowed perceptions of the ART by both those outside the tradition and those within it.

United States. In response to popular pressures, the U.S. Congress enacted a very vague statute in 1890 (the Sherman Antitrust Act) that federalized concepts drawn from common law judicial decisions in England and the United States; that is it made them available for enforcement in the federal courts. The legislation provided almost no guidance regarding the conduct to which the law could be applied, leaving to the federal courts the task of providing its normative content. The statute remains the basic legislation, but it is so general that it plays almost no role as a source of guidance in decision making, allowing the courts wide discretion in exercising control over the decisions of the administrators who apply it. The judges are constrained only by other judicial decisions that are seen as "law" in the U.S. legal system.

Control by the courts is further institutionalized in the context of enforcement. One of the enforcement agencies—the Department of Justice—must go to court to enforce its decisions. In general, it cannot itself impose fines or make direct orders against litigants; for this, it must undertake litigation in the federal courts, where it is merely a plaintiff and in general has the rights and obligations of other plaintiffs. The other enforcement agency, the Federal Trade Commission, is independent and can make direct orders under most circumstances, but its decisions are reviewable by the federal courts, which can and often do interpret and apply substantive antitrust law (as developed in other federal decisions) to its decisions.[23]

In addition, basic procedural elements associated with U.S. courts suffuse

administrative decision making in antitrust Law.[24] The procedures tend to be adversarial in tone and structure. Procedural authority and responsibilities are diffused, so that lawyers for the parties play prominent roles in administrative procedures. They typically have extensive authority to prepare and submit factual materials and to argue cases. The procedures reflect the basic idea that contesting arguments are also an important source of administrative justice in the United States.

Europe. In contrast, competition law in Europe developed along a path that began with administrative decision making and has continued to foreground administrators in shaping and implementing competition law.[25] Until recently, the courts have played little or no role in many countries, and this has changed only marginally.

The basic patterns of competition law in Europe took shape under circumstances that differed fundamentally from their U.S. analogs. In the 1890s a highly respected and intellectual elite within the central bureaucracy of the Austro-Hungarian Empire in Vienna recognized the pressing need to improve the effectiveness of the Austrian economy. Embarrassed by German economic and scientific successes and by the Prussian military victory over Austria in the Austro-Prussian War of 1866, they sought new strategies for achieving that goal. The Habsburg Empire was struggling with slow economic growth at the same time that it was battling forces of its own disintegration as a result of growing nationalist and ethnic movements in many of its component areas, in particular among Slavic populations. These movements sought more political rights within the empire as well as greater autonomy from it. Their demands fueled dramatic and often violent clashes that severely disrupted government operation in 1890s and into the next century.

The bureaucrats in Vienna were part of the German-speaking imperial government whose members were painfully aware of the need to improve the economic situation of the empire in the hopes of preserving the empire itself and their own privileged status at its center. They developed the initial European model of competition law in an effort to harness the potential of economic competition for this purpose.[26] The marginalist revolution in economic theory that had recently been developed independently by Carl Menger in Vienna and Alfred Marshall at Cambridge University

spurred their belief that competition could have the desired effect.[27] A main idea of this development in economic theory is that economies are interrelated and dynamic and that the components are interconnected in systematic ways. For example, changes in prices in one market could have identifiable and at least partially predictable impacts in other markets. Individual markets could be seen as part of a system of relationships in which changes in one part of the system influenced other parts. They were part of a dynamic process that was continually being influenced by changes and new elements.

The architects of European competition law saw in this conceptualization of economic life a basis for modernizing and energizing the Austrian economy. From this perspective, competition was a principle engine of an economy's effectiveness—the energy within the economic process—so protecting it from distortion could spur the economy and lead to the much-needed economic growth. Accordingly, the substantive component of their competition law proposal focused on protecting competition from interference. Its authors viewed the project broadly, envisioning competition law as a means of protecting a social/economic process.

In this it differed fundamentally from the starting point of U.S. antitrust law, which was conceived as a law to protect economic freedoms and/or individual rights. The US statute as a vague political act without a grand design of broad vision of the role of competition law. Its subsequent evolution was shaped by this image.

The procedures and institutions used to implement the Austrian model were consistent with and supported by its substantive provisions. The basic assumption was that the appropriate institutions for protecting the competitive system are administrative. The central bureaucracy could direct the power and authority of the state against large private firms that could harm the competitive process. It alone was in a position to use state power to modify the conduct of these amalgams of private power. The courts were assumed to be too weak and to have too few enforcement tools to wield state power effectively against powerful economic opponents.[28] This conception comported well with widespread European views of the role of the bureaucracy and its elites.

Again, this form of implementation contrasted sharply with U.S. choices. Rather than viewing the bureaucracy as the appropriate vehicle for applying and implementing

the law, U.S. antitrust turned to the courts. The politicians who drafted the statute had little confidence in the bureaucracy. They saw the courts as the agents most appropriate for enforcing the rights they were creating. The courts were expected to be largely above politics and in the best position to handle the private litigation that was envisioned as the main tool for antitrust enforcement.

The bureaucrats who developed the European competition-law model soon included these ideas in legislation proposed for the Austro-Hungarian Empire. The growing political instability of the empire in the late 1890s disrupted the entire legislative process in 1897 and prevented the proposal from being enacted. The model was, however, picked up and promoted in Germany, where it was initially blocked by the Kaiser. Its principal supporters were representative of small and medium-sized firms that viewed it as a means of controlling the power of large firms and thereby achieving fairer opportunities in their markets. When World War I ended the German Empire, many of those who had initially supported competition law came to positions of power, and it became the basis of legislation in the 1920s.[29] The model was also incorporated into legislation in other European countries, such as Norway (1926, Trustloven), over the next decade.[30] It attracted further attention in Europe in the context of its League of Nations project for stabilizing European economies.[31]

Depression and war blocked further spread of these ideas until the 1950s. The fragility of European economies after the World War II led to extensive state control of most economies, further impeding the development of competition law ideas. The exception was Germany, where the perceived need to create a new relationship between government and the economy led to competition legislation in 1957. Competition law ecame a fundamental component of the "social market economy" that was designed to reconstruct German society and harness a market economy to social needs. From here, the model began to spread within European states.

Throughout this evolution, administrators have remained the focus of the implementation process. States have continued to entrust competition-law enforcement to administrative organs, and for most purposes administrators continue to control the content, application, and direction of the law. Most national regimes now subject

administrative decisions to court review, but such review is often limited, sometimes only to correcting procedural and constitutional faults in litigation.

Since the 1950s the European integration process has fostered the spread of this model of competition law. The Treaty of Rome (1957) that established the European Common Market contained two basic competition-law provisions that have become the basis for the competition law of what has become the European Union (EU).[32] In the system that evolved, administrative decisions by the European Commission (EC) have played the central role. The two courts of the EU provide substantive as well as administrative oversight of the EC's competition law practice, and their decisions are sometimes highly influential, but they have relatively few cases. The EC plays the central role.

Perspectives: External, Internal, and Comparative

Differences between these trajectories of the use of political authority to control economic conduct provide a basis for comparing them. They are the raw material that shapes perceptions of the ART. These perceptions are our focus here because they are the basis of decisions, in both business firms and the political institutions that wield government authority to shape business behavior. They are the fulcrum of the dialogue between government and business. External perceptions of the ART—that is, the perceptions of those who are not part of it—often differ in fundamental ways from internal perceptions, and comparing them provides insights into the ART that are difficult to conjure from within the tradition and often obscured from outside it.

Distances and their consequences are often invisible to both insiders and outsiders—and for related reasons. For insiders, the ART's features are established and quotidian: They are merely part of the existing legal and political system. The system is assumed to be solid and, if not perfect, at least not likely to undergo fundamental change. Few operating within it suggest that fundamental change is necessary or that it would be appropriate to look to foreign models for any changes that may be deemed appropriate. For outside viewers, the ART's features are adumbrated because they are "givens." They

are obscured because they are embedded in basic assumptions about law and political authority and in political structures intertwined with those assumptions.

The divergence in perspectives itself often remains unrecognized by those involved. Those inside the tradition are often unaware that foreign viewers do not share their perceptions and assumptions. They may therefore disregard the issue entirely or assume that the views of outsiders are similar to theirs. Those outside the tradition often also have limited awareness that their views differ from the views of insiders. For both, the differences are invisible. A comparative perspective makes them visible. The examples that follow could be repeated for other features of the ART.

Revealing dimensions. Viewing the ART from both outside and inside the tradition reveals dimensions that often go unnoticed. We focus here on the most fundamentally influential of them: the *legitimizing* role of the courts. This is the basic idea that administrative acts do not have full legitimacy without explicit or implicit support from the courts. This role is central to U.S. thinking about the state's use of its power to control economic conduct, but foreign observers often fail to recognize its centrality.

Antitrust provides a useful example. The legitimizing role of courts in the ART helps to explain a tendency that sometimes appears within the U.S. antitrust community to be dismissive of decision making in other systems that is solely administrative, even to the point of denouncing administrative decisions as illegitimate unless they are "validated" or approved by courts. The comments often reflect an assumption that such decisions deserve less attention and respect, because they are subsidiary to judicial decisions—tainted by the lack of judicial participation. Those who encounter these U.S. responses are often perplexed and angered by this dismissiveness, and it influences their perceptions of American antitrust officials and representatives. These misunderstandings and misperceptions then also infect relations between the two groups.[33]

Failure to recognize the perceptual basis for these understandings is a key to explaining both the U.S. dismissiveness itself and the reactions of Europeans and others to it. Both are routinely treated as "givens" that need not be explained or even mentioned. A comparative perspective reveals their perceptual roots and foregrounds the

distinctiveness of ways of thought that are standard in the United States. In short, it highlights the cognitive distance between perspectives and the power factors that help to protect that distance. To be sure, other factors can also play a role in explaining the dismissiveness. For example, it obviates the need for serious discussion of the issues: the hostility and responses to it can be presented as the product of values and ideology rather than arguments, leaving nothing to discuss. It may also provide tactical advantages by putting those that dismiss in a superior position to those that are "dismissed."

A set of events in the early 2000s provides a valuable example of the many dimensions of the encounter. On July 3, 2001, the EC blocked what would have been the largest industrial merger in history, between General Electric (GE) and Honeywell.[34] Both were U.S.–based companies. The two companies believed that the combination of GE's large aircraft engines and Honeywell's avionics and nonavionics components, along with GE's capital financing abilities, would allow customers to purchase bundled goods from the conglomerate at attractive discounts. The merger was easily and quickly approved by U.S. authorities, who saw no harm to competition under U.S. law. To the surprise and consternation of many in the United States, however, EU authorities applying EU law rejected the merger. Both GE and Honeywell had significant divisions and subsidiaries in Europe, which made EU law applicable to the conduct and required approval of the merger by the EC, the EU's competition authority. Applying EU law, the EC foresaw harmful consequences of the merger for the European economy and prohibited it within Europe. This essentially ended the merger project.

Revealing for our purposes here is the scenario that followed.[35] American officials, high-ranking politicians, and even scholars lashed out at the EC and condemned the decision in often harsh language. Four lines of criticism are particularly relevant. One was the claim that the EC had no "right" to prohibit a merger between two U.S. companies. For example, two prominent antitrust noted that, "Americans are asking how a foreign authority could scuttle a deal that involved only U.S. companies and [that] the Justice Department and about a dozen other competition authorities had approved with modest concessions."[36] This point failed to recognize that under basic international principles the EU's competition-law system was as justified in applying its competition

law to conduct that caused it harm as was the United States in applying its antitrust law to similar types of harm.

A second criticism was that the decision was not based on law, but was instead motivated by the desire to protect domestic European industries. The noted economist Gary Becker claimed that "Europe appears to be guilty of caving in to powerful interests."[37] This common claim was an interpretation that was not accompanied by factual support but based on assumptions about the relationship between law and administrative decision making.

This was even more evident in the claim that the European system is "regulatory" in nature, and thus implied to be less "legal" and less objective than the U.S. system, allowing the EC to pursue political and other objectives. One commentator noted, "These differences [in outcome]—and the strengths and weaknesses of the two systems—flow from the fact that while the Antitrust Division [of the U.S. Justice Department] operates in a law enforcement context, the Merger Task Force [of the European Commission] operates in a regulatory system."[38]

Particularly common among antitrust specialists is the claim that the Commission was simply wrong in its analysis.[39] Here the assumption is that the U.S. and EU decision makers were applying the same standard and seeking the same objectives but the EU misunderstood the economics of the case and thus got the analysis wrong. Such claims seldom refer explicitly to the standard that is being applied in arriving at this conclusion, and they seldom reflect careful comparison of the standards and objectives used in U.S. and EU law.

This encounter also highlights the relationship between general patterns in the use of political authority and specific instantiations of those patterns—in our example, the control of competitive conduct. Structures and decision-making patterns in antitrust clearly reflect central patterns of the ART itself. Recognizing this connection helps to explain decisions and procedures that an unknowing observer might explain and interpret in other and perhaps misleading ways.

Exposing the layers: comparison and the role of history. Our comparative-historical perspective pries open the layers of the ART, exposing

components of the "sediment" from which it and its antitrust instantiation have developed and continue to be influenced. The analysis is both historical and comparative because the two are here inextricably interrelated. Although the potential value of developing the analytical potential of the relationship is seldom fully appreciated, history enables us to peer within the ART and explore its shape and many of its features. It also illuminates the perspectives we have used in doing that. Both assemble pieces of data into flows, and comparing them forces the observer to ask how. The following examples are instructive.

One layer that this juxtaposition of perspectives exposes is the fundamental role of the common law tradition in the ART. The ART's basic assumptions and institutional and procedural values are reflections of the English background—for example, the centrality of the courts, the importance of contestation, and authority dispersal in decisions involving political authority. Viewing the evolution of the ART from a continental European perspective thrusts this into awareness. These elements played no part in continental experience except in isolated situations and, to a limited extent, an awareness of their existence makes apparent the inadequacy of any narrative that does not give due weight to that tradition. Their absence is often not only obvious but glaring.

A comparative-historical perspective also draws attention to the role of constitutionalism in the ART.[40] Historical awareness of the central role of the Constitution in the United States and the almost religious reverence long held for the Supreme Court points to its role in supporting claims for judicial control over administrative decision making. Continental European systems have not similarly cloaked the judicial role in reverence for a constitution, and, as a result, comparing the images highlights the discrepancy.

A third example is more speculative, but it also points to the potential of this perspective to provide points of entry into the ART. All states use and sometimes rest on symbols of unity, but European experience does not locate these symbols in the judiciary.[41] A comparative perspective points therefore to cultural factors that give traction to the legitimating role of courts—above all, perhaps, as the need of a nation of immigrants and regional loyalties for unifying symbols and institutions that operate

"above" the political sphere.

At the very least, this dual perspective reveals the inadequacy of explanations based solely on factors such as economics, domestic power relations, and the desire to justify the use of U.S. power abroad. A viewer who sees the ART as merely a product of economic forces, domestic power struggles, or the need to justify U.S. interference in the affairs of other states will draw conclusions that distort the ART's realities. Numerous factors emerge as necessary for grasping the way political authority has been conceptualized and instrumentalized over time, and historical analysis is needed to reveal the layers of sediment that comprise the ART.

Distance: clouded images and black boxes. Differences between European and U.S. ways of conceptualizing and implementing the use of state power necessarily create cognitive distance and cloud external images of the ART. They make external views of the ART less distinct; what is "out there" in this context is at least somewhat blurred. These clouded images are the basis for decisions by business decision makers, officials, and lawyers, accompanying business history at least as much as political or legal history.

They are also the basis for communication between those inside and those outside the ART. In that context they can crystallize into what are perhaps best described as "black boxes" that are then embedded in messages and lead to misunderstandings and raise unintended expectations. They conceal differing assumptions about the meaning of words and the valence of explanations that lie beneath the surface of the communication. These misunderstanding acquire lives of their own. Once embedded, the black boxes continue in time. They are not one-time events but part of the ongoing evolution of discourse across political and legal boundaries. As a result, they infiltrate the relationship between governments on one side of those boundaries and businesses on the other. They often change shape over time in response to changes in both the business environment and the political and legal environments, spawning new conceptions and expectations that shape those relationships. Studying their content and effects can be of significant value for business history. Comparative analysis helps to reveal these black boxes.

Power and cognitive distance. The intertwining of power with cognitive distance is often overlooked, but it plays a role in many contexts, including views of the

relationship between business and government. Governments, businesses, and individuals have incentives to support or ignore particular images of the relationship between government and business in their own countries and sometimes outside them. I note here just one of them: the impact of U.S. economic and political power on internal and external perceptions of the ART. American power tends to shield from view the clouds of distance and the associated black boxes, thereby consolidating their force and prolonging their influence while sometimes adding their own distortions. For both external observers and those within the tradition, it provides a kind of carapace around their perceptions. It weakens incentives to contest and correct the images and to pry open the boxes that distort communication. Attempts to unpack perceptions have costs in mental and sometimes even material resources. The paucity of effective historical and comparative tools with which to engage in this kind of unpacking increases the costs. As a result, sufficient incentives are needed to outweigh these costs, and U.S. power tends to block potential incentives. I again use competition law as the example.

Those within the ART have had few incentives to examine their own images of the use of political power embodied in the ART. They are part of it, and images of it can have value for them. Moreover, its potential value has repeatedly been reinforced. For example, in the years after World War II, U.S. representatives promoted American antitrust around the world as a democratic antidote to the consolidation of power in Germany and Japan that was thought to have contributed to the forces of Nazism and Japanese militarism that led to the devastations of that war.[42] After the collapse of the Soviet Union, they promoted U.S. antitrust to political leaders that were seeking to develop market economies in response to the loss of Soviet economic support or disillusionment with state socialism. Antitrust lawP was an important emblem of capitalism. In the twenty-first century, the U.S. antitrust law has been central to emerging global networks of competition law institutions, business advisers, and lawyers. Each of these contexts has given those representing U.S. interests positions of power and influence, both vis-à-vis others and within American society. They have had few reasons to question the assumptions and claims on which their status and power are based. The claim that the ART, and specifically its antitrust component, is inherently superior to

systems in which courts do not play similar roles serves their interests. In this sense, it tends to deter efforts to improve perception and communication.

Foreign viewers have faced similar disincentives to critically examine their perceptions of U.S. law and experience. Many have had reasons to praise and emulate the U.S. model—or at least appear to emulate it—in order to gain favor with U.S. representatives and institutions. Others have seen domestic political advantages come from being associated with it. In addition, it is common for young officials and scholars in some foreign competition-law systems to earn advanced degrees in the United States that yield status value in their home states. Some, of course, question or even reject the U.S. model, but they may also have few incentives to delve into the perceptions on which they base their rejection. Knowing enough to do so in a serious way takes time and effort while relying on vague images does not.

Conclusion

Viewing the ART from both the inside and the outside enables us to identify forces that have shaped its development and influenced business and regulatory conduct over time. It may illuminate many elements of business history that have yet to be fully explored. Decision makers in business necessarily operate on the basis of their images and perceptions of what government officials are likely to do that might affect their interests. They base the projections in their business plans as well as their communications with officials, lawyers, and competitors on these images. As a result, those both within and outside the ART respond to each other on the basis of vague and distorted images that can impair decision making across borders. A clearer understanding of these perceptions can therefore provide insights into their decisions, now and in the past.

These few comments foreground the potential value of examining the ART through a broader lens infused with memory. Conventional accounts use lenses that focus narrowly on rules, institutions, and incentives, all of which have value, but they see only individual parts of the picture. A wider lens can reveal how the parts function together.

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[1] See, for example, Thomas K. McCraw, "Rethinking the Trust Question," in *Regulation in Perspective: Historical Essays*, ed. Thomas K. McCraw (Cambridge, MA, 1981), 1.

[2] See, for example, Francesca Bignami, "Regulation and the Courts," in *Comparative Law and Regulation: Understanding the Global Regulatory Process*, ed. Francesca Bignami and David Zaring (Cheltenham, U.K., 2016), 275, 279n2.

[3] For an extended discussion of this method, see Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford, 2006), 339–82.

[4] On Europe, see Giandomenica Majone, *Regulating Europe* (London, 1996), esp. xiii.

[5] See, for instance, Reuel Schiller, "The Historical Origins of American Regulatory Exceptionalism," in Bignami and Zaring, *Comparative Law*, 35.

[6] On the contested term "regulation," see, for example, Robert Baldwin, Martin Cave, and Martin Lodge, eds., introduction to *Understanding Regulation: Theory, Strategy, and Practice* (Oxford, 2012), 2.

[7] Particularly important contributions include Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (Oxford, 2014); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge, U.K., 1982); and Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas, 1875–1891," *American Political Science Review* 96, no. 3 (2002): 511–24.

[8] See, for instance, Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation," *Indiana Law Journal* 74, no. 3 824(1999): 819–92.

[9] See William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, 3rd ed. (Chapel Hill, 1996), 235–48; and Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Cambridge, MA, 2005), 70.

[10] See, for example, Tom Ginsburg, "Comparative Administrative Procedure: Evidence from Northeast Asia," *Constitutional Political Economy* 13, no. 3 (2002): 260–61.

[11] See Sean Farhang, "Public Regulation and Private Lawsuits in the American Separation of Powers System," *American Journal of Political Science* 52, no. 4 (2008): 821–39.

[12] See Francesca Bignami, "Introduction: A New Field: Comparative Law and Regulation," in Bignami and Zaring, *Comparative Law*, 1–51.

[13] The concept was coined and developed in Robert Kagan, *Adversarial Legalism* (Cambridge, MA, 2003).

[14] See Robert Kagan, "Adversarial Legalism and American Government," *Journal of Policy Analysis and Management* 10, no. 3 (1991): 372.

[15] On the legal realist movement, see William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (Oxford, 1993); and Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill, 1986).

[16] For a comparative study that focuses on some of these issues, see Ronald J. Allen, Stefan Kock, Kurt Riechenberg, and Toby D. Rosen, "The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship," *Northwestern University Law Review* 82

(1987–1988): 705.

[17] For a classic study, see Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of the Law*, ed. William N. Eskridge Jr. and Phillip P. Frickey (Minneapolis, 1994).

[18] See, e.g., [Au: BHR does not use "supra." Please use shortened citation format: Bignami, "Regulation and the Courts," 63, and Baldwin, Cave, and Lodge, introduction to *Understanding Regulation*1 . For France, see Susan Rose-Ackerman and Thomas Perroud, "Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment," *Columbia Journal of European Law* 19, no. 2 (2013): 225–312.

[19] See Walter A. Stoffel, "Enlightened Decision Making," *Tulane Law Review* 75 (2001): 1202–3.

[20] For a comparative review, see Louis Favoreu, "Constitutional Review in Europe," in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, ed. Louis Henkin and Albert Rosenthal (New York, 1990), 37.

[21] See R. Daniel Keleman, *Eurolegalism* (Cambridge, MA, 2011).

[22] On the evolution in U.S. law, see Herbert Hovenkamp, *Enterprise and American Law: 1836–1937* (Cambridge, MA, 1991).

[23] See Richard A. Posner, "The Federal Trade Commission," *University of Chicago Law Review* 37, no. 1 (1969): 52.

[24] The concepts are identified and highlighted in Paul R. Verkuil, "The Emerging Concept of Administrative Procedure," *Columbia Law Review* 78, no. 2 (1978): , 264–65.

[25] Much of the material in this section is based on my detailed study of the evolution of competition law in Europe. For details, and copious references, see David J. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford, 1998); and Gerber, "The Origins of the European Competition Law Tradition in Fin-de-Siecle Austria," *American Journal of Legal History* 36, no. 4 (1992): 405–40.

[26] See Gerber, "Origins."

[27] Herbert Hovenkamp insightfully analyzes the impacts of marginal economics on competition law thinking, in general, and on the evolution of U.S. antitrust law, in particular, in many works. See, for example, Hovenkamp, "The First Great Law and Economics Movement," *Stanford Law Review* 42, no. 4 (1990): 993–1058.

[28] See, for instance, Gerber, *Law and Competition*, 54–62.

[29] For details, see Gerber, *Law and Competition*, 121–35.

[30] See Gerber, *Law and Competition*, 153–59.

[31] See David J. Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford, 2010), 21–52.

[32] For details, see Gerber, *Law and Competition*, 34–52.

[33] See Klaus J. Hopt, "Restrictive Trade Practices and Juridification: A Comparative Law Study," in *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, ed. Gunther Teubner (Berlin, 1987), 291–331.

[34] See, for example, Eleanor M. Fox, "GE/Honeywell: The US Merger That Europe Stopped," in *Antitrust Stories*, ed. Eleanor M. Fox and Daniel A. Crane (New York, 2007), 331–60; and William E. Kovacic, "Transatlantic Turbulence: The Boeing-McDonnell Merger and International Competition Policy," *Antitrust Law Journal* 68, no. 3 (2001): 805–73.

[35] The following paragraphs are little modified from a fuller discussion of the conflict in David J. Gerber, "The European Commission's GE/Honeywell Decision: US Responses and Their Implications," *Journal of Competition Law* 87 (2003): 87–95.

[36] William Kolasky and Leon B. Greenfield, "The Lost GE/Honeywell Deal Reveals a Trans-Atlantic Clash of Essentials," *Legal Times*, 30 July 2001, 28.

[37] Gary Becker, "What U.S. Courts Could Teach Europe's Trustbusters," *BusinessWeek*, 6 Aug. 2001, 20. In a letter to the European authorities, senator Ernest Hollings, chair of the Senate Commerce Committee, stated that the European Commission had applied "an apparent double standard" that favored European companies and disadvantaged their U.S. competitors."U.S. Steps In over EU Opposition to G.E. Deal," *Financial Times*, 16–17 June 2001, 1.

[38] See, for instance, Donna E. Patterson and Carl Shapiro, "Transatlantic Divergence in GE/Honeywell: Causes and Lessons," *Antitrust*, Fall 2001, 22.

[39] See, for example, William J. Kolasky, "Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels," address, George Mason University Symposium, Washington, DC, 9 Nov. 2001, http://www.usdoj.gov/atr/public/speeches/9536.htm.

[40] See *Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe* (Oxford, 2000).

[41] On this use in the United States over time, see Michael Kammen, *Mystic Chords of Memory: The Transformation of Tradition in American Culture* (New York, 1991).

[42] For in-depth discussion of these developments, see Gerber, *Global Competition*, 19–270.