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When Think Tanks Refuse Thinking: Why American Pro-Market Conservatives Oppose Market Integration

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Research Article

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Abstract

American pro-market conservatives often oppose use of federal authority to rein in anti-competitive behavior by market actors. Competitive barriers, whether created by local jurisdictions or the absence of national competitive rules, go unaddressed. In international comparison, especially considering the European Union's use of central authority for market openness, this is quite puzzling. Based on interviews and archival research, I trace inattention to market barriers to contradictions within Hayek's neoliberalism and an enthusiastic reception within the American academy of one possible interpretation of those writings. This conception of markets—competitive federalism—diffused into the conservative law and economics movements, think tanks, and eventually mainstream conservative politics. It permitted conservatism to align a strong pro-market rhetoric with demands for states' rights and federal retrenchment, albeit side-stepping many significant issues in economic theory and policy. Thus, conservatives pursue spending and tax cuts, deregulation and decentralization, often to the detriment of market openness.

1. Introduction

The United States was founded at least in part to curb interstate protectionism and establish a single market with competitive rules. Throughout the nineteenth century, U.S. federal institutions used central authority to pursue market openness, including preempting state legislation that interfered with interstate commerce. Under its Dormant Commerce Clause jurisprudence, the U.S. Supreme Court struck down protectionist state laws. Other federations and international organizations have also recognized the importance of strong central rules for the success of open markets. The most prominent example is the European Union (EU), which has advanced a vast single-market project since the 1970s, promising that the reduction of barriers to interstate exchange and mobility would bring economic dynamism. EU institutions have sought systematically to replace state regulations with unified rules and to restrict anti-competitive practices of member states (e.g., harmonized standards, service mobility, and banning certain state business subsidies).

However, despite many remaining barriers to openness, using federal authority to complete America's "single market" is virtually absent from current political discussion. Particularly, rhetorically pro-market conservatives oppose fairly obvious market-building actions, like the mutual recognition of professional licenses, adopting nationally harmonized standards, and restricting discriminatory state government procurement rules. This article considers the nature of such opposition, locating it in the ideas of "competitive federalism," which have become dominant in conservative circles.

Despite America's reputation as "neoliberal" and the world's foremost liberal market economy,[1] its single market is surprisingly incomplete; in particular, heterogeneous rules by local jurisdictions often create obstacles to the free flow of goods and services. Service mobility is often hampered by the fact that licensed professionals need to acquire host-state licenses, even when doing business temporarily or remotely.[2] Alcoholic beverages are just one example of states insulating their markets from "foreign" (out-of-state) competition through complex product regulations.[3] States and cities often legally favor local providers in public procurement and provide subsidies to attract firms across state borders without scrutiny by the federal government.[4] Construction activity and firm mobility is significantly restricted by market

[1]Among others: Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge: Cambridge University Press, 2002); David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).

[2]Michelle Egan, *Single Market. Economic Integration Europe and the United States* (Oxford: Oxford University Press, 2015).

[3]National Conference of State Legislatures, "Direct Shipment of Alcohol State Statutes," 2016, http://www.ncsl.org/research/financial-services-and-commerce/direct-shipment-of-alcohol-state-statutes.aspx.

[4]Leiff Hoffmann, "Land of the Free, Home of the (Un)Regulated: A Look at Market-Building and Liberalization in the EU and the US" (PhD diss., University of Oregon, 2011).

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fragmentation through state- or city-specific licensing rules as well as more than 20,000 different building codes.[5] Policymakers and federal institutions often assume that nontariff barriers are only an issue for external trade; regulatory heterogeneity among states and local jurisdictions is rarely considered a potential market barrier.

This article highlights and explains why the actors we would most expect to address such concerns—conservative policymakers and think tanks—seem uninterested in market integration. While pro-market politicians are dominant in federal politics, they almost never suggest that new central rules could generate dynamism by reducing state protectionism or fragmentation. Instead, they seek dynamism by weakening the federal role in the economy—cutting federal taxes and spending and loosening federal regulation—and empowering "states' rights" over their economies.[6] As House Speaker Paul Ryan's "Better Way" manifesto put it in 2016, federal regulation should be "used sparingly," because "states in many cases do a better job, and should be encouraged to take the lead."[7] American conservatives tend to believe that markets are not carefully crafted, but come into existence if government withers away.

Based on interviews with multiple scholars at the American Enterprise Institute (AEI), the Heritage Foundation (Heritage), and the Cato Institute (Cato), a review of all their publications available online, and a close reading of academic sources, this article demonstrates how ideas of competitive federalism became dominant in conservative circles, precluding a serious consideration of the importance of federal authority for market openness.[8] Competitive federalism ideas reflect a specific interpretation of Friedrich Hayek's neoliberalism that became very influential in economics and political science research in the second half of the twentieth century. However, the diffusion of these ideas into the law and economics movement and conservative think tanks (CTTs) was simplified and selective. Within academia these ideas became more and more nuanced, subject to many limitations, exceptions, and revisions. But within the conservative movement, market ideas came to be politically linked to social conservatism that championed states' rights in response to progressive expansions of federal authority, precluding a consideration of central authority for market openness. For think tank scholars, the tenets of competitive federalism became not researchable propositions but rather unshakable axioms of political economic thought. As a result, they inspired a conservative "return to markets" that became a fiscally focused attack on the federal government and central regulation. Thus, federal market authority is blanketly opposed as means to generate openness and market dynamism—the only necessary condition for competitive markets being the withdrawal of government even when that proliferates real obstacles to competition.

This analysis does not concern itself with a broader historical explanation of the genesis and transformation of the conservative movement, which in some sense remain under a veil of complex multicausality.[9] One important historical thread that created principled antipathy to federal power among conservatives was the New Deal and the civil rights movement. As New Deal Democrats built a new political coalition that included Southern and urban African Americans, Republicans moved into the South and became champions of states' rights against federally imposed desegregation. States' rights and federalism were one of the ways in which conservatives equivocated between rational policies for economic growth and playing on racial fears, especially of white Southerners.[10] Another important historical thread is the unequal influence of well-endowed, organized business interests under conditions of rising economic inequality in politics and policy, enabled by specific characteristics of the American politico-institutional eco-system, such as strong opportunities for obstruction and politics as a spectacle.[11] Since the 1970s, large American businesses have become political entrepreneurs, embracing public-interest strategies that allowed them to penetrate conservative intellectual networks, think tanks, and electoral politics, warping policy positions in their favor.[12] A burgeoning literature not only documents how conservative mega-donors influence policy directly (obfuscated but not secret), but also their interrelationships with conservative intellectual networks

[5] Benedikt Springer, "Building Markets? Neoliberalism, Competitive Federalism, and the Enduring Fragmentation of the American Market" (PhD diss., University of Oregon, 2018).

[6] While the Republican Party is the stronger example, these ideas have also influenced the Democratic Party. While members of the latter are likely to harness central power for social purposes, they rarely propose to do so to dismantle interstate barriers.

[7] Paul Ryan, "A Better Way," December 24, 2018, https://web.archive.org/web/20181224224320/https://abetterway.speaker.gov/.

[8] Interviews were conducted in accordance with the American Political Science Association's Principles for Human Subjects Research. I followed consent procedures approved by the institutional review board of the University of Oregon. Subjects were not compensated.

[9] A few illustrative examples for this literature include: for the conservative movement conceptualized as status competition and backlash, see Cyh Lo, "Counter-Movements and Conservative Movements in the Contemporary United-States," *Annual Review of Sociology* 8 (1982): 107–34; as free-market coalition, see Monica Prasad, *The Politics of Free Markets: The Rise of Neoliberal Economic Policies in Britain, France, Germany, and the United States* (Chicago: University of Chicago Press, 2006); held together by material interests or cultural resources and practices, see Robert Brent Toplin, *Radical Conservatism: The Right's Political Religion* (Lawrence: University Press of Kansas, 2006); as an intellectual movement, see Melvin J. Thorne, *American Conservative Thought Since World War II: The Core Ideas* (New York: Praeger, 1990); as deliberative fusionism between an libertarian intellectual network, see Jeffrey Hart, *The Making of the American Conservative Mind: National Review and Its Times* (Wilmington, DE: Intercollegiate Studies Institute, 2006); Philip Mirowski and Dieter Plehwe, eds., *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Cambridge, MA: Harvard University Press, 2009); and as neoconservative intellectual network, see John Ehrman, *The Rise of Neoconservatism: Intellectuals and Foreign Affairs, 1945–1994* (New Haven, CT: Yale University Press, 1996). For materialist/economic approaches, more clearly within political science, see Mark Smith, "Economic Insecurity, Party Reputations, and the Republican Ascendance," in *The Transformation of American Politics: Activist Government and the Rise of Conservatism*, ed. Paul Pierson and Theda Skocpol (Princeton, NJ: Princeton University Press, 2011), 135–59; ideational approaches, see Blyth, *Great Transformations*; cultural, see Joseph E. Lowndes, *From the New Deal to the New Right: Race and the Southern Origins of Modern Conservatism* (New Haven, CT: Yale University Press, 2008); institutional, see Jacob Hacker and Paul Pierson, *Winner-Take-All Politics* (New York: Simon & Schuster, 2011); especially focusing on think tanks and related organizations, see Jason M. Stahl, *Right Moves: The Conservative Think Tank in American Political Culture Since 1945* (Chapel Hill: The University of North Carolina Press, 2016); Steven Michael Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008).

[10] Dan T. Carter, *From George Wallace to Newt Gingrich: Race in the Conservative Counterrevolution, 1963–1994* (Baton Rouge: Louisiana State University Press, 1996); Desmond S. King and Rogers M. Smith, "Racial Orders in American Political Development," *The American Political Science Review* 99, no. 1 (February 1, 2005): 75–92; Randolph Hohle, *Race and the Origins of American Neoliberalism* (New York: Routledge, 2015).

[11] Hacker and Pierson, *Winner-Take-All Politics*.

[12] Thomas B. Edsall, *Building Red America: The New Conservative Coalition and the Drive for Permanent Power* (New York: Basic Books, 2007); Bruce J. Schulman and Julian E. Zelizer, eds., *Rightward Bound: Making America Conservative in the 1970s* (Cambridge, MA: Harvard University Press, 2008); Mirowski and Plehwe, *The Road from Mont Pelerin*; Daniel Stedman Jones, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics*. (Princeton, NJ: Princeton University Press, 2012).

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(e.g., CTTs), where scholars sometimes build financially rewarding careers with research favoring donors.[13]

I do not contradict this vast literature on American conservative thought and the rise of the New Right. However, I am arguing that the connection between states' rights and race, or deregulation and business interests, is an insufficient explanation for the maintenance of interstate barriers to trade.[14] The fact that many large, nationally operating businesses oppose reducing interstate trade barriers that, according to these same businesses, are costly, is itself in need an explanation.[15] Ideas about competitive federalism provide a narrative and discourse that allow these actors to explain (to themselves and others) that their opposition to federal authority is also desirable in economic terms. Without those theories, one could have reasonably expected a different "transformation of racial orders," leading to different alignments around federal market authority.[16] But as it is, a consideration of carefully crafted federal rules for more market openness is virtually absent from conservative political discourse.[17] Hence, tracing the intellectual line of competitive federalism from Hayek through American academic scholarship to their eventual absorption into powerful CTTs significantly contributes to our understanding of conservatism.

2. Making Competitive Federalism a Viable Argument

Competitive federalism originated in in the Americanization of European neoliberal scholarship of the 1930s. A core conundrum in the application of neoliberal thinking to multilevel polities is how to push for more markets. If governments in general can be expected to incline toward impairing markets, does that mean that a well-constructed, overarching (federal) government should preempt the powers of lower-level units to be protectionist? Or does shifting any power to a higher (federal) level, even in the name of neoliberal principles, simply worsen the fundamental problem of government interventionism? In a famous essay on the subject, Hayek argued that a certain form of multilevel regulation optimizes economic governance.[18] Markets flourish where central institutions ensure that "goods, men and money can move freely over the [subunit] frontiers"—but are otherwise limited to this function. Mobility and competition across subunits deters interventionism at their level, generating "less government all round."[19] But even as Hayek's first and dominant theme called for minimal central government, he raised a second theme that suggested a larger internal-market role:

> All the effects of protection can be achieved by means of such provisions as sanitary regulations, requirements of inspection, and the charging of fees for these and other administrative controls. In view of the inventiveness shown by state legislators in this respect, it seems clear that no specific prohibitions in the constitution of the federation would suffice to prevent such developments; the federal government would probably have to be given general restraining powers to this end. This means that the federation will have to possess the negative power of preventing individual states from interfering with economic activity in certain ways, although it may not have the positive power of acting in their stead.[20]

A plausible interpretation is that a normative push for markets needs to be accompanied by strong central authority. Without strict rules, "competition over achievement" would soon become "competition to prevent competition."[21] This is the position most closely aligned with (German) ordoliberals, such as Walter Eucken, Franz Böhm, Wilhelm Röpke, Alexander Rüstow, and Alfred Müller-Armack, who thought that competitive tendencies, left to their own devices, could be destructive to the market order, necessitating political regulation.[22] It also tracks with what many political economists have found empirically.[23]

At times, Hayek was quite well aligned with this line of thinking that married belief in free markets with the necessity of a well-crafted order.[24] However, when he became the intellectual engine behind an American political project to bring about a "freer" society, the emphasis changed.[25] Skepticism of government action came to dominate; decentralization became the only path to markets; and gaps and contradictions were filled in by abstract mathematical models.[26]

In the United States, Milton Friedman and colleagues at the University of Chicago, among others, gave rise to a different interpretation of Hayek's conundrum (with his consent), elevating the limitation of central government to the main principle. Friedman argued that while there might be a need for government intervention due to market failure, in most cases this was a bad

[13] Teles, *Conservative Legal Movement*; Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America* (London: Penguin Books, 2017); Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (New York: Anchor, 2017); Stahl, *Right Moves*, 47; Alex Hertel-Fernandez, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States —and the Nation* (New York: Oxford University Press, 2019).

[14] They are all important pieces of the puzzle.

[15] The U.S. Chamber of Commerce quite deliberately stays out of criticizing interstate barriers, except when talking about deregulation in general; see Hoffman, "Land of the Free," 187. National construction companies say, that is "just not something that is on our radar"; see Springer, "Building Markets," 286. Neoliberal ideas were crucial in constituting business interests; see Blyth, *Great Transformations,* ch. 2.

[16] King and Smith, "Racial Orders." For a similar argument, see Timothy P. R. Weaver, "Market Privilege: The Place of Neoliberalism in American Political Development," *Studies in American Political Development* 35, no. 1 (April 2021): 104–26.

[17] See footnote 6.

[18] Hayek rejected the label of conservatism; see Friedrich August Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 2011), 519. He would call himself a (neo-) liberal, closest to what Americans tend to consider libertarian. However, what is important here is the way his ideas have shaped the American conservative agenda, independent of specific labels.

[19] Friedrich August Hayek, "The Economic Conditions," *New Commonwealth Quarterly* 5, no. 2 (1939): 131–49, 140.

[20] Ibid., 141.

[21] Walter Eucken in Sally Razeen, "Ordoliberalism and the Social Market: Classical Political Economy from Germany," *New Political Economy* 1, no. 2 (July 1, 1996): 233–57, 237.

[22] Brigitte Young, "Ordoliberalismus—Neoliberalismus—Laissez-Faire-Liberalismus," in *Theorien der Internationalen Politischen Ökonomie*, ed. J. Wullberger and M. Behrens (Wiesbaden, Germany: Springer VS, 2013), 33–48.

[23] See, for instance, Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001); Mark Granovetter, "Economic Action and Social Structure: The Problem of Embeddedness," *American Journal of Sociology* 91, no. 3 (1985): 481–510; Peter A. Hall and David W. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); Steven K. Vogel, *Marketcraft: How Governments Make Markets Work* (New York: Oxford University Press, 2018).

[24] William Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (London: SAGE, 2014), 73ff.; Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Boston: Harvard University Press, 2018).

[25] Rob Van Horn and Philip Mirowski, "The Rise of the Chicago School of Economics and the Birth of Neoliberalism," in *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective*, ed. Philip Mirowski and Dieter Plehwe (Cambridge, MA: Harvard University Press, 2009), 139–77.

[26] Robert Van Horn, Philip Mirowski, and Thomas A. Stapleford, *Building Chicago Economics: New Perspectives on the History of America's Most Powerful Economics Program* (New York: Cambridge University Press, 2011).

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idea because politics in most cases would lead to even worse results.[27] In the case of natural monopolies, he wrote, "If government is to exercise power, better in the county than in the state, better in the state than in Washington."[28] Friedman viewed markets as "natural order" (or spontaneous order)—that is, competitive markets would evolve automatically when government intervention ceased.[29]

This interpretation became dominant in much of American academia, mostly because neoliberal thought fused with the push to apply the parsimonious models of neoclassical economics to politics, law, and regulation, which allowed scholars to sidestep many tricky issues of power and politics.[30] The "Chicago school of economic theory was perhaps the most influential group in terms of the development of neoliberal politics" in the 1950 and 1960s.[31] While elder scholars at Chicago, like Frank Knight, Jacob Viner, and Lloyd Mints, had worked on pure economic theory within marginalism, the newer generation, organized around Henry Simons, Aaron Director, Milton Friedman, of course Hayek, and others, pursued an "aggressively pro-free-market research program," expanding free-market analysis to everything from regulation to sex.[32] This deliberately normative project spanned the Law School, the Department of Economics, and the Business School.[33] George Stigler, also at Chicago, argued that all regulatory agencies would eventually be captured by powerful industry interests.[34] Positions like this undermined any faith in the federal government's ability to police subnational units. While William Riker, founder of rational choice approaches in political science, lamented inefficient outcomes from subnational competition, the dominant federalism perspective soon agreed on its beneficial effects.[35]

The Virginia School of Economics developed similar arguments by applying public choice theory to government and federalism. Its central insight was that self-interested politicians would be unlikely to use public power for public purposes, arguing that government failure was much more likely than market failure.[36] James Buchanan and Gordon Tullocks's "main political preoccupation was working out how to use constitutional mechanisms to limit [federal] state intervention, taxation, and spending."[37] The result of these "fiscal federalism" models leads to the conclusion that only jurisdictional competition can protect citizens from government exploitation and provide optimal bundles of public goods: "Total government intrusion into the economy should be smaller, ceteris paribus, the greater the extent to which taxes and expenditures are decentralized."[38] The main mechanism behind this result, as Charles Tiebout first elaborated, are exit options: Federalism gives citizens choices that discipline subnational governments.[39] While these arguments were developed with respect to fiscal policy and local public goods, they were soon also applied to everything, from regulatory policy and standardization to social policy.[40]

Another strand of research that contributed to the prominence of jurisdictional competition in favor of the central ordering of markets was the Bloomington School of public choice. When studying overlapping jurisdictions in metropolitan areas, Vincent and Elinor Ostrom argued, "Coordination in the public sector need not, in those circumstances, rely exclusively upon bureaucratic command structures controlled by chief executives. Instead, the structure of interorganizational arrangements may create important economic opportunities and evoke self-regulating tendencies."[41] Such "polycentric systems of governance" can work efficiently when jurisdictions compete over satisfying citizens preferences.[42] Interestingly, while polycentrism can be interpreted as a thinly veiled market metaphor for studying politics, it has also been elaborated on as an unified conceptual framework for studying various forms of social self-organization.[43] Unfortunately, according to Elinor Ostrom, the former interpretation proved to be much more influential in public choice, contributing to skepticism of any government intervention, especially when not subject to market discipline.[44]

In political science these theories were well received through Barry Weingast's model of "market-preserving federalism." He argues that markets do well if "subnational authorities have primary authority over regulating the economy…. As long as capital and labor are mobile, market-preserving federalism constrains the lower units in their attempts to place political limits on economic activity, because resources will move to other

[27] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), 166f. Friedman was much more interested in government failure than market failure, often attributing bad developments, like the Great Depression, to government interventions distorting the market. In his earlier, more Hayekian writings, he was much more open to the use of federal market authority, for instance, Milton Friedman, "Neoliberalism and Its Prospects," *Farmand* (February 17, 1951): 89–93.

[28] Friedman, *Capitalism and Freedom*, 3.

[29] Ibid., 165.

[30] As Davies argues, neoliberal thought, Chicago-style, "stripp[ed] the state of its metaphysical 'liberal' authority" and "bestow[ed] a quasi-judicial authority upon economists, and a normative status upon the procedures of Chicago price theory," Davies, *The Limits of Neoliberalism*, 71.

[31] Jones, *Masters of the Universe*, 90.

[32] Ibid., 91f. For an early example, see Gary S. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 2010).

[33] Van Horn and Mirowski, "The Rise of the Chicago," 165f. They also emphasize that donations from business interests, that recognized potentials to further their cause, bankrolled this coalition.

[34] George J. Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3–21.

[35] William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964); Riker, associated with the University of Rochester, was one of the first to apply economic reasoning and mathematical models in political science, in some sense similar to what was happening at the University of Chicago; see William H. Riker, *The Theory of Political Coalitions* (New Haven, CT: Yale University Press, 1962). For a summary of the dominant American perspective on federalism, see Jan Erk, "Comparative Federalism as a Growth Industry," *Publius* 37, no. 2 (2007): 262–78. Another good example is Paul E. Peterson, *The Price of Federalism* (Washington, DC: Brookings Institution Press, 2012).

[36] For instance, James M. Buchanan, "Politics, Policy, and the Pigovian Margins," *Economica* 29, no. 113 (1962): 17–28; James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1965).

[37] Jones, *Masters of the Universe*, 130f.

[38] Wallace E. Oates, "Toward a Second-Generation Theory of Fiscal Federalism," *International Tax and Public Finance* 12, no. 4 (August 1, 2005): 349–73; Gordon Tullock, "Federalism: Problems of Scale," *Public Choice* 6 (1969): 19–29; Geoffrey Brennan and James Buchanan, *The Power to Tax* (Cambridge: Cambridge University Press, 2006), 15.

[39] Charles M. Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64, no. 5 (1956): 416–24. Tiebout calls this phenomenon "sorting," but "exit" is a better description of the dynamic of the situation.

[40] Lars Feld, "James Buchanan's Theory of Federalism: From Fiscal Equity to the Ideal Political Order," *Constitutional Political Economy* 25, no. 3 (2014): 231–52.

[41] Vincent Ostrom and Elinor Ostrom, "Public Goods and Public Choices," in *Polycentricity and Local Public Economies: Readings from the Workshop in Political Theory and Policy Analysis*, ed. Michael Dean McGinnis (Ann Arbor: University of Michigan Press, 1999), 94.

[42] Vincent Ostrom, Charles M. Tiebout, and Robert Warren, "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry," *American Political Science Review* 55, no. 4 (1961): 831–42.

[43] Paul D. Aligica and Vlad Tarko, "Polycentricity: From Polanyi to Ostrom, and Beyond," *Governance* 25, no. 2 (2012): 237–62.

[44] Michael D. McGinnis and Elinor Ostrom, "Reflections on Vincent Ostrom, Public Administration, and Polycentricity," *Public Administration Review* 72, no. 1 (2012): 15–25.

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jurisdictions."[45] This implies that markets appear naturally—little deliberate action in the center or in the states is necessary—fitting with the broader image of the market as a natural, default set of relationships. Neoliberal thought, American style, could have remained a purely academic phenomenon, had it not found a political motivation and network to spread its message in CTTs. Looking at writings on competitive federalism from the conservative legal movement and contrasting it with what economists and policymakers claim, makes clear that their conception is much better understood as a context-specific product, demonstrating the power of ideas, rather than social scientific truth.[46]

3. Simplified Translation within CTTs

The role of CTTs in the rise of the New Right in the United States has been widely acknowledged.[47] "Many of the most visible expert voices today emanate from public policy think tanks…, [whose] work often represents pre-formed points of view rather than even attempts at neutral, rational analysis."[48] Starting with Reagan, Republican policymakers heavily relied on these new conservative scholarly networks, often giving them prominent positions or advisory roles in federal government.[49]

The Southern strategy of the Republicans and their attempt to create a better defined ideology based rhetorically on embracing free markets is connected with the rise of new ideological CTTs that aggressively market their economic research, based on economic theories like monetarism, public choice, or regulatory capture.[50] The most important of these new CTTs are the American Enterprise Institute (AEI), the Cato Institute, and Heritage Foundation; hence this article focuses on these three.[51] As Stahl summarizes, "Avowing that ideas were the only weapons able to overturn the [liberal] establishment and working diligently to build an establishment of their own, conservatives founded and strengthened [these] institutions."[52] CTTs are part of a larger conservative organizational network, "primarily motivated by ideological principle" that includes the libertarian strand of the law and economics movement as well as conservative public interest law firms.[53]

Starting in the 1970s, CTTs began employing many young scholars directly out of university or law school, with the goal of making them into advocates.[54] Doing so, they mobilized from, and connected with, the conservative legal movement. These new scholars, trained in law, but harnessing neoclassical economic theory, operated under the theory that their conservative bias was a positive attribute that would "balance out" the marketplace of ideas.[55] Conservatives latched onto law and economics as a "powerful critique of state intervention in the economy."[56] Legal scholars like Richard Posner and Richard Epstein not only apply the lessons from their economist colleagues, but they also set out to capture law schools and judgeships with their thinking, mobilizing their networks through CTTs and foundations.[57] This was encouraged by the political mobilization of business: "Through funding think tanks, the business opponents of the New Deal could bring ideas reflective of their broad political views—not simply their immediate interests—into the intellectual life of the nation."[58]

However, soon a divide opened within law and economics. On the one hand, conservative "proponents of law and economics [like Epstein, Easterbrook, or Posner] offer the market as a model for thinking about the law" and then conclude that these mathematical models are the only and accurate way to understand the workings of law and politics.[59] "Chicago style law and economics … [are] not just more libertarian than what evolved at Harvard [and other schools, but are also] more of a 'lawyer's' version of the field, as opposed to the more economist-dominated Harvard variant."[60] On the other hand, economic thinking about the law more broadly "came to resemble disciplinary economics in its overall ideological coloration…, a far cry from law and economics' former-free market enthusiasm."[61] Now, nonconservative legal scholars, like Daniel Esty at Yale or Steven Shavell at Harvard, use more complex models that lead to less certain conclusions, precluding grand claims like "local competition works." Another scholar of legal history at Harvard, Mark Tushnet, concludes, "The better legal economists got as economists, the less clear the conservative spin of law and economics became."[62]

Given that CTTs are integral to the conservative policy agenda-setting powers over the last fifty years, understanding CTTs helps illuminate why their agenda turned out so differently from market-building projects in other countries. Despite nuances, what they have in common is the goal to bring about "more markets" and "individual liberty" combined with antipathy to federal (market) authority—what I describe as a competitive federalism conception of markets. Their primary strategy is deregulation (less government activity altogether). If this fails, or a

[45] Barry Weingast, "The Economic Role of Political Institutions—Market-Preserving Federalism and Economic Development," *Journal of Law, Economics & Organization* 11, no. 1 (1995): 1–31, 5.

[46] It is beyond the scope of this article to arbitrate the causes of the uptake of these ideas. Political opportunities, business bankrolling of these networks, racist backlash, and purely intellectual positions all played a role. For good overviews, see Teles, *Conservative Legal Movement*; Stahl, *Right Moves*; Jones, *Masters of the Universe*. However, it is hard to understand the shape of current conservative positions without taking into account the intellectual history narrated here, suggesting at least some independent causal power of ideas; see, for example, Kim Phillips-Fein, "Business Conservatives and the Mont Pèlerin Society," in *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective*, ed. Philip Mirowski and Dieter Plehwe (Cambridge, MA: Harvard University Press, 2009), 280–302.

[47] Stahl, *Right Moves*, 47.

[48] Rich, *Think Tanks*, 4.

[49] Eugene Smith, "The Influence of Conservative Think Tanks: 1970s Capitalism and the Rise of Conservative Think Tanks" (master's thesis, Rutgers University, 2014).

[50] Blyth, *Great Transformations*.

[51] Jones, *Masters of the Universe*, 162; Andrew Rich, *Think Tanks, Public Policy, and the Politics of Expertise* (Cambridge: Cambridge University Press, 2004), 84.

[52] James A. Smith, *The Idea Brokers: Think Tanks and the Rise of the New Policy Elite* (New York: The Free Press, 1991), 182.

[53] Teles, *Conservative Legal Movement*, 274.

[54] Constance Holden, "Heritage Foundation: Court Philosophers," *Science* 211, no. 4486 (1981): 1019–20.

[55] Stahl, *Right Moves*, 47. This is in contrast to older New Deal think tanks, whose "financial supporters favored … strict adherence to conventions of social science research," Rich, *Think Tanks*, 43.

[56] Rich, *Think Tanks*, 45; Teles, *Conservative Legal Movement*, 208.

[57] Beyond the CTTs, important institutions include the Olin Foundation, the Federalist Society, and openly libertarian law schools like the University of Chicago, George Mason University, or University of Virginia.

[58] Phillips-Fein, "Business Conservatives," 281. As the author explains, in doing so, business would often forego their immediate economic interests. This is at least suggestive for the independent power of ideas in shaping this movement.

[59] Mark Tushnet, "Law, Science, and Law and Economics," *Harvard Journal of Law & Public Policy* 21, no. 1 (1997): 47–52, 47.

[60] Teles, *Conservative Legal Movement*, 205; Richard A. Posner, "A Review of Steven Shavell's 'Foundations of Economic Analysis of Law,'" *Journal of Economic Literature* 44, no. 2 (2006): 405–14.

[61] Teles, *Conservative Legal Movement*, 182.

[62] Mark Tushnet, "What Consequences Do Ideas Have?" *Texas Law Review* 87 (March 22, 2009): 447–62, 447.

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regulation is considered somehow necessary, their secondary strategy is decentralization. This is theoretically founded on two central beliefs articulated by the CTTs: (1) The problem of government; my interviewees all believed that government and regulation always distort the market to favor small groups. (2) Unrestrained competition among states is the only mechanism that can lead to (regulatory) policy that delivers broader benefits, or at least distorts the market less.

Contrasting the elaboration of these beliefs by conservative scholars with those in broader academia clearly illustrates the ideological nature of the formers' project. Several "interpretive leaps" demonstrate that policy proposals are more driven by antipathy toward government than evidence, often leading proponents to undermine their own goal of establishing functioning markets.[63] Scholars at the three think tanks have elevated public-choice-derived "capture theory," or the problem of government, to an axiom with universal applicability to public policy.[64] "President Reagan's regulatory team latched onto public choice and capture theories" to defend their deregulatory agenda.[65] Christopher DeMuth, former President of AEI, and Douglas Ginsburg, appointed to the U.S. Court of Appeal for the DC circuit by Reagan, are credited with popularizing the concept among conservative legal scholars, arguing that agencies "invariably" overregulate to benefit the best organized group.[66] In every case, they assume that small groups would be better able to influence regulation to their benefit. It follows that due to these universal forces (i.e., public choice assumptions) "good" regulation is basically impossible—the only solution is reliance on market forces, even if the results are suboptimal.[67] This means that private regulatory solutions, like industry standards or private certificates, are assumed to be superior to government prescription. Thus "regulatory reform" becomes "abandonment" of regulation.[68] Competition and regulation are seen as by definition antithetical—except when it coincides with their second central belief: the disciplining effects of (jurisdictional) competition.[69]

The villain in these narratives is always pro-regulatory interests; however, given "the logic of collective action" invoked, it would seem equally likely that regulatory agencies would be captured by concentrated industries that benefit from less regulation.[70] Actual case studies of regulatory rule making usually show a multitude of factors influencing outcomes, much more complicated than simple rent seeking.[71] Studies of interest groups suggest that they often pursue (even if disingenuously) broad public goals that benefit more than their membership, or different interest groups from the same industry pursue different policies —both contradicting the predictions of simplified public choice theory.[72] Similar questions can be asked of the claim, that if not captured, regulation is designed to enrich the regulator. In fact, agencies often pursue general-interest regulatory principles shaped by institutional structuring and ideas.[73]

A related interpretive leap rejects the necessity of some federal regulation to maintain interstate commerce (i.e., prevent a trade war) and allow sophisticated markets. From an international perspective, the conservative consensus against federal market authority is even more curious. The European Union considers harmonization as one of its main purposes, and its benefits are one of the main arguments for pursuing regulatory cooperation between the United States and the EU in the Transatlantic Trade and Investment Partnership (TTIP).[74] The World Trade Organization (WTO) considers many instances of regulatory heterogeneity to be nontariff barriers, asking countries to harmonize their standards.[75] International economists tend to agree that "regulatory divergence distorts the market, raising production costs, encouraging price discrimination across markets, and limiting the available import varieties."[76] Believers in local competition find none of these cases convincing.[77] In my interviews, scholars either referred to (1) the outcomes of federal government intervention *will be worse*, for instance, regarding occupational licensing, or (2) local competition *will work eventually*, for example, regarding local procurement preferences. Some interviewees suggested a stronger role for courts as solutions, while also acknowledging that many conservative judges prefer local control even more than the conservative mainstream does. Finally, some argued that certain interstate barriers could not possibly exist, because if they did, powerful industry groups would have mobilized against it by now.

Ignorance of scholarly evidence is even clearer for the unequivocal embrace of the working of jurisdictional competition.

[63] I cannot exclude the possibility that these actors have more "nefarious motives," as suggested in some of the literature, for instance, by MacLean, *Democracy in Chains*. Without denying politically motivated reasoning, it is important to parse out the logic of the protagonists' arguments to makes sense of the conclusions they arrive at. See Craig Parsons, "Ideas and Power: Four Intersections and How to Show Them," *Journal of European Public Policy* 23, no. 3 (2016): 446–63.

[64] Stigler, "The Theory of Economic Regulation."

[65] Nicholas Bagley and Richard L. Revesz, "Centralized Oversight of the Regulatory State," *Columbia Law Review* 106 (2006): 1260–1329, 1285.

[66] Christopher DeMuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," *Harvard Law Review* 99, no. 5 (1986): 1075–1088, 1081.

[67] Manuel Frederick Cohen and George J. Stigler, *Can Regulatory Agencies Protect Consumers?* (Washington, DC: American Enterprise Institute, 1971).

[68] Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton, NJ: Princeton University Press, 2009), 22.

[69] Frank Easterbrook, "Antitrust and the Economics of Federalism," *Journal of Law and Economics* 26, no. 1 (1983): 23–50.

[70] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1965).

[71] Daniel Carpenter, *Reputation and Power, Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton, NJ: Princeton University Press, 2010); Ethan Bueno De Mesquita and Matthew C. Stephenson, "Regulatory Quality Under Imperfect Oversight," *American Political Science Review* 101, no. 3 (2007): 605–20; B. Dan Wood, *Bureaucratic Dynamics: The Role of Bureaucracy in a Democracy* (Boulder, CO: Routledge, 1994); James Wilson, *The Politics of Regulation* (New York: Basic Books, 1980); Martha Derthick and Paul J. Quirk, *The Politics of Deregulation* (Washington, DC: Brookings Institution Press, 1985); David Vogel, *Trading up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, MA: Harvard University Press, 1995).

[72] Croley, *Regulation and Public Interests*.

[73] Carpenter, *Reputation and Power*; Daryl J. Levinson, "Empire-Building Government in Constitutional Law," *Harvard Law Review* 118, no. 3 (2005): 915–72; James Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1991); Croley, *Regulation and Public Interests*.

[74] European Commission, *Transatlantic Trade and Investment Partnership* (2013), https://eeas.europa.eu/archives/delegations/canada/documents/news/md-029b-13-ttip_the_economic_analysis_explained.pdf.

[75] Michael Faubert and Amy Wood, "Regulatory Harmonization in International Trade: A Categorical or Conditional Imperative?" *Global Policy* (blog), July 26, 2016, http://www.globalpolicyjournal.com/blog/26/07/2016/regulatory-harmonization-international-trade-categorical-or-conditional-imperative.

[76] Caroline Freund and Sarah Oliver, "Gains from Convergence in US and EU Auto Regulations Under the Transatlantic Trade and Investment Partnership" (Robert Schuman Centre for Advanced Studies Research Paper No. RCAS 2015/59, September 1, 2015), 1, https://papers.ssrn.com/abstract=2663554; Daniel Drezner, "Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence," *Journal of European Public Policy* 12, no. 5 (October 1, 2005): 841–59; Donna Roberts, "Analyzing Technical Trade Barriers in Agricultural Markets: Challenges and Priorities," *Agribusiness* 15, no. 3 (1999): 335–54.

[77] Easterbrook, "Antitrust and the Economics of Federalism;" Richard Epstein and Michael Greve, "Federal Preemption: Principles and Politics" (AEI, 2007), https://www.aei.org/publication/federal-preemption-principles-and-politics/.

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Scholars at AEI, Heritage, and Cato argue that jurisdictional competition will force states to govern well, because otherwise capital and labor will "vote with their feet" and "exit" the jurisdiction.[78] In this view of competition, the central government appears as a "cartel" in which competing regulators, at the behest of producers, collude to "reduce the number of potential competitors and dilute entrepreneurial incentives."[79] The model of jurisdictional competition goes back to Tiebout, who applied his model to a limited set of public goods—things local governments "produce" such as police and fire protection, primary education, roads, and sewers, but conservative legal scholars expanded this reasoning to regulation in general, ignoring that the modeling assumptions are violated.[80] Widely cited among AEI scholars is Frank Easterbrook, who argues that public finances and consumer "regulatory products," such as labor laws, health and safety standards, and contract law, can be treated like local public goods.[81] Combined with the belief that regulation, especially at the central level, will lead to capture by interest groups, "There emerges a presumption in favor of locating regulatory authority at lower level units," even in cases where uniformity might clearly be more functional, like with the existence of strong external effects.[82]

Of course, it is not quite clear that fifty state governments will be less likely to be subject to special interest capture than the national government. One might imagine that on the federal level that mobilization is so costly, public scrutiny so high, expertise so much better, and mobilized interests so diverse, that legislators find it easier to follow the public interest at that level.[83] However, my interviewees consistently rejected that reasoning, either by repeating the axiom that central government will be flawed or that local competition "just works." Empirical evidence questioning the formative influence of jurisdictional competition on policy, the superiority of decentralization, or the formative influence of capture, is consistently disregarded.[84]

Academic commentators emphasize that these wide-ranging conclusions do not follow from Tiebout's model. Conservative scholarship "materially mischaracterizes the theory actually articulated in economic literature. The restatement relies on an early generation of economic models, the robustness of which long has been questioned by advanced opinion in the field of public economics."[85] This means much regulatory policy might not be suited for understanding via this theory, and competitive dynamics might lead to inefficient outcomes. Comparative federalism scholar Sbragia notes that "there is still no consensus regarding" whether "competitive federalism is 'market-preserving.'"[86] The axiomatic acceptance of this model ignores a vast literature on competitive races to the bottom, albeit with mixed evidence.[87] More importantly, it ignores the complications of "real life," where markets and information are imperfect, where there are external effects and economies of scale, and where people refuse to "vote with their feet" as assumed. For example, given the 20,000 different building codes across U.S. jurisdictions, it seems unlikely that citizens or even politicians are able to gauge the utility-maximizing level of regulation. Similarly, how can we expect regular citizens to judge the optimal level of occupational licensing? Furthermore, the potential "exit" option would be complicated by the fact of a myriad of preferences over other regulatory issues—a point that is side-stepped through assumptions in economic models.

Tiebout modeling rarely leads to any stable equilibriums that are predictive in the real world.[88] Academic analysis "proceeds on a level of complexity that precludes global efficiency pronouncements about the location of regulatory advantage within the federal system."[89] If conservative scholars had taken these findings seriously, they might have concluded that due to "the instability attending Tiebout competition," a central government would need to perform many "stabilizing functions"—though given the amount of imperfection, the list might be a "Pandora's Box."[90] In newer restatements of Tiebout-style models in tax competition, economists find strong benefits with interstate coordination or federal market authority.[91]

There is a long line of scholarship criticizing the unquestioned assumptions of conservative law and economics scholars, but given the positions of think tank scholars revealed here, one might think those did not exist.[92] Searching through the archives of AEI, Cato, and Heritage, I found no acknowledgment of any of these critiques. Importantly, these critiques are not leftist but mainstream economics: "Even when law and economics took hold, economics itself was using more complicated models (and mathematics) than the legal economists favored by conservative foundations were."[93] Comparative law expert Ugo Mattei writes

[78] Albert O. Hirschman, *Exit, Voice, and Loyalty; Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

[79] William Bratton and Joseph McCahery, "The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World," *Georgetown Law Journal* 36, no. 201 (1997): 204.

[80] Tiebout, "A Pure Theory of Local Expenditures."

[81] Easterbrook, "Antitrust and the Economics of Federalism."

[82] Damien Geradin and Joseph McCahery, "Regulatory Co-Opetition," in *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, ed. Jacint Jordana and David Levi-Faur (Northampton, MA: Edward Elgar, 2004), 3; for example, see Richard L. Revesz, "Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rational for Federal Environmental Regulation," *Administrative & Regulatory Law News* 20, no. 2 (1995): 1–16.

[83] Ryan T. Moore and Christopher T. Giovinazzo, "The Distortion Gap: Policymaking under Federalism and Interest Group Capture," *Publius* 42, no. 2 (2012): 189–210.

[84] Bratton and McCahery, "The New Economics of Jurisdictional Competition;" Daniel Esty and Damien Geradin, *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford: Oxford University Press, 2001); Bagley and Revesz, "Centralized Oversight of the Regulatory State."

[85] Bratton and McCahery, "The New Economics of Jurisdictional Competition," 204.

[86] Alberta Sbragia, "American Federalism," in *The Oxford Handbook of Political Institutions*, ed. Sarah A. Binder, R. A. W. Rhodes, and Bert A. Rockman (Oxford: Oxford University Press, 2008), 247.

[87] Carruthers and Lamoreaux's review shows that empirically neither races-to-the-top or bottom are very common, "Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards," *Journal of Economic Literature* 54, no. 1 (2016): 52–97. Instead, the most common result is heterogeneity. See also Daniel Drezner, "The Race to the Bottom Hypothesis: An Empirical and Theoretical Review" (Fletcher School, Tufts University, 2006), http://www.danieldrezner.com/policy/RTBreview.doc; Vogel, *Trading Up*; Neal D. Woods, "Interstate Competition and Environmental Regulation: A Test of the Race-to-the-Bottom Thesis," *Social Science Quarterly* 87, no. 1 (2006): 174–89.

[88] Bratton and McCahery, "The New Economics of Jurisdictional Competition," 222.

[89] Ibid., 205.

[90] Ibid., 230.

[91] Robert P. Inman and Daniel L. Rubinfeld, "Designing Tax Policy in Federalist Economies: An Overview," *Journal of Public Economics* 60, no. 3 (1996); 307–34, 313; Jeremy Edwards and Michael Keen, "Tax Competition and Leviathan," *European Economic Review* 40, no. 1 (1996): 113–34; OECD, *Harmful Tax Competition* (Paris: Organisation for Economic Cooperation and Development, 1998).

[92] Reza Dibadj, "Weasel Numbers," *Cardazo Law Review* 27, no. 3 (2006): 1325–91; Reza Dibadj, "Beyond Facile Assumptions and Radical Assertions: A Case for Critical Legal Economics," *Utah Law Review* (2004): 1155–200; Arthur Allen Leff, "Economic Analysis of Law: Some Realism about Nominalism," Faculty Scholarship Series (Yale Law School, 1974); Margaret Oppenheimer and Nicholas Mercuro, *Law and Economics: Alternative Economic Approaches to Legal and Regulatory Issues* (New York: Routledge, 2015); Mario Rizzo, "The Mirage of Efficiency," *Hofstra Law Review* 8, no. 3 (1980): 641–58; Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1998); Morton Horwitz, "Law and Economics: Science or Politics?" *Hofstra Law Review* 8, no. 4 (January 1, 1980): 905–12.

[93] Tushnet, "What Consequences Do Ideas Have?" 451.

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that conservative legal scholars borrowed "broad theoretical categories" from economists and imported "simplified legal notions that economists have not re-discussed since Adam Smith … into legal scholarship" resulting in rather "simplistic and unrealistic" models.[94] Similarly, the behavioral revolution in economics has gone completely unnoticed by the foundations.

The preceding illustrations do not prove that conservative scholars are wrong—I do not mean to pronounce the final word on regulatory theory—but they do show that their claims are on much less secure footing than they make it appear. This suggests that their opposition to federal market authority reflects a mental filtering of existing evidence, *not* a scholarly consensus. Competitive federalism gave conservatives with political commitments to limiting federal powers ("states rights") an economic argument to rationalize those commitments. New Right movement politics selected this version of neoliberalism over others that might have emphasized more central authority. As a contingent result, pro-market politicians ignore interstate barriers to competition. Political motivations and business-funded research undoubtedly played an important role. However, the academic evidence presented here and elsewhere shows that opposition to central power at times undermines proponents' own economic interests, suggesting some independent role of the coming-together of ideas in influencing policy.[95]

4. Conservative Think Tanks Today

Positions revealed in my interviews at CTTs in 2017 had direct outgrowths of this intellectual history. Focusing on their current agenda provides another piece in the puzzle of understanding the nonmobilization around federal market authority. AEI, Cato, and Heritage were selected for their importance in the conservative movement, and because they span the spectrum from strictly libertarian to more traditionally conservative. I interviewed federalism and regulation experts at these institutions and bolstered this with a systematic review of their online archives reaching back to the early 1970s.

The line of questioning pursued here was originally designed to highlight whether a comprehensive market-building agenda was ever developed at CTTs. Since this was not the case, however, I focused in on specific interstate barriers and their solutions. While people at these institutions have written on some of these issues, like occupational licensing, they do not frame them in terms of interstate barriers, but rather as "overregulation." They never endorse central authority for market openness. Broadly, the reasons given fall into the two axioms and corollaries reported earlier: (1) belief in persistent government failure and (2) jurisdictional competition. Their reaction to inconsistencies in the evidence suggests that this process is not necessarily conscious. My interview partners seemed to wholeheartedly believe that jurisdictional competition will lead to optimal policy and that the EU's approach to harmonization is misguided. Through detailed interviews regarding these processes, I was able to piece together how they imagine the relationship between markets and authority as competitive federalism. Asking about the historical context yielded self-reflection that pointed at a specific law and economics connection as well as deep opposition to the New Deal and civil rights legislation.

A search of all three foundations' web-based archives showed that they do not post any assessments on the state of the internal market or review interstate barriers across a range of subjects. They do not consider obstacles to interstate trade a general problem but focus on overregulation or federal overreach. When specific barriers to mobility are mentioned, like licensing restrictions, they are not embedded into a larger market-building agenda, but are always framed in deregulatory terms. In addition, no statements advocating federal preemption or more state cooperation for market openness could be found. As on interviewee put it, "There are specific people that work on all the issues. But the kind of broader EU style regulation and harmonization is just not something people think about or push much. I agree with you that this is counterproductive, but people are kind of caught up in their own rhetoric about federalism."[96] In response to my examples of a wide range of interstate barriers and the question of what could be done about them, Michael Greve explained:

> [Government agency coordination] is very different in the EU, where every single policy item they have on deck, starting in 1960s, was always built to give life to an ever-closer union. We just don't think like that because we were already an integrated country. And so, people think about this on a on the level of policy by policy or at least policy sector by policy sector.[97]

Alden Abbott said Heritage does not have a comprehensive approach to interstate barriers "because we have to address federalism concerns."[98] He added, "To some degree, they [conservatives] are undermining themselves with putting too much emphasis on state autonomy." Federal market authority is often opposed—"the idea of having uniform regulation" is more important in the EU, because of "the history of German ordoliberalism that influenced European constitutional theory on that."[99] The attitude at Heritage is mostly that regulation is "federal" and "bad." Heritage opposes harmonization: "[Harmonized standards] is problematic. As Heritage has previously observed, harmonization is likely to be driven in practice by international commissions and to harmonize up to higher levels of regulation."[100] It is no surprise then that Heritage scholars saw TTIP very skeptically.[101] They all agree that most federal regulation is harmful, even in cases where state competition might have negative consequences.[102] Peter VanDoren explained, "Libertarians in

[94] Mattei, *Comparative Law and Economics*, 57.

[95] Springer, "Building Markets," ch. 5.

[96] Stan Veuger (resident scholar at AEI, works on public finance and political economy), interview by author, 2017.

[97] Michael Greve (Professor of Law at George Mason University, Former John G. Searle Scholar and now Adjunct Scholar at AEI, Former Director of the AEI Federalism Project and Federalism Papers, Former Chairman of the Competitive Enterprise Institute), interview by author, 2017.

[98] Alden Abbott (Deputy Director of Heritage's Edwin Meese III Center for Legal and Judicial Studies, holds degrees in law and economics, lectures at George Mason University, and publishes specifically on anti-trust and regulation), interview by author, 2017.

[99] Ibid.

[100] Bryan Riley, "Needed: A Congressional Mandate for Economic Freedom" (report, The Heritage Foundation, 2015), www.heritage.org/trade/report/needed-congressional-mandate-economic-freedom.

[101] Alden Abbott, "Transatlantic Trade Negotiations: Keeping Regulation in Check" (commentary, The Heritage Foundation, 2014), https://www.heritage.org/europe/commentary/transatlantic-trade-negotiations-keeping-regulation-check; Theodore R. Bromund, "TTIP: Small Upside, Big Downside" (commentary, The Heritage Foundation, 2015), www.heritage.org/europe/commentary/ttip-small-upside-big-downside.

[102] Todd Gaziano, "Expansion of National Power at Expense of Individual Liberty" (commentary, The Heritage Foundation, 2011), www.heritage.org/conservatism/commentary/expansion-national-power-expense-individual-liberty; William Beach, "President Clinton's Sellout of Federalism" (report, The Heritage Foundation,

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general, and Cato in particular, oppose the economic favoritism and protectionism you describe"—but the only mechanism they favor to preclude is it deregulation on all levels of government.[103] Indeed, Cato scholars have analyzed local regulations much more comprehensively than scholars at AEI or Heritage. However, they have not done so comprehensively or as a coordinated effort to reduce interstate barriers. Ilya Somin elaborated:

> There is a debate in the US on the question of whether there should be unified standards for different kinds of regulations—interestingly, it is more commonly the Left that argues for that. The Right is much more worried about overregulation on the federal level. But some business groups like the U.S. Chamber of Commerce argue for broad preemption of regulation, so states cannot regulate on top of that.[104]

Cato's approach is one of fighting "overregulation" on all fronts, without ever conceptualizing it as interstate barriers.[105] Their general perspective does not come from a will to create competitive markets but a principled opposition to government, that is, "downsizing the federal government"; this means they would never endorse federal market authority.[106] This can be specifically seen in comparison to the EU:

> The EU commission is to a large degree insulated from political pressures and voters and that has some advantages and disadvantages.… I certainly would not want to replicate the Commission in the US. Beyond constitutional problems, I think there would be lots of other problems with that. And I would not want to federal government to regulate more than it currently does. I would cut the enormous growth in federal authority to regulate since the 1930s.[107]

Similarly, AEI scholars tend to oppose federal market authority, with a few exceptions. Searching the AEI archives for some comprehensive view on interstate barriers or federal market authority does not produce much. Of the few articles, even fewer call for federal preemption to reduce barriers. One example is taxation, and another consists of some limited cases of local telecommunication restrictions.[108] However, most conservatives oppose a system that would actually avoid interstate taxation barriers and externalities, like a VAT: "You see that on the tax side too. Lots of people on the right don't like a value added tax because they are afraid it would be too easy to raise it."[109]

Even in areas where one might expect consensus on federal action due to external effects, there is none because federal rules are seen as always anti-competitive: "Non-competitive states will go to Congress or some regulatory agency and push to suppress competition and raise their rivals' costs. That's what the entire Clean Power Plan was about. Attempts of certain states to lock themselves into federally sponsored cartel. That is the reason why after all you have to be skeptical of federal legislation."[110] If AEI scholars do take general views, they usually argue for less regulation and more decentralized federalism.[111] They paint national administration as the main problem for economic growth. As one AEI publication puts it, "Modern conservatism is closely linked to decentralization. Free markets are by definition decentralized markets. Also important to modern conservatism is the decentralization of government itself, allowing decisions to be made close to the communities they affect, while also encouraging policy competition and experimentation."[112]

A pattern of anti-government sentiments (capture) and the promise of jurisdictional competition trumping arguments for federal market authority can be observed in a variety of issues related to protectionist local government action. Beyond the general, this attitude also holds true for specific issues that are obvious examples of market barriers. In the EU, for instance, state and local subsidies to business are considered protectionist, in need of explicit justification and approval by the EU Commission. In the United States, conservatives might consider these subsidies inefficient, but they do not frame them as protectionism in need of federal regulation. I could not find any publication at AEI or Heritage that would address the issue systematically. Heritage has only published arguments against specific subsidies that conservatives tend to dislike, like for solar power, health care, or agriculture.[113] Miller, at AEI, explained the rationale, "this is just spending money unwisely" but "jurisdictional competition" will limit this kind of behavior.[114] While AEI scholars have regularly criticized foreign business subsidies as inefficient and distortionary, they never supported a federal rule against state and local subsidies.[115] They do not ever use the frame of interstate barriers, but rather address this issue as one where businesses they dislike receive subsidies.[116] The same is true for local procurement

1998), www.heritage.org/political-process/report/president-clintons-sellout-federalism; David Engdahl, "Not So Sweeping after All: The Limits of the Necessary and Proper Clause" (report, The Heritage Foundation, 2011), www.heritage.org/the-constitution/report/not-so-sweeping-after-all-the-limits-the-necessary-and-proper-clause; Adam Thierer, "Federalism Reform: Seven Options for Congress" (report, The Heritage Foundation, 1999), www.heritage.org/report/federalism-reform-seven-options-congress.

[103] Peter VanDoren (Senior Fellow and editor of Cato's *Regulation* Journal), interview by author, 2017.

[104] Ilya Somin (professor of law at George Mason University, formerly at Cato; published several books for and with Cato about decentralization and regulatory capture), interview by author, 2017.

[105] Cato Institute (web archives, 2017), http://www.cato.org/; Chris Edwards and The Institute Cato, "Downsizing the Federal Government" (blog), 2017, https://www.downsizinggovernment.org/.

[106] Cato Institute (web archives).

[107] Somin interview.

[108] Alan Viard, "Use Tax Collection on Interstate Sales: The Need for Federal Legislation," AEI, November 26, 2012, https://www.aei.org/publication/use-tax-collection-on-interstate-sales-the-need-for-federal-legislation/; Alan Viard, "Free the Munis!," AEI, May 29, 2007, https://www.aei.org/publication/free-the-munis/; Howell Brownwyn, "Can State Regulations Go Where Federal Ones Do Not?," AEI, 2017, https://www.aei.org/publication/can-state-regulations-go-where-federal-ones-do-not/.

[109] Veuger interview.

[110] Greve interview.

[111] Ramesh Ponnuru and Reiham Salam, "A Constitutionalist Agenda for the GOP," AEI, May 7, 2015, https://www.aei.org/publication/a-constitutionalist-agenda-for-the-gop/.

[112] Peter Wallison, "Decentralization, Deference, and the Administrative State," AEI, 2016, https://www.aei.org/publication/decentralization-deference-and-the-administrative-state/.

[113] The Heritage Foundation (web archives, 2017), http://www.heritage.org/; John Frydenlund, "At the Federal Trough: Farm Subsidies for the Rich and Famous" (report, The Heritage Foundation, 2001), www.heritage.org/agriculture/report/the-federal-trough-farm-subsidies-the-rich-and-famous; David Kreutzer, "Subsidies and Costs in the Solar Industry" (commentary, The Heritage Foundation, 2012), www.heritage.org/environment/commentary/subsidies-and-costs-the-solar-industry; Jim DeMint, "Let the Subsidies Die" (commentary, The Heritage Foundation, 2015), www.heritage.org/health-care-reform/commentary/let-the-subsidies-die.

[114] Stephen P. Miller (resident scholar at AEI, holds a law degree, and studies health care as well as regulatory competition), interview by author, 2017.

[115] Mark Perry, "Michigan: $3 Billion in Business Subsidies," AEI, December 17, 2008, https://www.aei.org/publication/michigan-3-billion-in-business-subsidies/; James Pethokoukis, "The 9 States That Are the Corporate Welfare Kings of America," AEI, October 15, 2014, https://www.aei.org/publication/9-states-corporate-welfare-kings-america/.

[116] Preston Cooper, "Pennies on the Dollar: The Surprisingly Weak Relationship Between State Subsidies and College Tuition," AEI, 2017, https://www.aei.org/publication/pennies-on-the-dollar-the-surprisingly-weak-relationship-between-state-subsidies-and-college-tuition/; Mark Perry, "Funding Electrics Is a Battery-Dead Idea," AEI, July 22, 2010, https://

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preferences, the practice of governments to discriminate against firms from other areas. I could not locate any publications by AEI or Heritage on this issue, resulting in Veuger's comment, "If you find out [why conservatives are not critical of local procurement preferences], I'd be happy to know."[117]

AEI scholars have also rarely addressed heterogeneous building codes, except in a few articles that denounce too stringent codes as overregulation but not market barriers. I could not find any publications by Heritage mentioning the issue.[118] Mostly they are quick to assume that if those things really were barriers, they would not exist:

> So, what you are talking about, building codes, licensing, inspection that is traditionally been seen as much more a locally and regionally directed approach. But if they go too far, and local regulations actually become barriers, they will lose out in the broader competition … but in construction, if the market becomes more dominated by large national businesses it will become more standardized.[119]

Similarly, Abbott offered the fact that conservative lawmakers "are concerned about political opposition along the lines of, 'You are inhibiting our legitimate state regulatory activity from being carried out.' It just creates lots of potential political problems."[120] Neither convincingly explain why CTTs would not put it on their agenda. It seems more likely that it just escapes their view since there exists no comprehensive thinking about single markets.

The relative inattention of AEI and Heritage to local protectionism contrasts with Cato publications, which have addressed every imaginable government regulation, and "denounced" them all as overregulation. Given their opposition to central market authority, there is not much that can be done about local protectionism though:

> I don't trust the government to make one national rule against [state subsidies and procurement preferences]. That does never work. The EU might have a rule against it, but European states don't follow it, like Spain subsidizing light rail or being bailed out. With trains you can similarly see that government regulations and subsidies are always bad. So the best strategy is to get rid of them.[121]

Beyond his opposition to public transportation, for which Randal O'Toole is known, he conveyed the sense in the interview that many Cato scholars consider local subsidies a problem, but not one that should be addressed by the federal government. Instead, he offered the mechanisms of jurisdictional competition and reducing the scope of government in general as the solutions.

Cato scholars have also analyzed problems that are caused by the heterogeneity of building codes. However, what sometimes sounds like critiques of non-uniform standards turns into one of overly stringent regulation: "There has been little use of manufactured housing in New York City, however, partially because of extremely rigorous local code standards, which out-of-state housing plants may not meet, and partially because of organized labor and political and bureaucratic stumbling blocks."[122] They also have criticized differences in general, but again from a perspective of overly strict (not different) codes: "Since New York's code is arguably even more Byzantine [than New Jersey's], its effect on costs is undoubtedly greater."[123] As expected, in none of the reports is federal market authority ever considered as a solution; instead they opt for local efforts to repeal as much regulation as possible.[124] In particular, there is a presumption that local competition will eventually produce good results—or must have already done so: "Also, non-harmonized standards can be a problem, but I don't think it is as big of a problem as people say it is because states have incentives to have standards that are not too weird or unusual, especially small states."[125]

This is compounded by concerns over "federal overreach": "Different standards are definitely a problem, but if we let the federal government have a uniform rule, what if it's a bad rule. I would much rather have the option of not working in a state, than being forced to. And over time states will adapt. I mean there are private institutions that promulgate building codes. That is much better than getting the feds involved."[126] Again, the implication is jurisdictional competition and markets will adapt without federal market authority. This notion is repeated in several Cato papers. In addition, the predictive leap is made that capture is much more likely at the central level. Accordingly, a trend toward more uniform buildings codes is "concerning," because on higher levels of government, they "may be subject to political interference by manufacturers and trade associations."[127] In most cases, when discriminatory barriers between states are noticed, they are always interpreted as the necessary consequence of interest group politics, to be prevented on the local level.[128]

Scholars at all three CTTs have been very prolific in opposing occupational licensing. However, they have solely focused on the issue as one of regulatory capture and on cases with the least plausible public health justification like "hair braiding."[129] In none of

www.aei.org/publication/funding-electrics-is-a-battery-dead-idea/; Mark Perry, "Who'd a-Thunk It? Without Taxpayer Subsidies, Market-Based Megabus Has Revitalized Inter-City Bus Travel in the US," AEI, November 3, 2013, https://www.aei.org/publication/whod-a-thunk-it-without-taxpayer-subsidies-market-based-megabus-has-revitalized-inter-city-bus-travel-in-the-us/.

[117] Veuger interview.

[118] Mark Perry, "How to Increase New Home Prices by $4,000 in CA," AEI, March 26, 2011, https://www.aei.org/publication/how-to-increase-new-home-prices-by-4000-in-ca/; Frederick Hess, "Fulfilling the Promise of School Choice," AEI, September 25, 2008, https://www.aei.org/publication/fulfilling-the-promise-of-school-choice/.

[119] Miller interview.

[120] Abbott interview.

[121] Randal O'Toole (senior fellow at Cato, who works on environmental and transportation issues, with a specific focus on the failures of government regulation), interview by author, 2017.

[122] Cassandra Moore, "Housing Policy in New York: Myth and Reality," Cato Institute Policy Analysis, April 4, 1990, 62, https://www.cato.org/publications/policy-analysis/housing-policy-new-york-myth-reality.

[123] Ibid., 57.

[124] Cato Institute (web archives).

[125] Somin interview.

[126] O'Toole interview.

[127] Carolyn Dehring and Martin Halek, "Do Coastal Building Codes Make Stronger Houses?," *Regulation* 37, no. 2 (2014): 45; Doug Bandow, "Is Voluntarism Enough?" (commentary, Cato Institute, 1997), https://www.cato.org/publications/commentary/is-voluntarism-enough; Thomas A. Firey, "And Don't Blame Houston's Building Codes, Either," (blog), Cato Institute, September 3, 2017, https://www.cato.org/blog/dont-blame-houstons-building-codes-either.

[128] Dennis Coates and Brad Humphreys, "The Stadium Gambit and Local Economic Development," *Regulation* 23, no. 2 (2000): 15–20; Daniel Ikenson, "Giving Florida Firms First Dibs on Bids Stifles Competition, Quality," Cato Institute, September 20, 2012, https://www.cato.org/publications/commentary/giving-florida-firms-first-dibs-bids-stifles-competition-quality; Gary Hufbauer and Tyler Moran, "What Can TTIP Accomplish to Liberalize Government Procurement?," Cato Institute, September 24, 2015, https://www.cato.org/publications/cato-online-forum/what-can-ttip-accomplish-liberalize-government-procurement.

[129] Mark Perry, "Should It Really Be Illegal to Braid Hair Without First Getting a License from the Government?," AEI, June 13, 2012, https://www.aei.org/publication/should-it-really-be-illegal-to-braid-hair-without-first-getting-a-license-from-the-government/; Matt Winneset, "To Boost Job Growth, Target These Regulations," AEI, October

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the CTTs have scholars addressed mobility restrictions through firm licensing laws, an issue that is frequently cited by construction companies.[130] Cato has spearheaded the movement against occupational licensing, by encouraging local political changes and supporting legal challenges through amicus briefs.[131] However, their belief in interstate competition is so strong that federal action is not an option discussed. In most cases, they see it not as a case of interstate barriers, but as a standard case of overregulation: "There has been a big push from Cato and places like that to get rid of those regulations. But what they are making is not really a federalist or interstate commerce argument—they just don't like the occupational licensing rules."[132] O'Toole explains, "Yes, it [licensing] is a huge barrier. But I would not want to get federal government or courts involved. You just got to educate people on the local level and push for changes in laws. Now you see lots of states adopting legislation that reduces licensing. The local competition approach works."[133] Libertarian scholars do not see the market-enhancing effect of some regulations, even in areas where Heritage and AEI hesitate to say "overregulation." They prefer to reduce interstate barriers to telemedicine by stopping the licensing of physicians altogether: "A significant barrier to telemedicine is the requirement that physicians obtain licenses from each state in which their current or potential patients are, or may be, located. The best option is to eliminate government licensing of medical professionals altogether."[134]

Some libertarians have played with the idea of "mutual recognition of occupational licenses" ironically through state compact, not federal action, but it has never been put on the political agenda by any of the three CTTs.[135] Somin adds,

> I think because the interest groups that benefit from the status quo are very powerful. They have a lot of influence on Capitol Hill—lawyer, doctors, dentists, professionals, and they have a lot of influence in the Republican and Democratic party, maybe that could be overcome if ordinary voters realized that that is a problem and forced Congress to change, but most ordinary voters have no idea that that is a big problem.[136]

According to further research, however, many big national corporations and professional associations support uniform standards and licensing, and thus the failure seems to stem more from the anti-government worldview of policymakers than interest groups pressures.[137]

Heritage and AEI have also pushed the issue of "excessive" occupational licensing.[138] In none of their articles did I find this described in terms of interstate barriers. In accordance with their antipathy to federal government, solutions always focus on calling on state legislatures to reduce licensing. The problem is singularly framed in terms of public choice theory: "Incumbent firms favor licensing because it prevents competition by new entrants that would drive down prices…. The licensing requirement generates economic rents for incumbents (supra-competitive profits) and political rents for politicians (campaign contributions, book sales, voter-turnout efforts, etc.)."[139] In this view, all regulation is bad and the only reasonable action is to "repeal licensing."[140]

Scholars at AEI and Heritage generally reject the view that a national rule could provide a more level playing field and more competition, independent of the specifics of that rule. This can be easily seen by the fact that when they acknowledge the legitimacy of some licensing, such as for emergency medical technicians (EMTs) or optometrists, they do not argue for a national license or mutual recognition that would break down state barriers.[141] Greve was clear in saying that a national patchwork of rules for him is preferable over states coordinating in some generalized reciprocity agreement: "That's what they tried when they formed the interstate nurse licensing compact. And lo and behold, the most regulated state rules.… And then you achieved the opposite of what you wanted to do."[142] This is, of course, related to the fact that they see all political processes as flawed, especially on the federal level: "Trying to have uniform licensing standards is impossible…. There is no political will by Congress—it is all public choice and rent seeking. The beneficiaries of occupational licensing would be combining their lobbying efforts."[143] For conservatives generally then, most regulations are "licensing cartels" to be eliminated, not tools that could be harnessed to increase competition and efficiency.[144]

In all three CTTs litigation against occupational licensing is supported. Abbott explains, "The substantive due process and equal protection clause of the constitution" are good avenues to use to restrict occupational licensing, but "those arguments have not been widely accepted."[145] Apparently, "There is some talk [in conservative circles] about the Federal Trade Commission

19, 2017, https://www.aei.org/publication/will-to-boost-job-growth-target-these-regulations/; Natalie Goodnow, "Your Barber Faces Stricter Licensing Requirements Than an EMT," AEI, January 27, 2015, https://www.aei.org/publication/barber-stricter-licensing-emt/.

130. Springer, "Building Markets," ch. 5.

131. Ilya Shapiro, "Fresh Thinking on Occupational Licensing," Cato Institute, August 3, 2017, https://www.cato.org/blog/occupational-licensing-bad; Ilya Shapiro and David McDonald, "In Support of Occupational Licensing Reform and SB-247," (blog), Cato Institute, April 14, 2017, https://www.cato.org/publications/public-comments/support-occupational-licensing-reform-sb-247; Ilya Shapiro, Elliott Engstrom, and Julio Colomba, "Vong v. Aune," 2015, Cato Institute https://www.cato.org/publications/legal-briefs/vong-v-aune; Shirley Svorny, "Liberating Telemedicine: Options to Eliminate the State-Licensing Roadblock," Cato Institute Policy Analysis, November 15, 2017, https://www.cato.org/publications/policy-analysis/liberating-telemedicine-options-eliminate-state-licensing-roadblock; Clark Neily, "Occupational Licensing Should Not Be Used to Keep Honest Americans out of Work" (commentary, Cato Institute, August 8, 2017), https://www.cato.org/publications/commentary/occupational-licensing-should-not-be-used-keep-honest-americans-out-work.

132. Veuger interview.

133. O'Toole interview; actually licensing is increasing: Morris M. Kleiner, *Stages of Occupational Regulation: Analysis of Case Studies* (Kalamazoo, MI: WEUpjohn Institute for Employment Research, 2013).

134. Svorny, "Liberating Telemedicine," 1.

135. The Cato Institute, eds., *Cato Handbook for Policymakers* (Washington, DC: Cato Institute, 2017), 67; Cato Institute (web archives).

136. Somin interview.

137. Springer, "Building Markets."

138. Alden Abbott, "Two Helpful Developments Aimed at Curbing Anticompetitive Protectionist Occupational Licensing Restrictions" (commentary, The Heritage Foundation, 2016), www.heritage.org/economic-and-property-rights/commentary/two-helpful-developments-aimed-curbing-anticompetitive; Paul Larkin, "A Public Choice Analysis of Occupational Licensing" (report, The Heritage Foundation, 2016), www.heritage.org/government-regulation/report/public-choice-analysis-occupational-licensing; James Sherk, "Creating Opportunity in the Workplace" (report, The Heritage Foundation, 2014), www.heritage.org/jobs-and-labor/report/creating-opportunity-the-workplace; Salim Furth, "Understanding the Data on Occupational Licensing" (report, The Heritage Foundation, 2016), /jobs-and-labor/report/understanding-the-data-occupational-licensing; Nathen Allen and Sanders Daniels, "Grow the Economy through Small Businesses," AEI, 2013, https://www.aei.org/publication/grow-the-economy-through-small-businesses/; James Pethokoukis, "What Modern, Pro-Competition Deregulation Might Look Like," AEI, February 18, 2016, https://www.aei.org/publication/what-modern-pro-competition-deregulation-might-look-like/.

139. Larkin, "A Public Choice Analysis."

140. Abbott, "Two Helpful Developments."

141. Sherk, "Creating Opportunity in the Workplace."

142. Greve interview.

143. Abbott interview.

144. Greve interview.

145. Abbott interview.

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(FTC) perhaps to be more aggressive, to bring more of these anti-trust cases."[146] One example is the *North Carolina State Board of Dental Examiners v. FTC*, in which the Supreme Court ruled that only directly supervised regulatory agencies are covered by the state action doctrine, which allows states to act in protectionist manners.[147] However, this and other actions are restricted to anti-trust considerations, not more general questions of discriminatory treatment of out-of-state firms and professionals. Similarly, the FTC's Economic Liberty Task Force, created in 2017, focuses on reducing excessive licensing, but not from a perspective of market integration, instead recommending litigation and local experimentation.[148]

The question to which degree jurisdictional competition can be supplemented by strong courts to curb protectionist behavior is controversial, because since the New Deal, "conservative justices have been ambivalent about the dormant commerce clause in particular" and "reining in state action in general."[149] Greve argues that the Supreme Court could act much more like the European Court of Justice by taking more seriously the Dormant Commerce Clause and the Privileges and Immunities Clause, as well as anti-trust laws.[150] He added, however:

> In the wake of the New Deal, we [conservative legal scholars] thought it was a great idea to give states something meaningful to do. And what that meant was to ramp up protectionist barriers and, you know, give advantages to their own industries and so forth. And that mode of thinking is so deeply ingrained in a lot of conservatives, who obsess about state powers. So, the general idea is that, you know, once the federal government got all these new powers on the Commerce Clause, … the idea came up that we should at least allow the states to regulate and protect themselves on top of whatever the feds say. To my mind, that's an idiotic idea but there you have it.… if you look at the jurisprudence and the literature that comes from conservatives on the Dormant Commerce clause or federal preemption, it reflects those impulses.[151]

Miller concurred, explaining that the conservative legal movement partially entrapped themselves into abetting state protectionism because their originalism—though developed as an argument against the New Deal expansion of the commerce power—implied to some abandoning attempts to reign into state regulation through courts or through federal preemption.[152] And indeed, conservatives at AEI remain divided on whether the appointment of Neil Gorsuch, who is supportive of deferring to legislators and states, to the Supreme Court, is a step in the right direction or not.[153] In the same vein, Harvie Wilkinson, a U.S. Court of Appeals judge, in a lecture at AEI, praises the Supreme Court for "ceding authority to state and local governments."[154]

A more libertarian vision is described by some think tank publications and several books by Epstein and Greve.[155] These writings describe already familiar arguments about the benefits of jurisdictional competition.[156] To this, they add an "activist judiciary," because limiting the authority of federal and state governments can only be achieved by the courts: "What Greve means by "real" federalism is protection from regulation of almost any sort," through strong Dormant Commerce Clause (and related constitutional articles) jurisprudence.[157] This is clearly expressed when Greve salutes the Rehnquist court for advancing more limited federal powers under the banner of states' rights, but criticizes that it did not limit state action equally due to skepticism of the Dormant Commerce Clause.[158] Greve wants to return to pre–New Deal times (the *Lochner* era) when the Supreme Court laid stricter scrutiny on economic regulation.[159]

This view is elaborated on in the *AEI Federalism Project Papers,* which broadly criticize the Supreme Court's reading of preemption powers, including conservative justices, as both giving Congress too much power for regulation and giving states too much power to regulate. The "presumption against preemption" created "concurrent powers" that "cut in only one direction: stricter regulation."[160] According to Greve, "cooperation does not work" and "cooperative federalism requires government growth" creating a "pro-regulatory bias."[161] These scholars argue that under concurrent powers, the state with the strictest regulation will win out because firms will always follow the strictest standard.[162] Instead, they argue, legislation should be exclusively federal or state—the important question of course being which is which. Theoretically, this suggests an endorsement of federal market authority: "In the context of network regulation, from interstate airline transport to communication, we are inclined to support exclusive national regulation. Conversely, we favor exclusive state or local regulation where effects are purely local and where active state competition seems plausible."[163]

Of course, "Federal preemption is only a second-best approach for Greve because it requires an exercise of federal power"—but can sometimes not be avoided since a return to *Lochner* era jurisprudence, scrutinizing state legislation, is politically unlikely.[164] If possible, Greve suggests turning around the exception of state

[146] Ibid.

[147] 135 S. Ct. 1101 (2015).

[148] Federal Trade Commission, "Economic Liberty" (report, Federal Trade Commission, March 10, 2017), https://www.ftc.gov/policy/advocacy/economic-liberty; Federal Trade Commission, *Prepared Statement of the Federal Trade Commission on Competition and the Potential Costs and Benefits of Professional Licensure* (Washington, DC: Federal Trade Commission, 2014), https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf.

[149] Abbott interview 2017.

[150] Michael Greve, "Cooperation Does Not Work" (report, AEI, September 1, 2000), https://www.aei.org/research-products/report/cooperation-does-not-work.

[151] Greve interview.

[152] Miller interview.

[153] Ramesh Ponnuru, "Gorsuch's Test: 3 Legal Issues That Divide Conservatives," AEI, February 1, 2017, https://www.aei.org/publication/gorsuchs-test-3-legal-issues-that-divide-conservatives/; Ramesh Ponnuru, "Neil Gorsuch: A Worthy Heir to Scalia," AEI, January 31, 2017, https://www.aei.org/publication/neil-gorsuch-a-worthy-heir-to-scalia/; Fred Thomson, "For the Defense," AEI, April 23, 2007, https://www.aei.org/publication/for-the-defense/; Harvey Wilkinson, "Is There a Distinctive Conservative Jurisprudence?," AEI, March 5, 2001, https://www.aei.org/publication/is-there-a-distinctive-conservative-jurisprudence/.

[154] Wilkinson, "Distinctive Conservative Jurisprudence."

[155] Douglas T. Kendall, *Redefining Federalism: Listening to the States in Shaping "Our Federalism"* (Washington, DC: Environmental Law Institute, 2004), 51; Epstein and Greve, "Federal Preemption"; Michael Greve, *Real Federalism: Why It Matters, How It Could Happen* (Washington, DC: American Enterprise Institute, 1999); Michael Greve, "The AEI Federalism Project," AEI, June 1, 2000, https://www.aei.org/publication/the-aei-federalism-project/.

[156] Greve, *Real Federalism*, Chapter 1.

[157] Kendall, *Redefining Federalism*, 32.

[158] Michael Greve, "Federalism's Frontier," *Texas Review of Law & Politics* 7 (2003 2002): 93–126.

[159] *United States v. Carolene Products*, 304 U.S. 144 (1938); Michael Greve, "How to Think about Constitutional Change, Part I," AEI, June 7, 2005, https://www.aei.org/publication/how-to-think-about-constitutional-change-part-i/.

[160] Epstein and Greve, "Federal Preemption."

[161] Michael Greve, "Cooperation Does Not Work," AEI, September 1, 2000, http://www.aei.org/publication/cooperation-does-not-work/; Epstein and Greve, "Federal Preemption," 310.

[162] Epstein and Greve, "Federal Preemption."

[163] Ibid., 312.

[164] Kendall, *Redefining Federalism*, 48; see Epstein and Greve, "Federal Preemption," 337.

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governments from anti-trust and Dormant Commerce Clause considerations, that is, the market participant and *Parker* doctrine that "immunized state-sponsored cartels from challenges under antitrust and constitutional law."[165] A cynical interpretation is that the principle behind those two points is this: "States should be free to act only if they are shedding regulations."[166] In any case, the theoretical endorsement of preemption appears slightly disingenuous here, because for all practical purposes, the superiority of competition over federal intervention is advocated. In most cases, federal rules are seen as unnecessary and federal agencies are described as "captured."[167] The main argument for preemption seems to solely come up surrounding concerns with state product liability laws and local use of eminent domain.[168]

Some libertarians at Cato also support using the judiciary to enforce market discipline, albeit mostly in a deregulatory manner: "We should use the privileges and immunities clause of the Fourteenth Amendment to strike down local licensing laws. The Institute for Justice, has done that. They are doing it under the due process clause of the Fourteenth Amendment due to current jurisprudence.… So what I would do is I would strengthen constitutional rules to prevent states from erecting trade barriers, enforced by the courts."[169] In his book on eminent domain, Somin denounces conservative scholars for believing that jurisdictional competition without strong judicial enforcement is stable.[170] However, other libertarians disagree, as Somin explains, beyond the technical reason—the Dormant Commerce Clause is not explicitly contained in the Constitution—there is a "broader attitudinal reason," specifically the fact that "most conservatives, until recently, were just very suspicion of the Courts in general, since they associated strong judicial review with the political Left, and with the Left doing things they did not like such as imposing the right to abortion, etc."[171]

Historically, conservatives have associated growth of central government, judicial activism, and liberal policies as part of the same package, but this might be changing with conservative judicial majorities.[172] The critique of stronger jurisprudence against interstate barriers is driven by the fact that judges are considered "undemocratic," especially in Cato circles: "[I would not want] unelected justices with that kind of power."[173] More broadly, originalism entraps scholars into this position: It became a " foundational commitment" because it allowed cogent arguments against "judicial activism" and the "expansion of federal power," but soon conservative scholars found "little or no support" that the framers believed that the Supreme Court could invalidate state laws, creating market barriers, under the Dormant Commerce Clause.[174] Instead, they decided, there is no such thing as a Dormant Commerce Clause at all, preferring to defer to the states' democratic institutions. The "federalism five (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas)" were quick to limit federal authority, but did not apply the same scrutiny to state activity.[175] Justice Thomas opined, "The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice" and Justice Scalia called it "a judicial fraud."[176]

Scholars at Heritage have taken up this rejection of strong Dormant Commerce Clause jurisprudence, maybe because they are more traditionally conservative, even in cases where state competition might have obvious negative consequences.[177] Todd Gaziano, founding director of Heritage's legal center, argues that "the commerce clause was written to prevent the states from enacting protectionist tariffs that would restrict trade 'among' or between the states, and that it should not be applied to state action that has 'indirect or incidental' effects to interstate commerce."[178] Heritage's Constitutional Guide for Lawmakers seems to suggest a slightly negative view of judicial activism to rule in discriminatory state behavior. A senior fellow at Heritage laments, "Over time, the Supreme Court has grabbed power by declaring that 'the federal judiciary is supreme in the exposition of the law of the Constitution.'"[179] Thus, there are no feasible remedies left for conservative efforts to dismantle barriers to market openness.

5. Conclusion

This article has shown how American conservative think tank experts have adopted several elements of theories from economics without assessing and taking seriously the limitations of said theories. In doing so, they weave together several strands of scholarship into competitive federalism, a set of beliefs that view the creation of markets as a natural product of the absence of central government. To maintain this view, they make several interpretive leaps that are not necessarily supported by empirical evidence, but are understandable as an interpretive product of antipathy to government and the strategic politics within the conservative movement, including its funding through ideologically motivated business interests. In this article, I have traced these beliefs to contradictions within Hayek's writings and to an enthusiastic reception within the American academy of one possible interpretation of those writings, especially epitomized by the works of Milton Friedman. From there, competitive federalism beliefs diffused into the libertarian and conservative law and economics movements, CTTs, and eventually into mainstream conservative politics. Several historical conditions explain the resonance of this set of beliefs: post–New Deal Democratic majorities as well as the Southern strategy of Republicans, including the adoption of "colorblind racism" and a states' rights agenda. But only this set of ideas—competitive federalism—permitted modern conservatism to align these issues with a strong pro-market rhetoric, albeit side-stepping many significant issues in economic theory and policy. As a result, the agenda of Republicans has been shaped around a project to cut spending and taxation, to deregulate, and to decentralize. CTTs do not develop a comprehensive review of potential interstate barriers, dismissing the role of federal market authority for the

[165] Greve, "Constitutional Change."

[166] Kendall, *Redefining Federalism*, 37; Epstein and Greve, "Federal Preemption," 310f.

[167] Epstein and Greve, "Federal Preemption," 19.

[168] Ibid., 323f.; see also Ilya Somin, *The Grasping Hand: "Kelo v. City of New London" and the Limits of Eminent Domain* (Chicago: University of Chicago Press, 2015).

[169] Somin interview.

[170] Somin, *The Grasping Hand*, 221.

[171] Somin interview.

[172] Greve interview.

[173] O'Toole interview.

[174] Michael Greve, "Conservatives and the Courts," in *Crisis of Conservatism?: The Republican Party, the Conservative Movement, and American Politics After Bush*, ed. Joel D. Aberbach and Gillian Peele (Oxford: Oxford University Press, 2011), 244; Richard Fallon, "The 'Conservative' Paths of the Rehnquist Court's Federalism Decisions," *University of Chicago Law Review* 69, no. 2 (March 1, 2002): 461.

[175] William H. Pryor Jr., "The Demand for Clarity; Federalism, Statutory Construction, and the 2000 Term," *Cumberland Law Review* 32 (2002): 361.

[176] 550 U.S. 330, 2007; 575 U.S. 13-485, 2015.

[177] Gaziano, "Expansion of National Power at Expense of Individual Liberty"; Beach, "President Clinton's Sellout of Federalism"; Engdahl, "Sweeping After All."

[178] Gaziano, "Expansion of National Power."

[179] Robert Alt, "What Is the Proper Role of the Courts?" (report, The Heritage Foundation, 2012), www.heritage.org/courts/report/what-the-proper-role-the-courts.

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creation and maintenance of single markets. This can be seen in their opposition to, and generally negative view of the EU as a central regulator, a general reluctance to acknowledge or lack of will to remedy local protectionist policy, as well as a dismissal of potentially market-widening effects of harmonization and standardization, for instance, in occupational licensing. Even when conservative scholars see the detrimental effects of local competition, for instance, local business subsidies, they see no real solutions since they oppose central rules and are conflicted over stricter jurisdictional scrutiny. In the end, this demonstrates how an ideational construct takes on some causal power on its own, albeit in conjunction with many other factors that have been analyzed by the literature.

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