

## **Why Did Europe's Single Market Surpass America's?**

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Which polity has more of a “single market,” the United States or the European Union, and why? Readers may expect easy answers. Surely interstate exchange faces fewer regulatory barriers in the domestic American arena than between EU member-states. As for why, the outcome seems overdetermined. In material terms, American interstate flows are higher than Europe’s. American firms should thus have stronger interests in rules that facilitate interstate exchange. In institutional terms, both polities were founded around central requirements for openness, but one is a federal state and the other a treaty-based international organization (IO). Presumably Washington, D.C. asserts stronger authority over its subunits than Brussels can over its sovereign principals. Culturally speaking, Americans are known as more market-friendly than Europeans. We would expect broader support for internal openness in the New World.

These expectations draw support from scholarship and political discourse about the EU’s “single market project” (SMP). It is widely described as incompletely imitating an American model. The most salient political-science comparison opens by quoting an EU Commissioner: “We could learn a lot from America about how to utilize and develop a single market.” Its author, Michelle Egan, portrays the SMP as following a US trajectory in “piecemeal” ways, especially in services.<sup>1</sup> Economists also frequently describe the EU as catching up to US openness. Given estimates that EU interstate goods trade is three to four times smaller than in the US, and the presumption that US flows are high because its states are “constitutionally prevented from erecting trade barriers,” they infer that Europe needs further SMP steps to achieve US-style dynamism.<sup>2</sup> The same message prevails in broad venues, like a recent feature in *The Economist*: “In theory... the EU’s 500m citizens live in a single economic zone much like America, with

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<sup>1</sup> Egan 2015, 1; Egan 2020, 159.

<sup>2</sup> For example, Aussiloux et al 2017. They cite this estimate and characterization of the US from Head and Mayer 2000, 288.

nothing to impede the free movement of goods, services, people and capital” – but in reality, Europe’s single market is “creaking” and “incomplete.”<sup>3</sup> A key source of “incompleteness” discourse is the European Commission, the SMP’s main architect. Its 2020 SMP relaunch claimed that, despite much progress, “too many barriers continue to hamper the functioning of the single market.”<sup>4</sup>

This article revises these images of European and American internal market governance. “Incompleteness” discourse rationalizes an ongoing EU agenda, and many Americans enjoy self-images as free marketeers, but scholars and policymakers should know that the common wisdom mischaracterizes both polities. The United States never attempted to “complete” a project remotely like Europe’s SMP. Europeans have now removed or mitigated a lengthening list of interstate barriers that Americans retain across the “four freedoms” of goods, services, persons, and capital. Overall, the EU unambiguously claims and actively exercises more authority to require interstate openness than the US has ever contemplated.

After redescribing these regimes, we propose a new explanation for them. Most scholarship in international relations or comparative politics struggles with the actual outcomes: neither a materialist focus on economic flows, an institutionalist focus on path dependence, nor broad cultural theories explain why Europe developed a stronger internal-openness regime than America. Our explanation highlights distinct connections that political movements forged between ideas about markets and governance, channeling the late 20<sup>th</sup>-century “return to markets” into contrasting varieties of neoliberalism. In Europe outside the United Kingdom, neoliberalism penetrated national arenas weakly but dovetailed with the mid-century regional project of European integration. Pro-market thinking came to focus on strengthening central

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<sup>3</sup> Economist 2019.

<sup>4</sup> Commission 2020a.

authority to eliminate interstate barriers. In America, neoliberals found common cause with racial- and social-conservative reactions to progressives' mid-century expansions of federal power. Pro-market thinking came to reinforce attacks on central authority, promoting "states' rights" and downplaying or legitimating many of the same interstate barriers.

Our argument has several implications. On the European side, it challenges leading theories of EU development that privilege flows or path dependence. The distinctiveness of the attempt to "complete" a single market underscores the ideational departures that underlie European integration. On the US side, in displaying an arena that is quite far from *The Economist's* imagined "single economic zone," we highlight the strikingly distinctive degree to which Americans (especially conservatives) oppose federal authority even for pro-market goals. The Anglo-American reach of their ideas also help explain Brexit, which centered on conflict between these two varieties of neoliberalism. Overall, our findings magnify old perceptions of the EU as an exceptionally strong IO and the US as an exceptionally fragmented state, to the point that their single markets swap their commonly understood positions. The EU has surpassed its supposed model.

### **Describing European and American Single Markets**

We first present our descriptive claims and then consider explanatory debates. We define "single markets" as regulatory regimes, not as flows of exchange. Describing an arena as any sort of market presumes some flows, with actors exchanging and competing to some degree. But single markets are a form of governance: the more such flows occur under rules that require and facilitate openness across jurisdictions, the more the arena is a *single* market. Thus the outcomes we describe below are regimes for interstate openness, including legal standards, legislation, and

administrative systems for implementation and enforcement. We summarize each regime and then compare them across the four freedoms and several salient policy areas.

### *Europe's Interstate Openness Regime*

The general principle of Europe's internal market is that member-states may not restrict cross-border movements of goods, services, persons or capital, except where specifically justified. The 1957 European Economic Community (EEC) treaty committed signatories to the "elimination... of quantitative restrictions... and all measures of equivalent effect" in goods, and to "abolition... of the obstacles to free movement of persons, services and capital," but with caveats, most importantly hedging on capital liberalization. Mostly-unified principles consolidated over time, partly from treaty modifications – notably the 1992 adoption of capital language similar to other areas, banning "all restrictions" – but mainly from jurisprudence of the Court of Justice of the EU (CJEU). In the 1960s it established the supremacy of its treaties over national law and the direct effect of the freedoms (judiciable directly from the treaties). In the 1970s it defined key interpretations for goods and services, including a default "mutual recognition" principle that goods and services sold lawfully in one state are marketable in others. The 1990s saw landmark cases for services, persons, and capital in ways that converged on a mostly-shared legal logic. A turn-of-millennium text summarized the resultant "internal market law in a nutshell:"

...national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: 1) they must be applied in a non-discriminatory manner; 2) they must be justified by imperative requirements in the

general interest; 3) they must be suitable for obtaining the objective which they pursue; and 4) they must not go beyond what is necessary to attain it.<sup>5</sup>

The “hinder or make less attractive” standard, often cited to the 1995 case *Gebhard* (on establishment), sets a high bar. It is understood to prohibit not only explicit or intentional interstate discrimination but also measures with unintended potential discriminatory effects. This includes “dual burdens,” like requiring a good accepted in one state to meet further standards, or a licensed professional to acquire another license. Most broadly, with considerable legal debate on the margins, it is interpreted to ban any restrictions on out-of-staters’ “market access,” discriminatory or not. Legal scholars discuss seriously whether this standard effectively defines *any* application of national regulations to out-of-state goods, services, or economic actors as potential violations.<sup>6</sup>

The treaties also provide many justifications for exceptions, and case law discovered others. With some variation by area, these may appeal to “public policy,” morality, health, security, gender equality, environmental protection, and more. The hitch is that the CJEU employs “Gebhard tests” to decide which exceptions are non-discriminatory, imperative, suitable, and proportional. Overall, then, the regime defines a huge range of national measures as violations and lets the EU level authorize “imperative” exceptions.

Especially since the “Single Market 1992” initiative of the 1980s, the EU has actively built these standards into legislation. The appointed Commission has a monopoly on proposal of legislation – a feature with no analogue in any democracy – and has systematically sought to facilitate openness. The resultant opus contains substantial exemptions, most importantly

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<sup>5</sup> Davies 2003, 127.

<sup>6</sup> Weatherill 1996; Paventa 2004; Snell 2010; Davies 2010.

protecting public provision or regulation of “services of general interest” in utilities, transport, and health care, but legislation frames even these areas as authorized and only partial exceptions against default expectations of unrestricted openness.<sup>7</sup>

Figure 1 sketches the rise and ongoing volume of SMP legislation. Beginning mainly in goods, the Commission eventually hit on a core approach of legislating default mutual-recognition rules with “harmonized” legislation where member-states balked. For goods, harmonized requirements are negotiated into legislation and then elaborated in technical standards that the Commission requests from industry bodies but approves and publishes itself. Services and capital display similar strategies, with harmonized qualifications for many professionals or “passports” for financial firms, and the onus falling on receiving states to justify any refusals within these standards. This legislative project has continuously interacted with jurisprudence. CJEU decisions that imply more openness are often followed by Commission proposals to codify them.<sup>8</sup>

By the mid-2000s, especially with passage of general directives on Professional Qualifications (2005) and Services (2006), today’s rules were mostly in place. Most action shifted from framing directives toward more implementation-focused regulations and decisions. SMP legislative activity continued through EU crises in the 2010s, but with increasing focus on enforcing rules and facilitating their use.<sup>9</sup> Though the EU is administratively small, with a budget capped at 1.2 percent of GNI and staffing the size of a city government, it has developed many systems for SMP implementation. Many involve what Americans would call “commandeering” of state capacities for central policies, like the 2018 requirement that states maintain “Single

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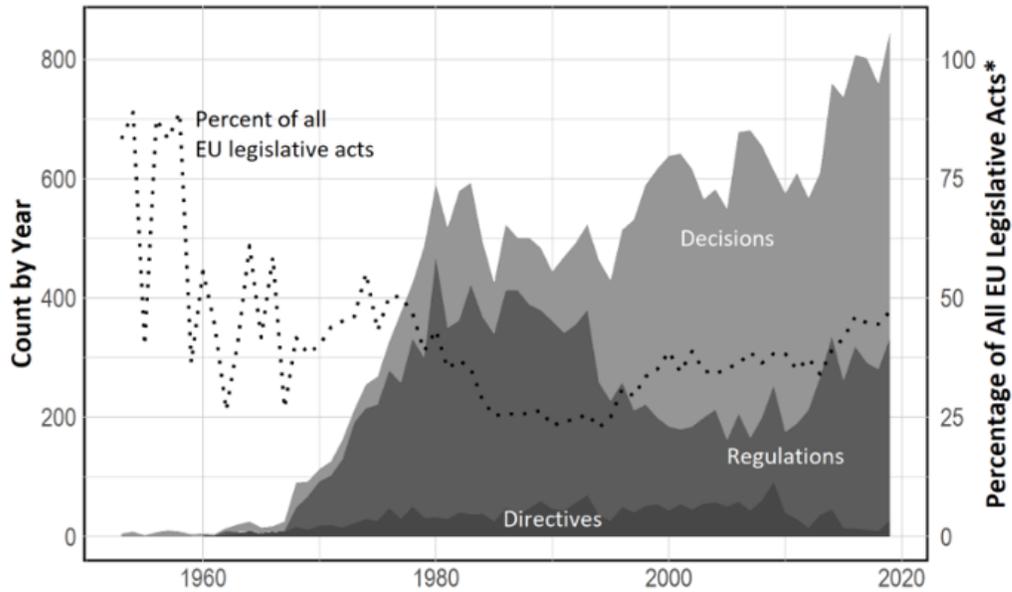
<sup>7</sup> Barnard 2019; Armstrong and Bulmer 1998; Grin 2003; Howarth and Sadeh 2013.

<sup>8</sup> Schmidt 2018.

<sup>9</sup> Pelkmans 2016; Commission 2020b.

Digital Gateway” sites where citizens can fully process cross-border démarches online. By 2023 these must include 21 procedures, like verifying degrees, establishing residence, registering cars, claiming pension benefits, or obtaining a European Health Card for insurance abroad.

**Figure 1. Annual European single-market legislation, 1953-2019**



Note: Within the rise and ongoing flow of EU legislative acts on the internal market, implementation-focused decisions and regulations have become more prominent relative to framing Directives. Data extracted from EUR-Lex, <https://eur-lex.europa.eu/>, drawing on EU-assigned directory codes of legislation. Single-Market legislation includes: 02 (Free Movement of Goods), 0510 (Free Movement of Workers), 06 (Freedom to Provide Services), 08 (Competition Policy), 1040 (Free Movement of Capital); 13 (Internal Market), 17 (Undertakings). For all EU legislative acts, we excluded 01 (Institutional Matters), and external affairs (11 External Relations, 18 Common Foreign and Security Policy).

Also quite extensive is a web of systems for SMP enforcement. The Commission still uses its ultimate weapon of “infringement” proceedings against states (of which it wins the large majority), but since the early 2000s has increasingly tried to head off court action with pre-infringement systems.<sup>10</sup> States must pre-notify all new SMP-related measures – in the tens of thousands since the 1980s – to the Technical Regulations Information System (TRIS, for goods or electronic services) or the Internal Market Information system (IMI, for other services). Problematic measures lead to dialogue with the Commission. The SOLVIT network invites

<sup>10</sup> Koops 2011.

citizens or governments to submit cross-border problems for non-judicial solution. Where SOLVIT cases identify legal restrictions (as opposed to implementation issues), they feed into the “EU Pilot” system for pre-infringement dialogue. More generally, the Commission’s Single Market Scoreboard shames states by tracking implementation publicly.<sup>11</sup> The Scoreboard also feeds the “European Semester” process, where the Commission can set SMP-compliance conditions for its annual approval of national budgets. Scholars debate the effectiveness of these systems, but recent studies find high and nationally-convergent rates of SMP compliance prior to the COVID crisis.<sup>12</sup>

### *America’s Interstate Openness Regime*

The general principle of America’s internal market is that states may not purposefully favor *intra*-state commerce over *inter*-state commerce, except in government procurement and subsidies. This principle is grounded mainly in the constitutional Commerce Clause assigning the federal Congress power “to regulate Commerce... among the several States...”<sup>13</sup> Like in Europe, jurisprudence strongly shaped founding commitments into legal standards. Not long after the Supreme Court asserted its authority to strike down state laws in 1803, it elaborated the “Dormant Commerce Clause” (DCC) doctrine authorizing courts to invalidate state intrusions on interstate commerce. Through the long era of “dual federalism,” when state and federal powers were understood as separate realms, a narrow definition of interstate commerce preserved most state rules from the DCC. That changed in the 1940s, when the court authorized progressive

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<sup>11</sup> See [https://ec.europa.eu/internal\\_market/scoreboard/](https://ec.europa.eu/internal_market/scoreboard/).

<sup>12</sup> Pircher and Loxbo 2020.

<sup>13</sup> Also potentially related is the Privileges and Immunities Clause (citizens enjoy all privileges “of citizens in the several States”), but its “curious history” made it inapplicable to corporations and almost never invoked for regulatory issues (Jay 2015).

federal legislation by ruling that practically any activity could affect interstate commerce.<sup>14</sup> The new understanding of “cooperative federalism,” where state and federal regulatory powers were seen as overlapping, meant reworking DCC logic. “It was not until the late 1970s,” summarizes one authoritative account, “that the Court settled on today’s ‘two-tiered standard’ for scrutinizing state laws: strict scrutiny for those that ‘discriminate’ against interstate commerce and validation of all others unless they pose an ‘undue burden’ on commerce.”<sup>15</sup>

This standard bars purposeful discrimination, whether explicit or in veiled versions with discriminatory effects and no other legitimate purpose. The second “tier” was described by the Court in 1970 as “balancing” between benefits of legitimate measures and their burdens on interstate commerce, but has only been invoked against such easily-avoidable burdens that it arguably just restates the prohibition on veiled purposeful discrimination.<sup>16</sup> “Dual burdens” are not included except in taxation. Taxing interstate income twice discriminates against interstate commerce, but requiring multiple licenses or standards are not problematic per se. Also important is the “market participant exception:” the Court ruled in 1976 that DCC limits on states as regulators do not include their participation in markets as spenders. They may favor locals in purchasing or aid.<sup>17</sup> Rulings in 2007-8 further extended the exception to authorize in-state preferences for any activity conducted by a public agency – a far stronger version of Europe’s “services of general interest” exception.<sup>18</sup>

Most striking relative to the EU is how erratically legislation enacts these principles. Congress has mostly left interstate openness to the courts, rarely using its commerce powers

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<sup>14</sup> Wickard v. Filburn, 317 U.S. 111 (1942).

<sup>15</sup> Friedman and Deacon 2011, 1926.

<sup>16</sup> Regan 1986. This is a “Pike test,” *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

<sup>17</sup> Coenen 1989.

<sup>18</sup> Williams and Denning 2009; Francis 2017.

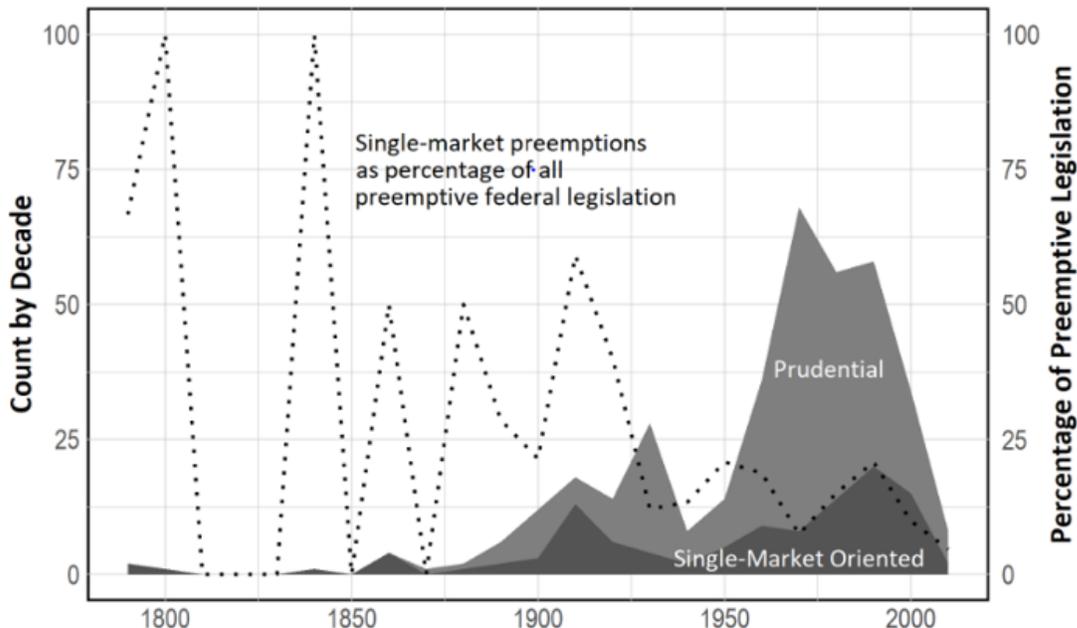
consciously for their original purpose. Fig. 2 shows that among federal statutes that somehow “preempt” state powers (as do practically all EU legislative acts, except those administering the EU institutions themselves), few were portrayed by their champions as aimed substantially at facilitating interstate commerce. Indeed, our coding is generous. Fig. 2’s “single market oriented” category includes not just acts that announce SMP-style motivations (like the Interstate Commerce Act of 1887 and later amendments that took over most transport regulation; standards-oriented laws like the 1968 Grain Standards Act; or the 1994 Interstate Banking Act requiring states to accept interstate bank branches) but those where the statute, committees, or Congressional Research Service reports mention *any* concerns about differing state regulations, even if other concerns seemed to dominate (like, say, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, a consumer-protection law where committee reports mention inefficiencies from different state regulations).<sup>19</sup> Even some of the most obviously liberalizing statutes in our “single market oriented” category had weak relationships to SMP-style concerns. For example, deregulation of airlines, trucking, and telecoms in the 1970s further preempted varying state regulations in these sectors, but consumer protection was far more salient in this movement than the theme of facilitating interstate commerce.<sup>20</sup>

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<sup>19</sup> Public Law 108-187, 117 Stat. 2699. See [https://www.law.cornell.edu/wex/inbox/what\\_is\\_can-spam](https://www.law.cornell.edu/wex/inbox/what_is_can-spam).

<sup>20</sup> Derthick and Quick 1985.

**Figure 2. US Federal Single-Market Legislation by Decade, 1790-2012**



Note: In federal legislation that somehow preempts state powers, prudential concerns have been dominant since the New Deal, with relatively few single-market oriented statutes. Lists of all preemptive legislation combined from American Council on Intergovernmental Relations 1992 (for statutes 1790-1992) and SoRelle and Walker 2016 (for statutes 1990-2012). Statutes coded by authors on basis of statutory language, Congressional committee reports, and Congressional Research Service reports. 'Single-market oriented' legislation included any mention of intent to facilitate interstate commerce. "Prudential" legislation included no such mention but could plausibly be interpreted as contributing to market singleness by requiring some form of more uniform regulation.

The larger “prudential” category in Fig. 2 includes much legislation that contributes to market singleness by preempting varying state rules to some degree, but not for purposes of openness. Instead, it pursues goals like food and drug safety, consumer protection, or environmental stewardship. Given prudential motivations, it makes sense that few statutes impose genuinely uniform regulation, like in auto emissions (with an exception for California), most medical devices, or appliance energy efficiency. Far more common are regulatory floors that states may exceed. Thus, states can ban the sale or use of federally-approved prescription

drugs,<sup>21</sup> add requirements for food labeling or toy safety,<sup>22</sup> set higher standards for chemicals,<sup>23</sup> and so on. State requirements can encounter DCC challenges as “undue burdens” on interstate commerce, but courts approach such cases gingerly with a “presumption against preemption:” preemption goes no further than Congress specifies.<sup>24</sup> This presumption, together with highly idiosyncratic statutes and the contested “burden” logic, creates a messy landscape of liability and makes preemption “the most doctrinally confused area of constitutional law.”<sup>25</sup> Private associations help reduce uncertainty by offering – usually selling – voluntary goods standards or professional exams, but firms or citizens must ultimately ascertain what applies in each locality.<sup>26</sup>

Despite immense federal administrative resources and direct regulatory action, central systems do little to require or facilitate interstate openness. Powerful agencies like the Federal Communications Commission (FCC), Federal Energy Regulatory Commission (FERC), or the Environmental Protection Agency (EPA) mainly implement their own rules across the territory. Some strongly preemptive federal statutes, like for auto emissions or appliance energy efficiency, require that states seek pre-authorization for any deviation that could “burden” commerce (and it is generally refused). Federal spending also greatly influences state policies with conditional grants, but federal conditionality rarely relates to non-discrimination or regulatory uniformity.<sup>27</sup> Notification requirements for commerce-related state legislation generally seem precluded by court decisions in the 1990s barring federal “commandeering” of

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<sup>21</sup> Costello 2018.

<sup>22</sup> Mitchell 1989. For examples, <http://www.toyassociation.org/ta/advocacy/state/regulations/toys/advocacy/state/state-home.aspx>.

<sup>23</sup> Katrichis and Keller 2000.

<sup>24</sup> *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947); reiterated in *Wyeth v. Levine*, 555 U.S. 555 (2009).

<sup>25</sup> Merriam 2017, 1000.

<sup>26</sup> Tate 2001, 463.

<sup>27</sup> McNiff 2015; Zimmerman 2004, 48-49.

state capacities.<sup>28</sup> Nor do federal agencies facilitate interstate policy coordination, which is left to organizations without decision-making powers like the National Conference of State Legislatures, the Council of State Governments, and the National Governors' Association. Overall, the American interstate openness regime is largely a project of federal courts, substantially but erratically abetted by federal regulation with mainly prudential goals.

### *Comparing Openness Regimes by Area*

Consider now brief comparisons of openness rules in major economic areas. In *goods*, nobody would describe either polity's trade as subject to high barriers, but EU rules look more open. With rare exceptions authorized against a stringent market-access standard, a good placed on one state's market can be sold elsewhere, under either mutual recognition or a harmonized standard. States may set higher standards for their *own* national products but not others'. National changes to goods rules are legally void unless pre-notified to the TRIS database.<sup>29</sup> US markets have far more erratically shared standards and no principles of mutual recognition. State-federal conflicts are arbitrated post hoc in courts under a weaker standard of discrimination.

Though *services* attract most complaints about EU "incompleteness," its openness rules look stronger here as well. Its notion of "freedom to provide services" is foreign to Americans. Defined in contrast to permanent establishment, this "freedom" promises unrestricted market access for out-of-state providers of temporary services. Such a legal category makes little sense without substantial home-state regulatory control and treatment of receiving-state "dual burdens" as discriminatory. Without those features the category dissolves into a conventional situation

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<sup>28</sup> *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States* 521 U.S. 898 (1997).

<sup>29</sup> CJEU affirmation of this notion in 1996 sparked a member-state scramble to notify hundreds of previously overlooked regulations (Jans 1998).

(sell services here, we regulate you). In the US that situation prevails with a caveat for indirect taxation, which features clearer dual-burden-avoiding rules for interstate “apportionment” than exist in Europe.<sup>30</sup> Otherwise, states require service providers to acquire their licenses and respect their rules, full stop. Resultant barriers attract some non-federal responses, like interstate “compacts” for licensing recognition (most successfully in nursing),<sup>31</sup> or a recent wave of state laws for “universal recognition” of out-of-state licenses.<sup>32</sup> Big, high-regulation states like California or New York reject all compacts, however, and the most salient recognition law is Arizona’s statute that only recognizes licenses held by its *residents*. In Europe, meanwhile, home-state regulatory responsibility is the general principle for services, with dual burdens broadly prohibited and strict scrutiny of any receiving-state conditions on market access.<sup>33</sup> The professional-qualifications regime roughly mirrors that for goods: default mutual recognition with harmonized deals for touchier cases (like doctors). States are “commandeered” into EU systems for regulatory notification and procedures to facilitate recognition of qualifications.<sup>34</sup>

In free movement of *persons*, Americans enjoy broader rights, but the EU uses free movement more as a wedge for openness. Inferring a “right to travel” from constitutional rights to due process and equal protection, the Supreme Court barred states from blocking interstate movement by poor people (in 1941) and required states to extend welfare benefits to newly-arrived residents (in 1968).<sup>35</sup> Still, “the economic implications of travel do not favor integration, but rather justify state autonomy;” citizens freely choose their residency and states regulate

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<sup>30</sup> Schutze 2016.

<sup>31</sup> Evans 2015.

<sup>32</sup> These are tracked by the Council of State Governments, <https://licensing.csg.org/>.

<sup>33</sup> The ballyhooed “defeat” of “country of origin” language in the Services Directive was largely rhetorical. Barnard 2019, 440.

<sup>34</sup> Notification is more loosely enforced than in goods, but a Services Notification Directive is under negotiation.

<sup>35</sup> Bruzelius and Seeleib-Kaiser 2020.

residents (new or old) in their jurisdictions.<sup>36</sup> In the EU, by contrast, movement into another state for longer than three months can be conditional on evidence of work, study, or resource independence – a migration firewall related to interstate wealth disparities that are roughly twice those in America – but states have limited autonomy to regulate incoming workers. Home-state regulation is the core rule for service providers (see above) or financial firms (see below). EU jurisprudence and legislation also created a novel category of “posted workers” – hired in one state but posted for up to 18 months in another – that lets firms import workers from states with lower social-security and regulatory costs. The controversial “Laval quartet” of CJEU cases in 2007-8 held that such interstate regulatory arbitrage was an intentional goal of the treaties.<sup>37</sup>

*Capital* flows freely across both polities, but Europe does more to facilitate it than America. Though European financial systems are quite heterogeneous, EU rules systematically promote interstate access in banking, securities, and insurance. Several major directives and regulations combine harmonized rules and mutual recognition to support “financial passporting.” Passports for banking and wholesale finance, non-banking firms, market infrastructure or securities-settlement providers, and insurers pre-authorize Europe-wide operation with home-state oversight. American finance, meanwhile, is more homogeneous but governed by weaker interstate rules. Strong preemption places nationally-chartered banks under federal supervision and exempts them from most (but not all) host-state banking laws. Weaker preemptions affect state-chartered banks and banking holding companies, who generally follow host-state laws.<sup>38</sup> Securities feature a strong federal regulatory floor and oversight alongside varying state requirements. Insurance is regulated by states, though federal legislation in 1999 that threatened

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<sup>36</sup> Strumia 2005, 741.

<sup>37</sup> Barnard and Deakin 2011.

<sup>38</sup> Sykes 2018.

preemption was mostly (if still incompletely) successful in pushing states to mutually recognize insurance licenses. US financial regulation overall is “a hodgepodge of federal and state agencies with overlapping authority.”<sup>39</sup>

Consider also what comparative studies find in salient areas crosscutting these “freedoms,” like establishment, taxation, state aid, and procurement:

- *Establishment*: American rules allow companies to choose their home state of incorporation, producing the “Delaware effect” wherein firms cluster in a low-regulation jurisdiction. But since US firms’ operations remain subject to most host-state rules, whereas the EU features more home-state responsibility, EU rules overall are “significantly more restrictive [on states] and leave Member States with less power to regulate their companies.”<sup>40</sup>
- *Taxation*: Unlike the EU, which has little authority to directly affect state taxation, the US Congress could plausibly constrain state-level taxation that affects interstate commerce. Nonetheless, Congress has invoked its authority “much more sparingly than EU institutions,” which have used expansively-interpreted single-market restrictions to “impose tighter constraints on Member State taxes than the American federal government imposes on state taxation.”<sup>41</sup>
- *State Aid*: EU jurisprudence interprets taxation and subsidies similarly, generally barring states from favoring their firms with either tool. US courts are widely perceived as incoherent in applying DCC restrictions to discriminatory taxation but not subsidies, with

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<sup>39</sup> Brown 2005, 10.

<sup>40</sup> Allmendinger 2013, 103.

<sup>41</sup> Genschel and Jachtenfuchs 2011, 293, 304.

which states can favor in-state recipients. Though “it is entirely [legally] possible that Congress, like the Commission, could regulate state subsidies through its power to regulate interstate commerce... There appears to be no support for a federal call” to do so.<sup>42</sup>

- *Procurement*: EU legislation bans in-state preferences in purchasing and requires that states tender all contracts (over certain thresholds, with exceptions) through a Commission-administered e-procurement system. In the US, 47 states have in-state preferences – including outright *bans* on out-of-state purchase of certain goods or services – as authorized by the “market participant exception” from the DCC.<sup>43</sup>

In sum, relative to the EU, the US openness regime “allows a greater degree of deference to state actors and to state regulation,” writes Cambridge law professor Catherine Barnard.<sup>44</sup> Given that America’s interstate flows are nonetheless higher than Europe’s, skeptics may wonder if its weaker rules really engender significant costs on the ground. This brief article cannot offer systematic evidence of such costs, but easily-available examples speak to them. Consider a sector familiar to our main audience: higher education. EU rules bar universities from charging differential tuition to EU citizens. US public universities typically charge “out-of-state” students roughly triple tuition (thanks to the market participant exception). That Americans pursue out-of-state degrees at almost fifty times the rate of Europeans does not alter the fact that American out-of-staters pay severely discriminatory costs.<sup>45</sup> Similarly, American firms pursuing out-of-state markets will gladly tell interviewers about costs from varying standards, social regulations,

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<sup>42</sup> Schenk 2006, 8.

<sup>43</sup> Hoffmann 2011.

<sup>44</sup> Barnard 2009, 578.

<sup>45</sup> Authors’ calculations. Data from Eurostat and US National Center for Education Statistics.

duplicative licenses, and requirements to hire local workers.<sup>46</sup> High flows alone are simply not evidence that visible regulatory barriers are cost-free. It is flatly implausible to suggest that these different regimes are inconsequential for firms or citizens.

The remainder of the article considers *why* Europe’s openness regime surpassed America’s in the past fifty years. Though we focus on explaining openness rules that most fundamentally define “single markets,” we recognize that other policies contribute to market singleness. Alongside these mostly (but not only) “negative” rules that remove disincentives to interstate exchange are “positive” policies that incentivize it. The US federal government’s massive fiscal resources do so by funding national-level infrastructure, offering housing support, insuring banking deposits, providing welfare benefits, and moving around many employees. These are all powers that the fiscal-midget EU mostly or fully lacks. Still, in the two “positive” policy areas typically seen as most tightly related to market singleness – external trade and antitrust – the EU exercises comparable authority to the US. A large literature depicts EU and US trade policy as similarly coherent and globally influential.<sup>47</sup> EU antitrust authority is similar to America’s, but more aggressively employed. Indeed, economist Thomas Philippon argues that strong EU antitrust action contributed to a “great reversal” since the late 1990s, with Europe’s markets becoming more competitive than America’s on many measures.<sup>48</sup> Philippon notes, though, that antitrust is “not the main channel through which Europe has freed its markets.”<sup>49</sup> That main channel is the SMP openness regime.

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<sup>46</sup> For construction-sector examples, Springer 2018.

<sup>47</sup> For one overview, Messerlin 2012.

<sup>48</sup> Philippon 2019.

<sup>49</sup> *Ibid*, 145.

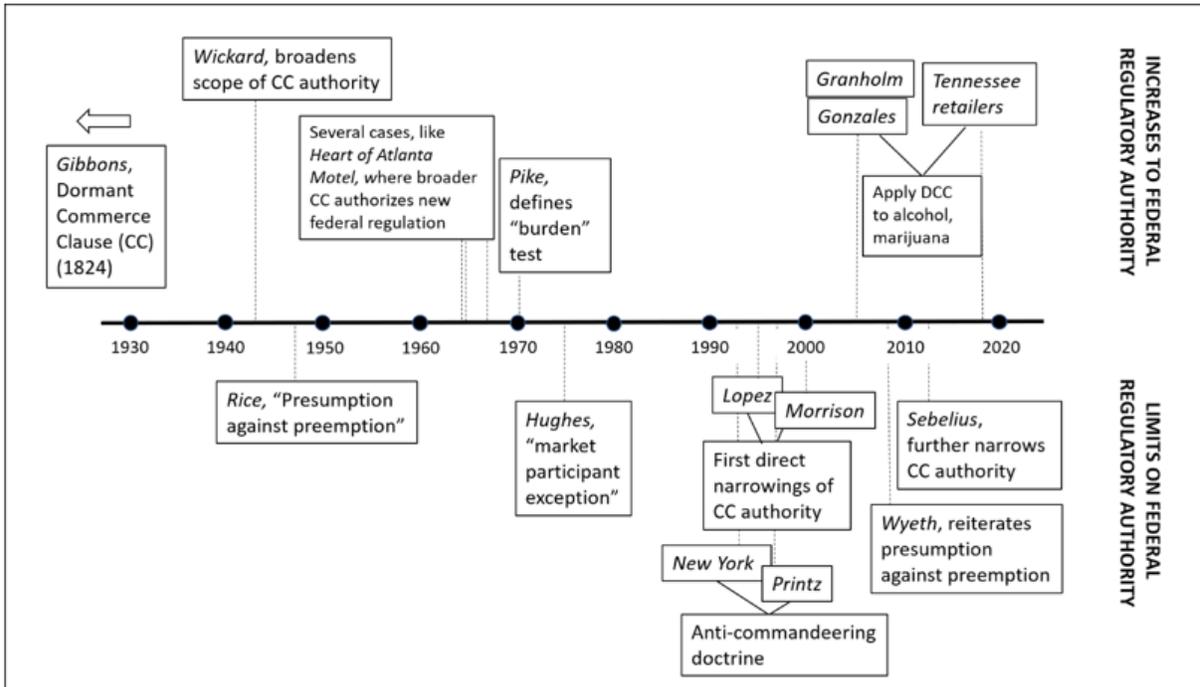
## **The Explanatory Puzzle**

Unlike much scholarship that compares the late 20<sup>th</sup>-century EU to the 19<sup>th</sup>-century United States,<sup>50</sup> we propose to compare these polities' choices about interstate openness since 1970. Relating each polity's formative years makes sense for some questions, but for ours it is problematic to compare cases from before and after the emergence of practically all modern regulation. By 1970 both polities had central institutions in place and extensive regulation. Both would grapple in the 1970s with roughly parallel economic slowdowns and the rise of neoliberalism, an international movement that advocated more open markets. And both polities – not just Europe – actively constructed openness rules in this period. As Fig. 3 underscores, what Barnard calls American “deference” to states is not a 19<sup>th</sup>-century vestige. The presumption against preemption, the modern DCC, the market-participant exception, and the ban on commandeering all consolidated while Europe was building its single-market rules.

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<sup>50</sup> E.g., Egan 2015; McNamara and Musgrave 2020.

**Figure 3. American legal evolutions during the era of European integration**



Caption: Salient single-market-related US jurisprudence since 1970 have mainly reiterated or strengthened limits on federal regulatory authority. The most direct exceptions apply dormant Commerce Clause limits to state regulations for alcohol and marijuana.

Why, then, did Europe’s openness regime surpass America’s in the neoliberal era? First, we deepen the puzzle by noting problems with both “commonsense” answers and expectations from political-economy theories about material interests, institutional path dependence, and cultural differences. Then we suggest a solution that combines certain strands of institutional and ideational theory.

*Why Strong Openness Rules?*

When we present this research, audiences often propose a seemingly commonsense explanation: Europe needs strong openness rules and America does not. The EU’s lower interstate flows leave it vulnerable to asymmetric shocks and hamper the dynamic allocation of resources. Lacking

large central fiscal or administrative capacities, its main tool to promote dynamism is openness requirements on member-states. The US economy, meanwhile, has long enjoyed high flows. Its weaker openness rules operate alongside direct federal-government action to implement its own regulations and distribute massive resources, sufficiently encouraging some common conditions across the states. Why exert federal power further?

The problem is that this is not really an explanation. Governments do not just meet overall “needs” or forbear where “needs” are not present. Such functionalist thinking implies absurd general predictions: strong openness rules should arise in especially fragmented regions (where “need” is greatest). Instead, governance outcomes follow from choices by identifiable people with the motivation and power to generate and sustain them. The previous paragraph’s musings bypass concrete questions about why powerful actors pursue or accept certain rules in these two contexts. Why would business support stronger openness rules in the arena with *less* cross-border traffic? Higher flows suggest that more actors pay costs from interstate barriers. Why would EU agents maximize their mandates while American “feds” discover a “presumption against preemption”? Scholarship on both federations and IOs tends to assume that central actors expand their authority when possible.<sup>51</sup> Why would European sovereigns agree to cede authority that American subunits will not? Nobody seriously expects nation-states to happily sacrifice authority for the overall needs of a continent.

Several schools of political economy hypothesize more concrete answers. One theorizes market governance as responsive to material conditions of resources and flows. On the EU, “liberal intergovernmentalism” (LI) posits that central rules arose because interest groups who profited from cross-border flows encouraged states to negotiate deals to amplify them. The

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<sup>51</sup> Kelemen 2004.

driving cause was “underlying trade flows.”<sup>52</sup> LI’s older rival, “neofunctionalism,” shared the same foundation, positing that beneficiaries of cross-border flows provided the key support for European-level rules.<sup>53</sup> In US scholarship, Samuel Beer used this logic to explain the growth of federal regulation: “...as the flow of interlocal and interstate benefits and costs increases, coalitions tend to form in the national political arena seeking action by the central government.”<sup>54</sup> Related general theories model the governance of advanced economies largely as responsive to interest groups, with denser flows implying stronger interests in openness.<sup>55</sup>

These theories seem quite coherent, but trade flows cannot explain our US-EU contrast. Interstate trade is roughly 40% of US GDP, versus about 20% of EU GDP.<sup>56</sup> US states have more specialized (thus more interdependent) economies than EU states.<sup>57</sup> America’s economy features far more large-scale (thus presumably interstate) businesses than Europe’s.<sup>58</sup> Though US interstate mobility has declined since the mid-20<sup>th</sup> century, and EU mobility has risen, US mobility remains ten to twenty times higher.<sup>59</sup> If Americans transact and move more across states than Europeans—incurring more costs from any given impediment—this logic predicts that they should demand stronger openness rules.

Another school theorizes market governance as institutionally path dependent. Yesterday’s configuration of rules and resources affects today’s outcomes. Stephen Skowronek famously argued that weak resources of the early US federation ensconced state-level vested interests that obstructed later attempts at centralized action.<sup>60</sup> Daniel Ziblatt found similar dynamics in

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<sup>52</sup> Moravcsik 1998, 496.

<sup>53</sup> Haas 1958; Sandholtz & Stone-Sweet 1998, 5; on ambiguous differences with LI, Parsons 2000.

<sup>54</sup> Beer 1973, 64. Similarly, Chandler 1977, Bense 2000.

<sup>55</sup> Frieden 1991; Keohane and Milner 1996; Alesina and Spalatore 2003.

<sup>56</sup> Pacchioli 2012.

<sup>57</sup> European Central Bank 2004.

<sup>58</sup> European Commission 2016.

<sup>59</sup> Bonin et al 2008; Kaplan & Woll 2015.

<sup>60</sup> Skowronek 1982; Ziblatt 2006 is similar.

European cases: German states' robust early resources helped them resist centralization better than Italian regions.<sup>61</sup> Related EU scholarship traces path-dependent effects from the early European institutions. The EEC tweaked national arenas, opening up new strategies for nationally-captive firms and eliciting pro-openness allies for the Commission and Court.<sup>62</sup> These supranational actors' strong regulatory mandates but weak resources incentivized construction of a "regulatory state" that specialized in rule-setting and technical-legal "integration by stealth."<sup>63</sup> New delegations of power depended on agreement among member-states, but their changeable interests and dysfunctionally incomplete deals often generated bargaining sequences that favored expansions of EU authority.<sup>64</sup>

These theories seem coherent too, but again struggle with our comparison. Institutional conditions in Europe circa 1970 did not seem to favor a path to strong central openness rules more than in the United States. American central actors were massively better resourced than EEC actors. Europe's states were far more powerful and heterogeneous. The EEC enjoyed a much more specific single-market mandate, but the analogous American mandate was neither ambiguous nor weak. After all, the Commerce Clause led the list of original reasons for the federation: as conservative judge Kenneth Starr notes, it was "the *only* substantive power not included in the Articles of Confederation."<sup>65</sup> Its expansive mid-20<sup>th</sup>-century reinterpretation reflected progressive concerns, not a market-openness agenda, but expanded federal authority could still be invoked for its original openness purposes. It seems hard to argue that American

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<sup>61</sup> Ziblatt 2006.

<sup>62</sup> Burley and Mattli 1993; Sandholtz and Stone-Sweet 1998; Stone Sweet and Brunell 1998.

<sup>63</sup> Majone 2005; partly similar is Genschel and Jachtenfuchs 2016.

<sup>64</sup> Pierson 1996; Jones et al 2016. Related IR scholarship includes Farrell and Newman 2010; Rixen et al 2016; Fioretos 2017.

<sup>65</sup> Starr 2007, xv. His emphasis.

“feds” in 1970 lacked resources or authority to pursue interstate openness, if they chose, or that EEC openness mandates enjoyed easy institutional pathways forward.

A third school of political economy theorizes that market governance varies with context-specific culture about markets. The old “American exceptionalism” literature emphasized its distinctively pro-market culture relative to Europe.<sup>66</sup> Later studies reinforced this notion, like Frank Dobbin’s landmark work on the politics of industrialization. Unlike in France or even Britain, he summarized, “In the United States, restraints of trade were associated with political tyranny, and policies adopted to guard liberty by precluding restraints of trade were soon cast as positive measures to promote growth.”<sup>67</sup> This historical backdrop relates to widespread perception of the US as the “spiritual home” of the neoliberal movement and the arena where its message resonated most easily and broadly.<sup>68</sup> Europe’s less liberal cultural context, by contrast, “offered a relatively ‘cold climate’ for economic liberalism in the 1970s,” and neoliberal discourse has “remained marginal” in most national arenas on the continent.<sup>69</sup>

This broad cultural contrast is hard to deny. Surveys consistently show stronger pro-market attitudes in America than in Europe.<sup>70</sup> But these observations just deepen our puzzle. Pro-market attitudes per se do not seem to indicate support for central action on openness. Indeed, as we elaborate below, the most pro-market American actors tend to be the strongest champions of “states’ rights,” including on most interstate-openness issues. In Europe, by contrast, practically all self-avowedly pro-market conservatives are pro-SMP. The exception is the United Kingdom, which is typically seen as culturally closest to the United States and echoes its main patterns: its

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<sup>66</sup> Hartz 1955; Schuck and Wilson 2008.

<sup>67</sup> Dobbin 1994, 225.

<sup>68</sup> Vail 2018, 11; also Hall 1993; Campbell and Pedersen 2001; Roy, Denzau and Willet 2007; Swarts 2013.

<sup>69</sup> Schmidt and Thatcher 2013, xv; Vail 2018, 13.

<sup>70</sup> For surveys from 1983-1997, Alesina and Glaeser 2004, 184.

conservatives perceive themselves as strongly pro-market, but most have come to be vociferous proponents of “states’ rights,” even on interstate-openness issues (whence Brexit).<sup>71</sup> Something connects market fervor to central openness rules in varying ways across these arenas.

### *Specific Institutions and Ideational Intersections*

Though broad institutional and cultural conditions deepen the openness-regime puzzle, strands of related scholarship may solve it. Within institutionalism, a helpful observation is that most EU-focused work actually differs from Skowronek- or Ziblatt-style theorizing about balances of organizational resources, though the distinction has received little attention. Tacitly recognizing that EU empowerment was *not* favored by the preponderance of institutional channels and resources, this work instead emphasizes path-dependent consequences of specific institutional mandates. The point of departure for scholars like Walter Mattli and Anne-Marie Slaughter, Wayne Sandholtz and Alec Stone-Sweet, Giandomenico Majone, or Philipp Genschel and Markus Jachtenfuchs, and for the legal literature on EU “integration through law,” is an independent Commission and Court tasked with implementing commitments to the “four freedoms.”<sup>72</sup> Their main analytic thrust is not that these actors assembled overwhelming resources or coalitions that outweighed national resistance. It is that they circumvented such resistance – cultivating support from pro-openness business and opportunistic allies in national institutions, working in stealthy regulation behind a veil of complex law – to expand EU authority beyond what national governments intended.

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<sup>71</sup> Matthijs, Parsons, and Toenshoff 2019.

<sup>72</sup> Cappelletti et al 1986; Burley and Mattli 1993; Sandholtz and Stone-Sweet 1998; Majone 2005; Genschel and Jachtenfuchs 2016.

If such specific-mandate institutionalism can be compelling about specific policy or legal developments, though, it stretches uncomfortably to explain major trajectories of political authority. We find it persuasive that thanks to their mandates, autonomy, and technical-legal obscurity, the Commission and Court could nudge Europe’s openness rules in stronger directions despite modest resources, interstate flows, and cultural support. Similarly, it seems plausible that many American barriers persist partly just because no federal agency is tasked with dismantling them. The more such steps (or lack thereof) cumulate into major configurations of political authority, however – in this case, generating IO authority beyond that of a robust federal state – the more we need additional theory to explain why broader forces support those outcomes. For France and Germany to accept more regulatory constraints than Texas and Illinois, we must explain why substantial political forces ultimately endorsed this shift. Any explanation must be consistent with American disinterest in (or opposition to) removing many of the same barriers despite high flows, the Commerce Clause mandate, central resources, and pro-market culture.

We see both theoretical and empirical foundations for an explanation in scholarship on ideas in public policy. Rather than focusing on broad cultural attitudes, this literature emphasizes the influence of relatively specific elite-level ideas that connect policy problems to solutions.<sup>73</sup> One core concept is that new ideas gain political power when they intersect with other more established (often institutionalized) ideas in ways that generate new coalitions—providing new rationales and actionable agendas that connect powerful actors’ pre-existing problems or goals. Neoliberalism has attracted more such arguments than any other set of ideas, with recent emphasis on its “historically contingent and intellectually hybrid” diversification into distinct

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<sup>73</sup> For surveys, Campbell 2002; Béland, Carstensen, and Seabrooke 2016; Carstensen and Matthijs 2018.

varieties.<sup>74</sup> Thus prominent scholars have already argued that in the 1970s, neoliberalism entered the European and American arenas in different ways, empowering both the pro-central-authority SMP and the anti-federal “Reagan revolution.”<sup>75</sup> Common-wisdom misdescriptions of single-market outcomes have obscured how well this scholarship combines into mutually-reinforcing explanations of major features of European and American political economy today.

In theoretical terms, our combination of existing accounts matters not just because it challenges non-ideational theories but because it bolsters certain ways of theorizing about ideas. Comparison of EU and US internal-market politics highlights deeply divergent transformations of similar neoliberal principles. The two continents’ free-marketeers arrived at near-opposite views about many regulatory arrangements. These observations encourage an ongoing theoretical movement away from conceptualizing ideas as “paradigms” or “worldviews.” Peter Hall’s seminal work portrayed major policy ideas as analogous to Kuhnian paradigms in science, with actors seeking fairly deep and broad coherence in overarching ideational frameworks.<sup>76</sup> More recent scholarship theorizes ideas in less hierarchical and coherent ways, more like James March and Johan Olsen’s separate “streams” of problems and solutions, or like the proliferation of relatively discrete models or practices across “fields” of action in organizational sociology.<sup>77</sup> Our account emphasizes that neoliberalism’s intersections with other “streams” of ideas in American coalition-building or European international bargaining channeled its principles into remarkably different political strategies. The results are not just locally-adapted variations on a coherent paradigmatic theme. They are contradictory. As we discuss in the next section, the

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<sup>74</sup> Ban 2016, 10; also Stark and Bruszt 1998, Block 2007, Burgin 2012, Matthijs 2012, Ban and Blyth 2013, Campbell and Pedersen 2014, Vail 2018, Slobodian 2018.

<sup>75</sup> Most directly, Carmines and Stimson 1989, Schickler 2016 for the US; Jabko 2006, Parsons 2010 on the EU.

<sup>76</sup> Hall 1993.

<sup>77</sup> Carstensen 2011; Ban and Blyth 2013; Wood 2015; Carstensen and Matthijs 2018; Cohen et al 1972; Kingdon 1985; Powell and DiMaggio 1991.

Brexit process recently made their conflicts highly explicit – pitting an Anglo-American neoliberal vision of unfettered “Global Britain” against the centrally-enforced “indivisible freedoms” of Europe’s Single Market. Both sides saw themselves as the true champions of market openness.

### **Varieties of Neoliberalism and Single Markets**

Our accounts are brief but draw credibility by connecting dots from other published research. Europe’s SMP has attracted massive scholarly attention, and our transatlantic contrast lends new support to versions of the story that center on ideational intersections. The “non-barking-dog” tale of American inattention to interstate barriers has not been told in similarly explicit ways, but is directly implied by scholarship on the late-20<sup>th</sup> century coalitional connection between neoliberalism and racially-tinged social conservatism. Together these accounts theorize the politics of single markets in a unified way while explaining divergent outcomes.

As backdrop, we understand neoliberalism as a mid-20<sup>th</sup>-century set of ideas about limiting discretionary economic governance in favor of market dynamics. It consolidated around the Mont Pelerin Society, a conference first convened in 1947 by Friedrich Hayek, but from the beginning featured varying Austrian, German, and Anglo-American strands.<sup>78</sup> All variants differed from classical liberalism in portraying markets as conscious political projects, not natural, self-forming systems. Their main early disagreements concerned central rules: what should national or international institutions do, or not do, to promote markets? Neoliberals’ answers further diverged as they achieved broad political resonance in the 1980s.

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<sup>78</sup> Murowski and Plehwe 2009; Slobodian 2018; Biebricher 2018

### *Neoliberalism and American “States’ Rights”*

In 1970 the United States obviously had a stronger interstate openness regime than Europe. EEC authority was tenuous, but America’s federation had been preventing interstate protectionism for 150 years. The New Deal reinterpretation of the Commerce Clause had vastly extended the federation’s reach. This expansion reflected progressive goals rather than pursuit of market openness, as did other federal action that followed – civil rights legislation, Great Society programs, environmental rules – but left intact the federal commerce mandate. Federal power could be wielded for market openness if national politics turned in that direction.

That possibility was growing around 1970, as reactions to progressive federal action crafted a merger around pro-market discourse. Roosevelt’s powerful New Deal coalition had allied poorer voters in northern cities with the old Democratic Party of rural southern states. Outside this coalition arose one set of reactions. Traditional northern elites rejected the New Deal out of *laissez-faire* liberalism and traditional-religious conservatism. Entrepreneurs like William F. Buckley sought “fusionism” between them around the idea of federal non-interference in society.<sup>79</sup> In so doing, they increasingly drew discourse from emerging neoliberal thinkers. Conservative businesspeople had funded the Hayek-centered movement that portrayed the New Deal as a “road to serfdom” and communism, and their investment delivered newly positive frames for old agendas.<sup>80</sup> Where both *laissez-faire* and traditional conservatism smacked of elites defending their power, neoliberals offered forward-looking calls to recast governance around deep liberty for all. In the 1960s they gained a remarkable spokesman in economist Milton Friedman, who combined academic legitimacy, fluid policy interventions, and affable

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<sup>79</sup> Nash 1976.

<sup>80</sup> Murowski and Plehwe 2009.

popularization of radical proposals.<sup>81</sup> Meanwhile another reaction arose inside the New Deal coalition. Many southern whites had been repelled by its incorporation of Blacks in the late 1930s and northern Democrats' support for postwar military desegregation. In 1948 a "States' Rights Democratic Party" splintered off around Senator Strom Thurmond, using "a national political idiom of 'local control' or 'states' rights'" to defend Jim Crow.<sup>82</sup> As the civil rights movement accelerated, southern "states' righters" and northern conservatives increasingly perceived common cause against expansive federal authority.

Political merger of these themes encountered some obstacles, but consolidated over the 1970s. If states' righters like Thurmond linked their cause rhetorically to market liberties early on, their inner circles included both New Dealers and business conservatives.<sup>83</sup> Conversely, many neoliberals and northern businesspeople hesitated to embrace segregationists. Edward Carmines and James Stimson famously argued that elites could have crafted other coalitions.<sup>84</sup> More recent research emphasizes deeper constraints on viable options, finding voter tendencies to associate anti/pro-market views with racial liberalism/conservatism in the 1930s and 1940s.<sup>85</sup> Either way, it took time to link the themes in electorally successful ways. National-level fusion came with Barry Goldwater's nomination as Republican presidential candidate in 1964 – linking a Friedman-advised economic program to "states' rights" rejection of the landmark Civil Rights Act – but lost in a landslide. Eight years later Richard Nixon did better with a moderated version of Goldwater's fusion, winning his own landslide amid turmoil over Vietnam and cultural change. Consolidation of the coalition was then delayed by Nixon's resignation and Democrats'

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<sup>81</sup> Burgin 2012.

<sup>82</sup> Lowndes 2008, 5.

<sup>83</sup> *Ibid*, 33-44.

<sup>84</sup> Carmines and Stimson 1989.

<sup>85</sup> Feinstein and Schickler 2008; Schickler 2016.

nomination of a southern Christian liberal, Jimmy Carter, in 1976. In 1980, the election of Ronald Reagan cemented the alliance of pro-market, white-targeted, and religious conservatism around the theme that “government is the problem” – meaning, above all, *federal* government.

In parallel, a distinctive neoliberal “knowledge regime” developed in academia and think tanks.<sup>86</sup> Across its many contributions to political-economic thought stretched one commonality: intense focus on central government as the key problem for markets, downplaying the concerns about inward-focused local jurisdictions that had motivated the Commerce Clause and the first century of modern economics. For Friedman, even if markets suffer from local protectionism or private monopoly, central-government fixes were worse than these diseases. As his “Chicago School” colleague George Stigler theorized, regulation is subject to business capture “as a rule.”<sup>87</sup> But the bigger the jurisdiction, Friedman argued, the less easily citizens can move to escape bad governance, so “If government is to exercise power, better in the county than in the state, better in the state than in Washington.”<sup>88</sup> James Buchanan’s “Virginia School” of public choice advanced the same idea about fiscal competition, echoing Hayek that “Total government intrusion into the economy should be smaller...the greater the extent to which taxes and expenditures are decentralized.”<sup>89</sup> Richard Posner led the incorporation of these theories into legal debates with seminal contributions to the “law and economics” literature.<sup>90</sup> A new complex of think tanks nurtured these ideas into policies. Stanford’s Hoover Institution was reinvented in free-market directions in the 1960s, and hosted Friedman after 1976. The American Enterprise

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<sup>86</sup> Campbell and Pederson 2014.

<sup>87</sup> Stigler 1971.

<sup>88</sup> Friedman 1962, 3.

<sup>89</sup> Brennan and Buchanan 1980, 216; Hayek 1939.

<sup>90</sup> Posner 1973; Teles 2008.

Institute (AEI) went from one-tenth the budget of the liberal Brookings Institution in 1970 to parity in 1980.<sup>91</sup> The Heritage Foundation appeared in 1973, the Cato Institute in 1977.

When the “Reagan revolution” finally came, its leaders thus had coalitional incentives and intellectual justifications to downplay state-level authority as a source of economic problems. Wholly uninterested in exerting Commerce Clause authority for goals like liberalizing procurement, limiting discriminatory state aids, encouraging mutual recognition in licensing or standards, or streamlining overlapping oversight in finance, Reagan focused first on cutting taxes and secondly on a “new federalism.” “If there is an underlying philosophy behind Reagan’s ‘new federalism,’” observed a 1981 non-partisan research report, “it can be summed up in two words: states’ rights. Traditionally, states’ rights has been associated with resistance to federal civil rights legislation. But officials in the Reagan administration are anxious to strip the states’ rights label of its association with racial discrimination and link it instead with the president’s vision of intergovernmental relations.”<sup>92</sup> Much of their vision was fiscal – reducing federal leverage over states by replacing conditional funding streams with “block grants” – and otherwise regulatory plans simply emphasized “relief” from federal rules. This agenda faced poor prospects in a Democratic Congress, but as Kip Viscusi writes, given disinterest in “meaningful regulatory reform as opposed to regulatory relief,” the story of “the Reagan regulatory reform effort is not just that such reforms were never achieved but that they were never even attempted.”<sup>93</sup> With rare exceptions, like continuing Carter-era deregulatory initiatives that preempted some state transport regulations, Reagan’s team did not see federal regulatory authority as a useful tool.

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<sup>91</sup> Hacker and Pierson 2010, 123.

<sup>92</sup> CQ Researcher 1981, 4.

<sup>93</sup> Viscusi 1994, 457.

Similar regulatory views have dominated conservative agendas ever since. House Leader Newt Gingrich’s 1994 “Contract with America” featured a “devolution revolution” to move “policy-making responsibility and administrative authority out of the federal government’s control.”<sup>94</sup> In 2016, House Speaker Paul Ryan’s “Better Way” program reiterated that “states in many cases do a better job” than federal regulation, and “should be encouraged to take the lead.” In between, Republicans supported federal authority opportunistically in a few areas with especially salient big-business pressure – notably bipartisan legislation to permit interstate banking and G.W. Bush-era attempts to preempt state-level torts claims<sup>95</sup> – but federal overreach remained their main regulatory theme.<sup>96</sup> In parallel, a conservative “federalist” legal movement pursued a related agenda in the courts.<sup>97</sup> Under Reagan-appointed Chief Justice William Rehnquist (1986-2005), the Supreme Court “frequently seem[ed] preoccupied with protecting state autonomy as an end in itself.”<sup>98</sup> In unusual cases where it ruled for federal commerce authority, like *Gonzales v. Raich* (2005), the most conservative justices dissented. The subsequent Roberts Court largely continued this line, most notably narrowing commerce powers in *NFIB v. Sebelius*.<sup>99</sup> Invocation of the DCC has steadily weakened over time, with the most conservative justices (Antonin Scalia, Clarence Thomas, Neil Gorsuch) leaning toward abandoning it.<sup>100</sup> Importantly, leaders of this legal movement often describe it as opposed by big business, which they perceive as dangerously inclined to prefer federal over state regulation.<sup>101</sup>

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<sup>94</sup> Scheiber 2000; also Kousser 2014.

<sup>95</sup> McGarity 2008.

<sup>96</sup> Springer 2018, 130-146.

<sup>97</sup> Teles 2008.

<sup>98</sup> Halberstam 2004, 795.

<sup>99</sup> Bowling & Pickerill 2013; Keck 2015. An exception is recent application of the Commerce Clause to state alcohol regulation, notably *Granholm* (2005) and *Tennessee Retailers* (2019).

<sup>100</sup> Francis 2017.

<sup>101</sup> Greve 2002; Teles 2008, 68-88.

Donald Trump’s transgressive presidency scrambled Republican priorities in ways that we will not attempt to trace, but his departure leaves intact the coalitional intersection of states’ rights and neoliberal discourse. With few exceptional voices or issues, the more American politicians today advocate “free markets,” the more they oppose federal regulatory authority. Conservative think tanks rail against regulatory burdens like professional licensing, but as one scholar at the Heritage Foundation told us, if anyone proposed federal legislation for mutual recognition in his context, “half the people in the room would fall dead from heart attacks.”<sup>102</sup> In legal affairs, conservative jurists’ skepticism about the DCC implies that states can discriminate *explicitly* against interstate commerce where Congress does not legislate otherwise. Given how erratically Congress has legislated to require interstate openness, that is a truly striking position. It implies a level of comfort with interstate barriers that would be a fringe view in today’s Europe, where neoliberalism intersected with a very different political project.

### *“European Integration” Meets Neoliberalism*

As of 1970, Europeans had endowed EEC agents with strong openness mandates, but few expected deep constraints on national regulation to follow. Such hopes may have motivated the Hayek-friendly Germans who drafted the treaty’s “freedoms” language, Hans von der Groeben and Alfred Müller-Armack, but most observers expected the opposite. Early neoliberals had largely opposed the treaty, interpreting its supranational institutions and safeguards as compromises with French *dirigisme*.<sup>103</sup> They implicitly agreed with its many socialist supporters, who hoped it would support regulatory coordination.<sup>104</sup> If the early Commission and CJEU duly

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<sup>102</sup> Interview, 21 April 2020.

<sup>103</sup> Slobodian 2018, 184-202.

<sup>104</sup> Shaev 2018.

pursued their mandates in Germanic style – including von der Groeben’s energetic role as first Commissioner for competition policy, empowered by early CJEU rulings – this era of ascendant planning and “embedded liberalism” carried little hint of deep impending liberalization.<sup>105</sup> Moreover, in 1966 French President Charles de Gaulle had slowed EEC ambitions by blocking the implementation of majority voting in its Council of Ministers.

The 1970s saw EEC agents explore the logic of their mandates, but without support for deep change. The Court set the foundations for internal-market law in *Dassonville* (1974), finding potential treaty violations in goods rules “capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.”<sup>106</sup> Meanwhile the Commission proposed harmonizing legislation in goods, professional qualifications, procurement, and other areas, but was often stymied by member-state vetoes. Then CJEU rulings found that the treaty directly authorized cross-border service provision without unjustified impediments, implying mutual-recognition logic and less need to harmonize rules.<sup>107</sup> By 1978 the Commission “was fishing around for a case” to promote this “new approach.”<sup>108</sup> It worked with the plaintiffs to elicit the CJEU’s landmark statement of mutual recognition principles in *Cassis de Dijon* (1979).

Action to extend these innovations remained unlikely, however, in a context of “Euro-pessimism.” “Stagflation” gripped the continent. EEC diplomacy was snarled in battles over the recently-entered UK’s demand for a budgetary “rebate” and accession of Greece, Spain and Portugal. Deal-making prospects declined further in 1981, when François Mitterrand’s Socialists captured French government promising “socialism in one nation.” Even the parallel rise of neoliberal politics did not obviously favor stronger openness rules. The “return to markets”

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<sup>105</sup> Von der Groeben 1985; Giubboni 2006; Joerges and Hein 2017.

<sup>106</sup> Amténbrink et al 2019.

<sup>107</sup> Beginning with *Van Binsbergen* (1974). See Hatzopoulous 2012, 101.

<sup>108</sup> Nicolaidis 2017, 282; also Grin 2003, 67.

gained its first and strongest European champion with Margaret Thatcher's UK electoral victory in 1979. The circles around Thatcher's mentor, Keith Joseph, included figures who would later favor EEC reforms to promote liberalization – most significantly Geoffrey Howe, the main architect of Thatcher's initial economic policy – but Thatcher and many of her allies shared the old neoliberal suspicion of the EEC institutions as interventionist.<sup>109</sup> UK positions into the mid-1980s consistently opposed moves to empower EEC authority, favoring liberalization by “gentlemen's agreement” among convergent national governments.<sup>110</sup>

In EU lore, the subsequent extension of European authority in the “Single Market 1992” initiative reflected leaders' functional recognition that deep liberalization required EEC reform, especially to use majority voting. In fact, the intersection of neoliberalism with European authority-building occurred less directly and more politically.

First came partial convergence of national economic policies. In 1983-4, France's Socialists abandoned their agenda in a “U-turn” to austerity and financial liberalization. By then Germany, Italy, and the Benelux had also chosen center-Right leaders who were fairly pro-openness. Discussion of EEC liberalization became imaginable, but with erratic enthusiasm. Only the Dutch under Ruud Lubbers took up Thatcher-like discourse, and neither Mitterrand nor Jacques Delors, his Finance Minister who became Commission President in 1985, suddenly became free-marketeers. Their EEC plans prioritized industrial, monetary, and social-policy coordination.<sup>111</sup> Moreover, Mitterrand sought to rebuild his profile as a statesman by calling for stronger EEC institutions. Thatcher called such proposals “ridiculous” in late 1984.<sup>112</sup>

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<sup>109</sup> Among many, Fontana and Parsons 2015.

<sup>110</sup> Wall 2008, 41-61.

<sup>111</sup> Ross 1995, 29.

<sup>112</sup> Wall 2008, 47.

Second came an explicit deal, *without* general recognition of a functional link, between distinct advocates of liberalization and EEC reform. Two proposals came before EEC leaders in early 1985. One packaged together over 300 liberalizing initiatives, and came largely from Arthur Cockfield, the Thatcher-nominated Commissioner for the Internal Market.<sup>113</sup> The other came from a committee on EEC institutions, created at Mitterrand's insistence, that overrode British objections to recommend majority voting and other reforms. At a meeting where some participants understood the proposals as *competing*, the Italian chair invoked a rule to convene treaty renegotiations by majority vote, and talks on both proposals were agreed over British, Danish, and Greek outrage.<sup>114</sup> In the subsequent talks, Commission drafts for a "Single European Act" (SEA) promoted the functional-link frame. But if this linkage was accepted by Benelux and German governments, who had long endorsed both majority voting and internal-market progress anyway, British and French leaders still saw a trade-off. The British eventually agreed to institutional reforms, but Thatcher consistently characterized them as distasteful concessions, including immediately after signing the deal.<sup>115</sup> The French only agreed to the internal-market plan after losing fights to limit its liberalizing content.<sup>116</sup>

A sufficient coalition to pursue deep openness via central rulemaking was thus a *consequence*, not a cause, of the SEA. Ratification cemented the new fusion. Geoffrey Howe justified the deal in the House of Commons with the functional-link rhetoric Thatcher had dismissed.<sup>117</sup> In France, Mitterrand's Europeanist pitch delivered Socialist votes despite fears of

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<sup>113</sup> Fligstein and Mara-Drita 1996.

<sup>114</sup> Haywood 1989, 140; Ross 1995, 73.

<sup>115</sup> See post-negotiations press conference, at <https://www.margaretthatcher.org/document/106187>; also Thatcher remarks to House of Commons, July 2, 1985 and December 5, 1985, at <http://hansard.millbanksystems.com/commons/1985>; also Parsons 2010.

<sup>116</sup> Favier and Martin-Rolland 1995, 216.

<sup>117</sup> House of Commons Debate, 23 April 1986, <https://api.parliament.uk/historic-hansard/commons/1986/apr/23/european-communities-amendment-bill>.

liberalization, while the Gaullists – newly converted to neoliberalism – voted yes while grumbling about majority voting.<sup>118</sup> The SMP logic consolidated further as the Commission proposed a flood of legislation, promoted a related “knowledge regime,” and elicited business mobilization. It funded a huge team of economists to produce the 1988 Cecchini Report, whose generous estimates of the “Cost of Non-Europe” became “the flagship of the promotion of the single market” and provoked waves of scholarship on regulatory barriers and “completing” the SMP.<sup>119</sup> Think tanks developed in Brussels, notably the Centre for European Policy Studies (CEPS, founded 1983) and the European Policy Centre (1990). Business lobbies led a “post-SEA explosion of European interest representation” that mainly targeted the Commission.<sup>120</sup> After 1989 the Commission funded “Jean Monnet” centers and chairs across European universities, followed by American centers in 1998. EU studies went “from boutique to boom field.”<sup>121</sup>

The openness agenda built on these bases advanced steadily after the 1980s, despite seemingly declining support and rising challenges. Internal Market Commissioners after Cockfield combined pro-market and Europeanist commitments—Martin Bangemann, Mario Monti, Frits Bolkestein, Charley McCreevy—and their staff in the internal-market directorate (“DG GROW”) is still widely perceived as self-selected for such views.<sup>122</sup> Many of their proposals have certainly been diluted or rejected, but they have kept coming. In the 1990s, while the Commission and Court maintained a heavy flow of SMP legislation and rulings, public support for the EU fell steeply amid economic malaise and unpopular moves to monetary union and Eastern enlargement. In the 2000s the SMP itself became the main object of contestation.

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<sup>118</sup> Saint-Ouen 1988.

<sup>119</sup> Grin 2003, 248-264.

<sup>120</sup> Coen 1997, 96.

<sup>121</sup> Keeler 2005.

<sup>122</sup> Georgakakis 2017.

The Services Directive attracted unprecedented anti-EU protests, and western European fears about openness to Eastern Europe encouraged referendum votes against the “Constitutional Treaty.” Major legislation passed nonetheless on qualifications, services and capital markets, and the Court aggressively defended openness in its “Laval quartet” rulings. The 2010s brought a catastrophic debt crisis, North-South acrimony, an electoral wave of Euroskepticism, a migration crisis, and finally the Brexit vote. SMP policy-making took a low profile, and criticisms of openness brought some minor reversals (most notably revision of the Posted Workers Directive).<sup>123</sup> Yet even in this period, the SMP produced the Internal Market Information system, tighter goods notifications procedures, a “European Professionals Card” for automatic mobility in six professions, required “Single Digital Gateways,” the e-Procurement system, and a new European Labor Authority to coordinate national agencies around “rights-based labor mobility.”<sup>124</sup>

Whatever happens with the SMP in post-COVID-19 Europe, its core elements have been neatly showcased in the Brexit process. Britain’s decision to withdraw threw the extraordinary automaticity of SMP openness in sharp relief. Simply reclaiming the *potential* for regulatory autonomy, without yet adopting substantively different British rules, has meant major new bureaucracy for goods and sector-shaking impediments to market access in finance and many services.<sup>125</sup> Also striking was how Brexit elicited continental support for SMP principles. In response to British hopes for selective internal-market access, EU negotiators insisted on “indivisibility” of the “four freedoms.”<sup>126</sup> In policy terms this was unconvincing: distinct

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<sup>123</sup> Lubow and Schmidt 2020.

<sup>124</sup> Cremers 2020.

<sup>125</sup> Holton 2021.

<sup>126</sup> Matthijs, Parsons and Toenshoff 2019.

arrangements in internal-market categories were feasible in economic and legal terms.<sup>127</sup> Nor was it an electorally resonant principle in any member-state. Nonetheless, mainstream EU politicians rallied around it with rhetorical celebration of their centrally enforced freedoms.<sup>128</sup> Most striking of all, Brexit directly contrasted varieties of neoliberalism, pitting “indivisible freedoms” against “Global Britain.” Though pro-Brexit voters leaned toward market skepticism, their conservative British leaders claimed to be the true champions of openness. Steeped since Thatcher in Anglo-American discourse about federal-style government as the main problem for markets, they portrayed the EU as a shackle on “Singapore-on-Thames.”<sup>129</sup> American neoliberals egged them on.<sup>130</sup> Both sides in the Brexit negotiations accused the other of misunderstanding the real nature of pro-market governance.

## **Conclusion**

Over the past fifty years, European countries enacted stricter requirements to accept interstate goods, services, persons and capital than exist within America’s internal market. Meanwhile Americans reinforced limits and exceptions to such rules, despite stronger cross-border flows, central institutional resources, and pro-market discourse than exist in the European Union. We have explained this contrast by building on largely separate scholarship on neoliberal ideas in these arenas. The fusion of “free markets” and “states’ rights” is familiar to Americanists, as is the marriage of liberalization and EU authority to specialists of European integration. When united in comparison, these context-specific histories become mutually reinforcing applications

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<sup>127</sup> Barnard 2017.

<sup>128</sup> Judah 2018.

<sup>129</sup> Slobodian and Plehwe 2020; Cornelisson 2021.

<sup>130</sup> Lawrence et al 2019.

of general expectations that ideational intersections shape market governance across the boundaries of international and comparative politics.

Important implications follow about both arenas. Scholars of European integration have long seen the EU as a uniquely strong IO, but have understated that status and the theoretical challenge of explaining it. The SMP is certainly incomplete, and confronts major resistance and challenges with enforcement, but we should not lose the forest in these trees. No nation-state, let alone any IO, has ever *tried* to “complete” similarly ambitious openness rules. It is relatively easy to explain reactions to this agenda, like Brexit, in a world still mainly structured around sovereignty, national identity, and national democracy. The deeper challenge is to explain EU authority that has passed “beyond the nation-state” in all senses. On internal-market issues, at least, it now contradicts our traditional expectation that “the principles and rules of international regimes will necessarily be weaker than those in domestic society,” as Robert Keohane once put it.<sup>131</sup> We should expect such a departure from the prevailing patterns of modern politics to flow from distinctive ideational intersections, like we have suggested, rather than more incremental dynamics of material incentives or institutional cumulation.

The United States has also long been portrayed as exceptional in comparative politics, and our findings strengthen that characterization in political economy. Our argument is built on Americanists’ work about the distinctive US fusion of neoliberalism and states’ rights, but also on their inattention – like that of the actors they study – to the questions that Europeans (and Europeanists) ask about interstate barriers.<sup>132</sup> Indeed, American disinterest in these issues stands out almost as much as Europeans’ obsession with them. Within the other Anglo-Saxon federations, Australia and Canada, the neoliberal turn included moves to mutual recognition of

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<sup>131</sup> Keohane 1984, 62.

<sup>132</sup> Zimmerman 2004, xii.

licensing, non-discrimination in procurement, and other SMP-style processes, despite generally weaker federal internal-market authority than in the US.<sup>133</sup> Only the EU-focused hostility of British neoliberalism echoes American neoliberals' deep and broad antipathy to federal pro-market action. Such intense focus on "states' rights" inside a federal state challenges the separation between IR and comparative politics almost as much as does strong EU authority. It should encourage IR scholars to explore their theoretical insights about federal politics as well.<sup>134</sup>

Lastly, we hope this work encourages policy discussions in both arenas. For EU audiences, we question common-wisdom references to America's market as evidence that removal of interstate barriers will bring high flows of trade and mobility. Removal of interstate barriers deserves some historical credit for American flows, and the SMP has increased intra-EU flows (from much lower levels), but overall, the comparison suggests the *insensitivity* of flows to interstate regulatory openness. Americans flow densely across interstate barriers, presumably thanks to shared language, identity, and homogeneity of conditions inside states. Europeans avail themselves modestly of SMP-crafted opportunities, presumably for the opposite reasons. Clear-eyed recognition of these differences will help Europeans debate the SMP's costs and benefits. For US audiences, our work suggests plausible benefits from SMP-style steps. Some features of American regulation are simply bad governance, like pervasive needs for duplicative licensing. Given social conditions favoring mobility, it is actually more plausible in America than Europe that regulatory tweaks will increase individual opportunities and macro-economic fluidity. Federally-coordinated mutual recognition in a variety of areas might attract bipartisan support, even if benefits from stronger EU-style harmonization and "commandeering" are more debatable

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<sup>133</sup> Brown 2002.

<sup>134</sup> As in Deudney 1995; Keohane 2002.

(and politically unimaginable). The old United States could learn something from the new Europe.

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