

## Constitutional Traditions and Competition Law Regimes: A Primer

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*What is the connection between constitutional traditions and competition law regimes? This article compares the constitutional traditions of the US and Latin America to show how some of their most salient aspects influenced the development of their respective competition law regimes between the 1910s and the 1990s. In particular, it shows how constitutional doctrines regarding property rights and freedom of contract, and the role of governmental intervention in achieving development contributed to shaping the merits of different competition law regimes. The differences in how the US and Latin American traditions perceive the role of the State vis-a-vis property rights and competition, are useful for understanding particular aspects of competition law regimes. Hence, a comparative approach to the relations between constitutional traditions and competition law regimes can be useful to unveil key underlying ideas about competition law regimes and their particular institutions.*

### **I. Introduction**

What are the connections between constitutional traditions and competition law regimes? This article provides a preliminary answer to this broad question. Comparative competition law studies often emphasize how different factors, like the availability of well-trained professionals, shape how their enforcement takes place; competition law is not a stand-alone

legal regime.<sup>1</sup> However, we seldom ask ourselves how constitutional traditions shape competition law regimes and their enforcement.<sup>2</sup>

This article compares the constitutional traditions of the US and Latin America to show how some of their most salient aspects have influenced the development of their respective competition law regimes during their formative periods. In particular, it shows how constitutional doctrines regarding property rights and freedom of contract, and the role of governmental intervention in achieving development, contributed to shape different competition law regimes. Section II of this article describes two different constitutional traditions, protective and aspirational constitutionalism, and traces their intellectual origins in the political theories of John Locke and Jean Jacques Rousseau. These two categories are meant as ideal types, not actual representations of any particular constitution or its history. Section III provides examples of each of these traditions. US constitutional law stands for a good example of protective constitutionalism, while Latin American constitutionalism, as evidenced in the constitutions of México, Colombian and Chile, is a good example of aspirational constitutionalism. In characterising each of the constitutions of these countries as protective or aspirational, it is important to consider that they are not entirely protective or entirely aspirational. Each one of these constitutions is part of a tradition that has protective and aspirational elements, and the differences are more about which one of them becomes salient and which remains latent. Section IV then shows how certain protective constitutional ideas shaped US antitrust law, and compares it with how certain aspirational ideas prevented the full development of competition law in Latin America between the 1910s and the 1990s. Finally, section V offers some conclusions regarding the contingency of the relationships between constitutional law traditions and competition law regimes.

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<sup>1</sup> See for example William E Kovacic, 'Getting Started: Creating New Competition Policy Institutions In Transition Economies' (1997) 23 Brooklyn Journal of International Law 403.

<sup>2</sup> Our scarce knowledge about the relations between constitutional traditions and competition law regimes derives from the fact that in the world's most influential jurisdictions, the United States of America (US) and the European Union (EU), competition law is not strictly speaking a constitutional matter. In the US, competition law (known as antitrust law) appeared in 1890 with the enactment of the Sherman Act, a federal statute. In turn, EU competition law came to be through several regional agreements among western European states, like the European Coal and Steel Community of 1951, and therefore it is considered to be different from the constitutional law of the member states.

Before continuing, it is important to provide two caveats regarding the nature of the arguments sketched here. First, this text is not intended to offer an in-depth analysis of different constitutional traditions or their historical importance. Such analysis would be beyond its intended scope. It does intend, however, to show that particular constitutional ideas and structures were influential during certain moments of time, especially when there were political discussions about the proper role of government intervention *vis-à-vis* markets. Second, the Latin American tradition is not exhausted by the examples from México, Colombia and Chile presented here regarding the development of Latin American constitutional law or competition law. However, the examples of these countries are taken as indicative of the Latin American tradition, although it should be noted that there can be counterexamples that undermine the arguments presented here.

## **II. Protective and Aspirational Constitutionalism: Definitions and Intellectual Origins**

Constitutions embody our normative commitments to build better societies in different ways. Some constitutions are conceived upon the idea that individuals have a series of pre-established rights and freedoms that merit special protection, not only from other individuals, but from their respective governments as well. These constitutions aim to build a better society based on protecting these rights and freedoms by limiting what other individuals and governments can lawfully do. They tend to follow from constitutional assemblies that aim to establish a new legal order based on a political reality that is already in place. Hence, these constitutions are based on ‘fixing’ in time an ‘essence’ about the members of the polity that is being constituted, or a series of ideals that are shared and that (supposedly) describes their social relations.<sup>3</sup>

Other constitutions, in turn, are conceived upon the idea that the rights and freedoms that citizens have are defined through the political processes that a community establishes for governing itself, and therefore express the general will of its constituents. The establishment and definition of rights and duties is a political process that involves deliberation and representation

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<sup>3</sup> Mauricio Garcia Villegas, ‘Law as Hope: Constitution And Social Change In Latin America’ (2002) 20 *Wis. International Law Journal* 353, 353–355; Kim Lane Scheppele, ‘Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models’ (2003) 1 *International Journal of Constitutional Law* 296.

of different views about how society ought to be organized. This type of constitutions usually follow from assemblies that view constitutionalism as a manifestation of a society's will to transform their political relations by establishing new rules about how their future government will be.<sup>4</sup> Their assemblies embody a desire to transform social relations, and as such can embody the promise of beginning from a 'clean slate' or as a rejection of past practices considered as mistaken. For our purposes, we will refer to the idea of conceiving constitutions as protecting pre-established rights and freedoms as *protective constitutionalism*, and will refer to the idea of conceiving constitutions as enabling social transformation through political participation as *aspirational constitutionalism*.<sup>5</sup>

Distinguishing between protective and aspirational constitutional traditions is an exercise that goes beyond the text of the constitutions themselves and that focuses on the political and social contexts that enable this interpretation to take place. While constitutional interpretation can seem straightforward, distinguishing a protective constitutional practice from an aspirational one depends ultimately on their implementation. This is of particular importance because constitutional interpretation changes over time and what might be considered as constitutionally required today may not have been so in the past nor may continue to be so in the future. Just as well, it is important to consider that certain constitutions may not be internally coherent, since certain parts or chapters may result from protective goals, while others may result from aspirational ones. Ultimately, the possibility of incoherence may result from several factors that include the process that led to the constitutional text, the composition and proceedings of the constitutional assemblies, and the amendment processes. Because of these factors, one can hardly expect that a particular constitution is entirely protective or aspirational, and it seems more reasonable to expect that the protective and aspirational strands alternate their preeminence over time. Hence, the

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<sup>4</sup> *ibid*, 299: 'Aspirational Constitutionalism refers to a process of constitution building (a process that includes both drafting and interpretation by multiple actors) in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations that they want to live up to. It is a fundamentally forward-looking viewpoint.'

<sup>5</sup> Garcia Villegas (n 6) 353 – 55.

categories of protective and aspirational constitutionalism refer more to ideal types than to the constitutional practice of a given jurisdiction.<sup>6</sup>

Private property rights and freedom of contract occupy a prominent place in protective constitutionalism. This is so because this view considers that they antecede the establishment of a government, and also that government should be limited precisely to avoid undue interference. In turn, aspirational constitutionalism considers that these rights result from the political processes that constitute a government in the first place, and therefore they reflect the general will of the polity. Other negative rights and freedoms, like the right to exercise one's own religion or to express our own views freely, occupy a prominent place as well in both theories. In turn, social and economic rights, like the right to medical assistance or the right to housing, are not formally recognized or are enforced actively in protective constitutional regimes, but may be formally recognized and actively enforced in aspirational constitutional regimes.<sup>7</sup> This difference does not mean, however, that positive rights are unknown in protective constitutions. The difference is not just about the formal recognition of certain rights, but also includes the theories that justify their acknowledgement and enforcement in the first place. In other words, it is more a difference between different rationales for why they are constitutionally protected as well as between how this protection takes place.

The differences in rationale point to the origins of protective and aspirational constitutional traditions, which can be traced back to the prevalent political theories of the 17<sup>th</sup> and 18<sup>th</sup> centuries in Europe and the United Kingdom. While each of these constitutional traditions has elements that reflect the influence of different authors and schools of thought, we also evidence the influence of two particular authors, John Locke and Jean Jacques Rousseau. Locke's 'Essay Concerning the True Original, Extent and End of Civil Government' was particularly influential for the development of protective constitutionalism. In this text, Locke argued that individuals in the state of nature are roughly equal and their relations are harmonious, to the extent that they undergo mutually beneficial exchanges of goods and

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<sup>6</sup> For a useful discussion and a related typology, see Gunter Frakenberg. 'Comparative Constitutional Law' In Mauro Bussani and Ugo Mattei (eds.) *The Cambridge Companion to Comparative Law* (CUP 2012) 178 – 182.

<sup>7</sup> Garcia Villegas (n 6) 356 – 357.

services to satisfy their needs.<sup>8</sup> Property results from efforts to transform and produce the fruits of the land, and as such follows from the rational actions of individuals.<sup>9</sup> However, they also face the threats of those who behave outside the law of nature and threaten the life, liberty and property of others; hence a civil government resulting from an agreement by all individuals in this state of nature is required to face and punish such threats.<sup>10</sup> At the core of this view of the government lies the consent of the governed, which retain the right to challenge the legitimacy of government if it becomes tyrannical and threatens the rights and freedoms of its constituents.<sup>11</sup> Hence, for Locke the rights stemming from private property and mutual consent antecede the establishment of government, and their protection justifies acts of civil disobedience.

Rousseau viewed the relations between individuals and between them and the State in a different way. To begin with, Rousseau argued that the relations between men in a state of nature were amoral, in the sense of escaping any judgments about their correctness, a judgment which can only be advanced once there is a social agreement about what is acceptable or not.<sup>12</sup> As a result, he did not conceive individual rights, and especially property rights, as pre-existing civil government, because the recognition of such rights entails a notion of correctness.<sup>13</sup> When individuals decide to bond and form a government, they aim to substitute the might resulting from force with the right resulting from common understandings. However, in order to do so they must surrender completely to the political body they will be part of – Rousseau uses the word ‘alienate’ – knowing that as all the individuals do so, none of them continues to be a threat to each other’s life.<sup>14</sup> Citizens acting collectively become sovereign, and their decisions – the ‘general will’ – should lead to the ‘common good’ of society.<sup>15</sup> An individual acting out of selfishness against the general will could be

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<sup>8</sup> John Locke, *Essay Concerning the True Original, Extent and End of Civil Government* (first published 1691, Rivington 1824, volume 4) 339 – 342.

<sup>9</sup> *ibid.*, 352 – 354.

<sup>10</sup> *ibid.*, 394 – 411.

<sup>11</sup> *ibid.* 464 – 471.

<sup>12</sup> Jean Jacques Rousseau, *The Social Contract or Principles of Political Right*. (First published 1762, JM Dent 1913; Translation by GDH Cole) 9 ‘Since no man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men.’

<sup>13</sup> *ibid.* 19 - 22.

<sup>14</sup> *ibid.* 14 – 16.

<sup>15</sup> *ibid.*

legitimately punished by force because the law has a moral dimension that justifies punishing departures from it; individuals could be ‘forced to be free’.<sup>16</sup> Moreover, for Rousseau inequality is more related with the laws adopted by a society than a consequence of the dynamics between men in their state of nature.<sup>17</sup>

Notably, Locke and Rousseau were highly influential authors among the leaders of the independence revolutions that took place in the American continent. However, even then there was a clear predisposition towards these authors that fell along the lines drawn by the cultural legacies of the colonies. In part this may be due to the fact that by the time that Rousseau’s ideas became more influential in the American continent (just after the French Revolution), the former English colonies had already identified themselves with the political tradition that followed Locke’s ideas. In fact, not only was Locke’s political theory highly influential among the ‘Founding Fathers’, he also drafted the Constitution of the State of Carolina.<sup>18</sup> The former Spanish colonies, in turn, revolted against Spanish institutions and adopted their French counterparts, thus embracing different ideas about government, including those of Rousseau.<sup>19</sup>

### III. From Constitutional Theories to Institutions

#### 1. US Constitutionalism as Protective Constitutionalism

The Lockean idea of conceiving property rights as a limitation to lawful government appears early in American constitutionalism. It can be evidenced in the 1776 Declaration of Independence, the discussions

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<sup>16</sup> *ibid* 16 – 18.

<sup>17</sup> Jean Jacques Rousseau. *A Discourse On A Subject Proposed By The Academy Of Dijon: What Is The Origin Of Inequality Among Men, And Is It Authorised By Natural Law?* (First published 1754, Project Gutenberg 2004) Note the conclusion that Rousseau presents: ‘I have endeavored to trace the origin and progress of inequality, and the institution and abuse of political societies, as far as these are capable of being deduced from the nature of man merely by the light of reason (...) It follows from this survey that, as there is hardly any inequality in the state of nature, all the inequality which now prevails owes its strength and growth to the development of our faculties and the advance of the human mind, and becomes at last permanent and legitimate by the establishment of property and laws.’

<sup>18</sup> They recognized so explicitly on the documents that led to the founding of the University of Virginia and specifically on the course on the US Constitution at that university. See, J David Gowdy, *Thomas Jefferson & James Madison’s Guide To Understanding And Teaching The Constitution*. (2<sup>nd</sup> edn, The Washington, Jefferson & Madison Institute 2011).

<sup>19</sup> JR Spells ‘Rousseau in Spanish America’ (1935) 15 *Hispanic Am Hist Rev* 260.

surrounding the ratification processes of the 1787 Constitution, and the constitutional text itself.

To begin with, the connection between Lockean ideas about government and the Declaration is quite straightforward. The Declaration states that all men are created equal and that they are endowed with inalienable rights; that in order to protect these rights men consent to the governments they agree to create, and that any form of government that endangers these rights can be modified or abolished by their citizens.<sup>20</sup> Such a view was revolutionary on many accounts, not the least because it provided legitimacy to the American Revolution.

After the War of Independence, there was a growing awareness that the Articles of the Confederation, also from 1776, were not adequate for governing inter-state matters effectively. The political discussions that followed their amendment led to the 1787 Constitution of the United States.<sup>21</sup> The ratification process of the newly adopted Constitution led to important discussions about the proper role of government *vis-a-vis* individual rights and freedoms. In *The Federalist* No. 10, for example, James Madison argued in favour of the creation of a republic as detailed by the recently approved Constitution because its structure was much more effective in curbing rival interests than alternative forms of government. Rather than considering the possibility that property rights result from political participation, Madison was concerned with preventing factions from imposing limits on these rights and other interests via governmental action.<sup>22</sup> Hence, he considered that ‘The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle

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<sup>20</sup> United States of America. Declaration of Independence, July 4 of 1776. The text is the following: ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government (...).’

<sup>21</sup> See Bruce Ackerman & Neal Katyal, ‘Our Unconventional Founding’ (1995) 62 *University of Chicago Law Review* 475.

<sup>22</sup> James Madison, ‘The Federalist No. 10’ In John Jay, Alexander Hamilton and James Madison (eds). *The Federalist* (first published in 1788, Liberty Fund 2001).

to a uniformity of interests. The protection of these faculties is the first object of government.’<sup>23</sup>

The concern that government would place undue limits to individuals rights can be appreciated in the substantive content of several of its provisions, including those of the Bill of Rights, as well as in the allocation of law-making authority among the different branches of power created by the Constitution. Regarding the substantive provisions, section 10 of Article 1 of the Constitution states that ‘No State shall (...) pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts’, a provision meant to prevent States from altering pre-existing contractual obligations to their advantage – a common practice before the Constitution was adopted.<sup>24</sup> Just as well, the 5<sup>th</sup> Amendment establishes that ‘No person shall (...) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.’ These provisions, however, were less important than the overall architecture of government and the allocation of law-making authority. For example, section 8 of article 1 of the Constitution establishes that the scope of the laws passed by the Federal Congress was delimited to subjects that require interstate coordination, and section 3, known as the ‘commerce clause’, refers to the regulation of interstate commerce.<sup>25</sup> In turn, the 10<sup>th</sup> amendment establishes that the States retain those powers that the Constitution does not allocate to the Federal government and that are not prohibited explicitly.<sup>26</sup>

Both the substantive provisions and the institutional architecture established by the US Constitution with the purpose of protecting property rights and other related freedoms were transformed with the adoption of the 13<sup>th</sup> and 14<sup>th</sup> Amendments after the Civil War. In particular, the 14<sup>th</sup> Amendment is considered to be about civil or economic rights, and especially property rights and freedom of contract.<sup>27</sup> Section 1 of this Amendment states that ‘(...) nor shall any State deprive any person of life, liberty, or property,

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<sup>23</sup> *ibid* 43.

<sup>24</sup> See Robert Hale, ‘Some Basic Constitutional Rights of Economic Significance’ (1951) 51 *Col L Rev* 271, 278.

<sup>25</sup> The Constitution of the United States of America. Article II section 8, clause 3.

<sup>26</sup> *ibid*, 10<sup>th</sup> Amendment. The text is as follows: ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

<sup>27</sup> Herbert Hovenkamp ‘The Political Economy of Substantive Due Process’ (1988) 40 *Stanford Law Review* 370, 394 – 396.

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ The Supreme Court relied on The Due Process clause of article 5 and the 14<sup>th</sup> Amendment, the commerce clause, and article 10 of the Constitution in order to review the constitutionality of both federal and state-based regulation. However, the Court’s interpretation of these provisions has changed in important ways over time. Between the 1870s and the 1930s the Court held that Federal regulation that restricted the entitlements established in the common law of the different States went beyond the constitutional powers vested in the Federal Congress.<sup>28</sup> Moreover, States did not have the prerogative to change common law entitlements either, because doing so would imply trespassing over the individual’s property rights and freedom of contract.<sup>29</sup> A good example of this interpretation of the Constitution can be found in the 1906 decision *Lochner v New York*, in which the Supreme Court declared that a New York State law that limited the maximum hours that bakers could work was unconstitutional because it deprived them of their freedom of contract.<sup>30</sup>

In the late 1930s, and as a result of dire political pressure, the Supreme Court adopted a more liberal interpretation of the Constitution. It considered that while the Constitution certainly grants the States the prerogative to maintain common law entitlements, their exercise cannot affect commercial matters that go beyond State limits, even if doing so has intra-state consequences.<sup>31</sup> Furthermore, the States can modify the common law entitlements when doing so is done under the ‘police powers’ that they have in order to guarantee public safety and other similar goals.<sup>32</sup> For around sixty years the Supreme Court upheld all the Federal legislation challenged before it until the mid-1990s, when it struck down two federal laws that were enacted under section 8 of article 11 of the Constitution.<sup>33</sup> The adoption of the common law entitlements as the basis for addressing the

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<sup>28</sup> See *United States v EC Knight* 156 US 1 (1895) (Holding that the Sherman Act could not reach a monopoly that was organized with the boundaries of a single state).

<sup>29</sup> *Lochner v New York* 198 US 45 (1906) .

<sup>30</sup> *ibid.*

<sup>31</sup> *NLRB v Jones & Laughlin Steel Corp* 301 US 1 (1937) (Upholding a national labor legislation because of its effects on commerce).

<sup>32</sup> *West Coast Hotel v Parish* 300 US (1937) (Upholding a State legislation that imposed minimum wages for women).

<sup>33</sup> *United States v Lopez* 514 US 549 (1995) (Holding that the Gun-Free School Zones Act of 1990 exceeded the commerce clause) and *United States v Morrison* 529 US 598 (2000) (Holding that Violence Against Women Act relates to non-economic activity).

extent to which Federal legislations is unconstitutional was very important for the development of several fields of law,<sup>34</sup> antitrust among them.

This quick glance of US constitutionalism shows why it can be considered an example of the protective type. However, it is also important to consider that during particular periods of time US constitutionalism has adopted ideas that are closer to those of aspirational constitutionalism. A particular decision that was significant for this change in constitutional interpretation was *West Coast Hotel V Parish*, in which the Supreme Court upheld a Washington State law that established minimum wages for women. In this decision, the Court challenged resorting to common law entitlements as a way of determining the constitutionality of a law.<sup>35</sup> Notably, recognition of the constitutionality of reforms regarding minimum wages and other similar social programs led to the establishment of a ‘new property’ composed by entitlements established in both federal and state regulations. These entitlements resulted from political processes established by the Constitution or acknowledged by it, and therefore can be placed along the lines of aspirational constitutional theory.<sup>36</sup> Moreover, the legacy of President Roosevelt’s New Deal and the advent of the modern administrative government in the US marked an important change in the US constitutional tradition.<sup>37</sup>

## 2. Latin American Constitutionalism as Aspirational Constitutionalism

Just as US constitutionalism is a good example of protective constitutionalism, 20<sup>th</sup> century Latin American constitutionalism, exemplified in the constitutions of México, Colombia and Chile, stands as a good example of aspirational constitutionalism.<sup>38</sup> However, in order to

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<sup>34</sup>Cass R Sunstein, ‘Constitutionalism After the New Deal’ (1988) 101 Harvard Law Review 421.

<sup>35</sup> *West Coast Hotel v Parish* 300 US (1937) (Upholding a State legislation that imposed minimum wages for women).

<sup>36</sup> For a general view, see Charles Reich, ‘The New Property’ (1964) 73 Yale Law Journal 733.

<sup>37</sup> See Robert L Rabin, ‘Federal regulation in historical perspective’ (1986) Stanford Law Review 1189.

<sup>38</sup> One of the particular difficulties of grouping the constitutions of different Latin American states under the heading of ‘Latin American constitutionalism’ is that doing so is a process that tends to generalize particular traits while foreclosing others that may be different and politically significant in their own jurisdiction. Because there is considerable diversity within Latin American constitutionalism regarding their intellectual baggage and day-to-day practice, this sub-section will touch mostly on influences that are common to all

understand why this is so, it is important to consider briefly the development of the interplay between protective and aspirational traits that took place during the 19<sup>th</sup> century.

The French Revolution of 1789 provided the Spanish colonies in Latin America with important ideas about law and government that legitimised the wars of independence that were fought shortly after. Among them were Rousseau's influential ideas about popular sovereignty.<sup>39</sup> However, these ideas became under increasing attack by both conservative factions, which embraced elitist ideas about governments and moral perfectionism through religion, as well as by liberals, who feared that they fueled 'radical' politics that would eventually obliterate individual rights. As these ideas were transformed into constitutional institutions, the emerging landscape was a constitutionalism that blended ideas about almost absolute property rights and popular sovereignty, bicameral parliaments and a strong executive branch, and a judiciary with relatively weak powers. By the end of the 19<sup>th</sup> century, Latin American constitutionalism was more conservative and liberal than egalitarian or 'radical'.<sup>40</sup>

During the same period of time, the Constitutions of México, Colombia and Chile established explicitly that property rights acquired according to the laws had to be respected by the government and could not be affected by later legislative enactments. The constitutional protection of property rights raised the symbolic importance of the civil codes, which were considered to embody the most important aspects of French and German private law.<sup>41</sup> Moreover, the civil codes were considered to be the only necessary body of law required to regulate the relations between citizens, as they covered topics that ranged from family law to contracts and torts. Beginning with the Civil Code of Oaxaca (Mexico), promulgated between 1827 and 1829, Latin American governments of different political affiliations adopted civil codes

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of them, knowing that such generalizations can be to some extent unmerited, even if what they reveal is useful for understanding larger patterns of legal and social change.

<sup>39</sup> Spells (n 22). Also María del Carmen Borrego Plá & Leopoldo Zea, *América Latina ante la Revolución Francesa* (UNAM 1993).

<sup>40</sup> Roberto Gargarella, 'The Constitution of Inequality: Constitutionalism in the Americas 1776–1860' (2005) 3 *International Journal of Constitutional Law* 1. Also Roberto Gargarella, 'Towards A Typology Of Latin American Constitutionalism 1810–60' (2004) 39 *Latin American Research Review* 141.

<sup>41</sup> Matthew C Mirow, 'The Code Napoleon: Buried But Ruling in Latin America' (2005) 33 *Denver Journal of International Law & Policy* 179, 183.

of their own until the early 20<sup>th</sup> century.<sup>42</sup> Their adoption was convenient from different perspectives. On the one hand, the original 1804 *Code Civil* adopted by Napoleon addressed the core subjects of private law, and adopting it entirely (albeit minor changes) was much more convenient than to enact piecemeal legislation to address all the issues covered by it.<sup>43</sup> On the other hand, the local elites identified themselves closely not with Spain but with France and its institutions, and they viewed the *Code Civil* as being better suited for the conditions that the former colonies faced at the time.<sup>44</sup> Following the example of the *Code*, the civil codes enacted in Latin America established private law regimes dealing with property rights and freedom of contract. They also included provisions regarding conflict of laws and the hierarchy of other legal rules *vis-a-vis* the codes themselves which placed them in a predominant position.<sup>45</sup> Because of their cultural importance, they became the ‘protective’ counterpart to the ‘aspirational’ constitutional changes that were to take place in the coming decades.

In spite of the diversity that can be appreciated during this period, presidentialism became a common trait among the different constitutional regimes of the time.<sup>46</sup> The importance of strong executive branches among Latin American countries can be appreciated in the role that executive decrees and administrative agencies had during the 20<sup>th</sup> century in the development and implementation of economic regulation. One of the keenest adherents to presidentialism was Simon Bolivar, who fought for and contributed to the independence of several South American countries. Bolivar revealed his views on presidentialism when criticizing the 1811 Venezuelan Constitution, which he considered weak because it divided the executive branch into three main offices.<sup>47</sup> Throughout the 19<sup>th</sup> century, different Latin American constitutions endowed the office of the President with the capacity to dictate laws during special emergencies and other

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<sup>42</sup> Bolivia (1831), Costa Rica (1841) Republica Dominicana (1845), Chile (1855) Venezuela (1862) Uruguay (1868) Argentina (1869) México (1870, 1928) Colombia (1873, 1887).

<sup>43</sup> Mirow, ‘The Code Napoleon’ (n 44) 182.

<sup>44</sup> *ibid* 183.

<sup>45</sup> See, with a special reference to Colombia, Mauricio Garcia Villegas, ‘Apuntes sobre codificación y costumbre en la historia del derecho colombiano’ (2005) 4 *Opinión Jurídica* 53.

<sup>46</sup> Miguel Schor, ‘Constitutionalism Through the Looking Glass of Latin America’ (2006)

41 *Texas International Law Journal* 1, 21.

<sup>47</sup> Gargarella, ‘The Constitution of Inequality’ (n 40) 5, 10.

qualified legislative powers.<sup>48</sup> Also, the laws approved by the congresses of several Latin American countries enabled the President to name the directors of administrative agencies and to regulate through ordinary decrees particular aspects of their operations. These prerogatives have been used since then to promulgate particular rules that regulate economic activities and coordinate the participation of private actors in these activities.<sup>49</sup> In particular, this institutional trait will become very important for the development of competition law regimes across Latin America.

The political revolutions that took place between the late 19<sup>th</sup> century and the early 20<sup>th</sup> century challenged the predominance of the institutions that enshrined property rights and the special place of the civil codes across Latin America. It is during this period that the aspirational ideas regained momentum and were translated into constitutional provisions that remain valid today. Beginning with the Mexican revolution against the rule of Porfirio Diaz (1876 – 1910), these movements challenged the political and economic status quo and the legal protection they received. The Mexican Constitution of 1917, with its emphasis on popular sovereignty and state-oriented management of resources, was meant to charter the development of the Mexican State by providing a common ground based on the compromise of antagonistic social interests. Overall, the intellectual foundations of the new constitution have been described as ‘democratic socialism’ with nationalist undertones.<sup>50</sup>

Articles 27 and 28 of the 1917 Constitution are of particular interest because they deal with property rights and competition concerns explicitly. The original text of article 27 stated that the Nation could limit property rights in the name of the ‘public interest’ and regulate privately held natural resources in order to distribute wealth fairly and ensure the preservation of

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<sup>48</sup> See Jose Antonio Cheibub, Zachary Elkins and Tom Ginsburg, ‘Latin American Presidentialism in Comparative and Historical Perspective’ (2011) 89 *Texas Law Review* 1.

<sup>49</sup> See in general Albert Fishlow ‘The Latin American State’ (1990) 4 *Journal of Economic Perspectives* 61; Howard J Wiarda, ‘Law and Political Development in Latin America: Toward a Framework for Analysis’ (1971) 19 *American Journal of Comparative Law* 434. Regarding the Colombian case, Diego Eduardo López Medina, ‘El Sueño Weberiano: Claves Para Una Comprensión Constitucional De La Estructura Administrativa Del Estado Colombiano’. (2006) 19 *Revista de Derecho Público* 1.

<sup>50</sup> Raymond Duncan, ‘The Mexican Constitution Of 1917: Its Political And Social Background’ (1963) 5 *International American Law Review* 277.

the latter.<sup>51</sup> In the years to follow this article was modified several times to justify massive land reform programs and industrial expropriation processes.<sup>52</sup> In turn, article 28 explicitly forbids monopolies and anticompetitive practices that we identify today with abuses of dominance.<sup>53</sup> Moreover, the prohibitions included in this article framed monopolies and abuses of dominance as practices that were fundamentally unfair and exploitative. These two articles constitute an excellent example of the way property right and competition law concerns are framed in the tradition of aspirational constitutionalism.

A similar change occurred in Chile with the drafting of the 1925 Constitution. Section 10 of article 10 of this Constitution establishes that no individual shall be deprived of their property rights without due process of law, or unless it is required for achieving a public purpose as defined by the law, in which case the owner is entitled to compensation.<sup>54</sup> Following this, it states that property rights are subject to ‘public utility’ limitations required for maintaining and achieving social order, and therefore the law may impose restrictions ‘in favour of the interests of the State, the health of the citizens and the public well-being’.<sup>55</sup> The notion of subduing private property to these ‘public interests’ resulted from the discussions that took place in the 1925 constitutional assembly chaired by President Arturo Alessandri.<sup>56</sup> Within the assembly, members of the Radical Party argued that property rights could not be absolute, and that they should fulfill a ‘social function’, while members of the Liberal-Moderate and Conservative parties defended notions of property rights that were closer to the protective tradition. As the discussions ensued, President Alessandri proposed a draft of article 10 that appeased the contending parties. While the protective formulation of property rights was maintained, the idea of limiting them in the name of ‘public well-being’ was also included as a way of showing that Chilean constitutionalism was keeping up with the social changes of the

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<sup>51</sup> Constitución Política de los Estados Mexicanos, Art 27. Article 14 also states that no individual may be deprived of his liberty, his possessions or his property without a trial before tribunals previously established, in which the essential formalities of the procedures are met and following laws adopted before the facts tried.

<sup>52</sup> For an interesting account, see Luis J Creel, ‘Mexicanization: A Case of Creeping Expropriation’ (1968) 22 *Southwestern Law Journal* 281.

<sup>53</sup> Constitución Federal de los Estados Mexicanos de 1917, Art 28.

<sup>54</sup> Constitución Política De La Republica De Chile, Art 10.

<sup>55</sup> *ibid.*

<sup>56</sup> President Alessandri resumed his first presidential term in 1925 after two military interventions, one to oust him of office and other to reinstate him in it.

time.<sup>57</sup> Underlying this was the intellectual influence of René Duguit, whom Alessandri quoted often while explaining the text he proposed. Eventually, the notion of the ‘social function’ of property embedded in this article was used for wide-ranging land reform and industrial development programs throughout the 20<sup>th</sup> century.<sup>58</sup>

A similar trend to limit property rights in the name of the ‘public interest’ is also appreciated in Colombian constitutionalism. However, the adoption of this view resulted from a different political logic than that of México and Chile; it was not preceded by revolutionary upheavals or by disruptive interventions in political affairs. Instead, it took place mostly because the Liberal Party government elected in 1934 considered that the 1886 Constitution protected property rights in such a way that it was too individualistic and therefore obtrusive to mayor social reforms.

When presenting the text of the constitutional amendment to Congress in 1935, president Alfonso López Pumarejo both emphasized that property rights should be guaranteed and that their exercise should be understood in terms of the ‘social function’ that they should fulfill. The proposed text establishes a protective clause, according to which lawfully acquired property rights cannot be modified or curtailed by later legislation, and that when a law based on ‘public utility’ or social interests conflicted with private rights, the private interest will cede before the public or social interest. And added: ‘Property is a social function that brings about duties’.<sup>59</sup> In 1936 the Colombian congress promulgated the proposed amendment, and it became the cornerstone of the land reform policies that President López began to implement.<sup>60</sup> The amendments of 1945 and 1968 further entrenched these ideas and established the notion that the State directs the nation’s economic activities.<sup>61</sup>

Beyond the local political shifts that led to new constitutions, as in Mexico and Chile, or to important amendments to established constitutions, as in

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<sup>57</sup> Mathew C Mirow, ‘Origins of the Social Function of Property in Chile’ (2011) 80 *Fordham Law Review* 1183, 1201 - 05.

<sup>58</sup> *ibid* 1205 – 14.

<sup>59</sup> Republica de Colombia, Acto Legislativo 01 of 1936, *Diario Oficial* No 23.263 de Agosto 22 de 1936.

<sup>60</sup> Daniel Bonilla, ‘Liberalism and Property in Colombia: Property as a Right and Property as a Social Function’ (2011) 80 *Fordham Law Review* 1135.

<sup>61</sup> *ibid*, 1149 – 59.

Colombia, lies a deeper current of change regarding how law was understood. This change can be appreciated in the impact that authors like León Duguit had in legal theory during the first half of the 20<sup>th</sup> century. Duguit gave a series of conferences in Argentina in 1911 in which he presented his work ‘General Transformations of Private Law Since the Code Napoléon’; it was there that he asserted that ‘property is not a right; it is a social function.’<sup>62</sup> His work was part of a current of antiformalist legal thought that revolted against the individualism embedded in the 1804 French *Code Civil*. This movement viewed law as a means to social transformation, as opposed to universalist or ahistorical views about law and rights present in natural law (as in social contract theory).<sup>63</sup> While this movement originated in Europe it acquired a particular significance in Latin America that it didn’t have in its original context.<sup>64</sup> In particular, Duguit was very careful in distinguishing his ideas from socialist theories of law; by claiming that property rights were a ‘social function’ he was not aiming to present a new theory of how these rights should be, but rather proposing an analytical framework for understanding the social transformations he witnessed.<sup>65</sup> However, his theory was used in Chile and Colombia as a justification for the implementation of large-scale reforms regarding the use of land and industrial development.<sup>66</sup>

The reception of the work of Duguit meant an intellectual break with the prevailing views about private law and property rights in Latin America and became part of administrative law theories concerning the role of the State in economic affairs. Rather than considering the State as necessary for the protection of pre-existing rights, the Latin American constitutional tradition developed the view that the State should take an active role in the definition of a common social project, namely, the development of the nation.<sup>67</sup> Such a

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<sup>62</sup> Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* (2d ed. 1920) 21. Quoted in: Matthew C Mirow, ‘The Social-Obligation Norm of Property: Duguit, Hayem, and Others’ (2010) 22 *Florida Journal of International Law* 191.

<sup>63</sup> See Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850-2000’ In: David M. Trubek, and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal*. (CUP 2006).

<sup>64</sup> An excellent explanation of this phenomenon can be found in Diego E López Medina. *Teoría Impura Del Derecho. La Transformación De La Cultura Jurídica Latinoamericana*. (Universidad de los Andes, Legis & Universidad Nacional de Colombia 2004).

<sup>65</sup> Mirow, ‘Origins’ (n 59) 1192.

<sup>66</sup> Regarding Chile, see *ibid.* Regarding Colombia, see Bonilla, ‘Liberalism and Property’ (n 62).

<sup>67</sup> Schor, ‘Constitutionalism’ (n 49).

task, however, implies an institutional allocation of law-making authority that contrasts with that of US constitutionalism. The Latin American states attempted to incorporate the interests of different social groups – labor, industrialists, the military, the Catholic Church and others – by creating special regulatory spaces through which their conflicts can be mediated. As Howard Wiarda points out, there is a general affinity between the ‘social function’ theory of property rights and corporativism (as a theory of government).<sup>68</sup> Because the state embodies the interest of the whole society, it can confiscate, expropriate or curb severely the exercise of an individual’s property rights in order to obtain the common good. In doing so, the state acts as an arbiter between competing claims to resources posited by different actors in order to accommodate and prevent conflicts rather than to foster disorder.<sup>69</sup> As the next chapter will show, the corporativist structure of the Latin American state is key for understanding the development of competition law regimes in this region.

#### **IV. How Constitutional Ideas and Structures shaped US Antitrust and Competition Law in Latin America**

##### **1. US Antitrust Law and the Imprint of the Lochner Era.**

As mentioned before, by the end of the 19<sup>th</sup> century the Supreme Court interpreted the Constitution and the 14<sup>th</sup> amendment in a narrow way, condemning both federal and state-level regulations that altered the property rights as defined by the common law of the time.<sup>70</sup> A similar doctrinal process took place during the formative years of antitrust law.

The antitrust decisions adopted by the Supreme Court between 1890 and 1911 show a gradual evolution towards an interpretation of the Sherman Act that highlighted its common law elements while downplaying other important elements.<sup>71</sup> This process was not smooth, for the Act’s text is not

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<sup>68</sup> Corporativism can also be a political theory (and not a fact, as Schmitter describes it) according to which the government should incorporate and accommodate different conflicting interest present in society in order to avert unnecessary conflict. See Wiarda, ‘Law and Political Development’ (n 52) 446 – 447.

<sup>69</sup> *ibid*, 446. It seems, however, the in making this connection Wiarda is also assuming that Duguit had an agenda for social change when he presented his concept of social function of property, rather than merely describing the changes of the exercise of these rights.

<sup>70</sup> Cass R Sunstein, ‘Lochner’s Legacy’ (1987) 87 *Columbia Law Review* 873.

<sup>71</sup> Among the most important of these decisions are: *Trans-Missouri Freight Association* 166 US 290 (1897), *United States v Joint Traffic Association*, 171 US 505 (1898),

entirely a reinstatement of the common law doctrine of restraints of trade. On the one hand, its wording is deferential to the common law, and the enforcement structure it established is adjudicatory and adversarial, and therefore its development depends on cases being brought before courts. On the other hand, the Sherman Act differed in important aspects from the common law. To begin with, while the common law established that agreements in restraint of trade were unenforceable, the Act considers them a criminal offense, subject to fines and imprisonment. Furthermore, the Act establishes a remedy under federal jurisdiction for the victims of the alleged conducts; in doing so, it implicitly acknowledges that the anticompetitive behaviours that occur in markets are not self-correcting, at least in the short term. Also, the sanctions enabled governmental intervention through enforcement as a way to improve the outcomes resulting from market forces. Because of these innovations, the Sherman Act can be better understood as a compromise between different views about markets and the role of governmental intervention than as simply a federal reinstatement of the common law.<sup>72</sup>

The decisions that settled how the Sherman Act should be interpreted were *Standard Oil Co of New Jersey v United States* and its companion case *American Tobacco*.<sup>73</sup> Justice White, who had dissented in past decisions, wrote for the majority that the language of the Sherman Act requires the exercise of judgment in order to differentiate between reasonable and unreasonable restraints of trade. The Act ‘(...) called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated.’<sup>74</sup> Such an exercise was the ‘standard of reason’ as developed in the common law and ‘was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided’.<sup>75</sup>

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*Addystone Pipe & Steel Co v United States*, 175 US 211 (1899), and *Northern Securities Co v United States*, 193 US 197 (1904).

<sup>72</sup> See William H Page, ‘Ideological Conflict and the Origins of Antitrust Policy’ (1991) 66 *Tulane Law Review* 1, 37.

<sup>73</sup> *Standard Oil Co of New Jersey v United States*, 221 US 1 (1911).

<sup>74</sup> *ibid* 60.

<sup>75</sup> *ibid*. It is important to note the affinity between this idea and *Lochner* especially the idea that the common law could be taken as a legitimate baseline for assessing private

The *Standard Oil* decision can be properly understood as a development of the *Lochner* era because in it the Supreme Court endorsed an interpretation of the Sherman Act based on the common law doctrine of restraints of trade, even when the Act itself reflected a different view. In this sense, the Act was interpreted following the same ideas that were used for interpreting the Constitution and the 14<sup>th</sup> amendment.<sup>76</sup> However, it is also important to note that there were other different possible interpretations of the Act, and that the interpretation established since then sets aside the literal wording of the Act and instead privileges considerations of reasonableness. In fact, categories like the ‘rule of reason’ and ‘per se illegal’ are judicial creations that resulted from this interpretation. The 1911 *Standard Oil* decision was a subject of much political discussion, and when Congress enacted in 1914 the Federal Trade Commission Act and the Clayton Act, it did so apparently under the motivation of improving the enforcement system and curbing the effects of this decision.<sup>77</sup>

## 2. Latin America, Protectionism and Competition (1910 – 1990)

Until now we have offered a general panorama of Latin American constitutionalism and the doctrines surrounding the protection of property rights during the late 19<sup>th</sup> century and the early 20<sup>th</sup> century. More often than not, the path to development was considered to be about transforming the structure of the local economies by fostering export-based industrialization. As a consequence, there was little space for conceiving and enforcing laws about competition locally. This general outlook explains why the adoption of the first competition laws between the 1910s and the 1990s were seldom enforced.

The case of México is particularly telling. Since 1857, Mexican constitutions contain provisions that explicitly address concerns regarding competition. Article 28 of the 1857 Mexican constitution prohibits private monopolies, ‘estancos’ (monopolies explicitly awarded by law), and special protections to national industries. The exceptions to this prohibition

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arrangements and public interventions in the economy. For a more detailed account of the influence of the *Lochner* ideas in *Standard Oil*, see Alan J Meese, ‘Standard Oil as *Lochner*’s Trojan Horse’ (2012) 85 Southern California Law Review 783, 797 – 798.

<sup>76</sup> See also Hovenkamp, ‘The Political Economy’ (n 30). James May, ‘Antitrust in the Formative Era: Political and Economic Theory in Constitutional And Antitrust Analysis 1880 – 1918’ (1989) 50 Ohio State Law Journal 257.

<sup>77</sup> Rudolph J R Peritz, *Competition Policy in America: History Law Rhetoric* (OUP rev edn 2001), Chapter 2.

concern, on the one hand, the monopolies concerning the issuance of currency and postal service held by the State, and on the other, the rights of pecuniary rights of inventors. While the 1917 constitution superseded its 1857 predecessor, its article 28 builds upon the prohibitions established there while adding some important elements as well. It maintains the prohibitions against private monopolies and the exception regarding the State monopoly over currency and the postal service. As mentioned before the new article also expands the prohibitions against a series of practices, which we would identify today as abuses of dominance, but which are framed in terms of social justice because it emphasizes their unfairness and exploitative character. Regarding the exceptions, article 28 included an exception concerning labor unions and cooperatives established by producers of goods.<sup>78</sup> These exemptions suggest to some extent the influence of the 1914 Clayton Act.<sup>79</sup>

The strong tone of article 28 was curbed through its implementation, or lack thereof. Beginning in the 1920s the Mexican government issues a series of laws that enabled it to set the prices and commercialization conditions of particular goods and services. In 1934, the government issued a law developing this constitutional mandate, but the law focused only on some sectors and considered a series of situations in which the government could limit competition. The law also established an unclear enforcement mechanism, according to which the federal government could impose a sanction if the National Economic Council considered it necessary, but did not clarify which of the many organs of the executive branch was responsible for doing so. As a result, the law was enforced sparingly. In 1934, the congress issued a new law that curtailed this article considerably, limiting it to certain sectors and allowing the government to determine the number of competitors in a market. Later on, in 1950, the congress passed another law that allowed the government to set prices for an important number of sectors, thus leading to a governmental control of the main economic activities.<sup>80</sup> However, article 28 continues to be in force and in spite of several modifications (none of which address the core prohibitions) it remains the cornerstone of contemporary competition law enforcement in this country. Only until 1992 did competition law became politically

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<sup>78</sup> Constitución Federal de los Estados Mexicanos de 1917. Artículo. 28.

<sup>79</sup> Manuel Gonzales Oropeza & Francisco Borja Martinez, 'Artículo 28' In *Constitución Política de los Estados Unidos Mexicanos Comentada* (UNAM 1994). 140

<sup>80</sup> *ibid*, 141 - 42

relevant once more with the enactment of the Ley Federal de Competencia Económica. However, competition law was neglected for most part of the 20<sup>th</sup> century.

The historical antecedents of competition law in Colombia contrast with those of México. By the time the first competition law was enacted – 1959 – Colombia was already in a well-established path of governmental control over the economy. Notably, the starting point of this trajectory was not the original constitution of 1886, but the constitutional amendments that were passed in 1936 and 1945. The 1886 constitution allowed congress to issue especial protections for businesses considered of some merit.<sup>81</sup> The 1936 amendment redefined the Constitution's definition of property rights as having a social function<sup>82</sup> and establishing that government can intervene, according to the procedures established in laws, in production processes underwent by private firms in order to 'rationalize the production, distribution and consumption of wealth (...)'.<sup>83</sup> As Colombia experienced the toll of World War II, President López persuaded Congress to issue law 7 of 1943, which established a general system of price controls and exchange rates. The rules pertaining to the price controls were developed through decree 928 of 1943, in which the government banned the hoarding and speculation over goods of essential necessity.<sup>84</sup> In 1945, a new constitutional amendment asserted the capacity of the government to intervene in economic affairs, but curtailed the special powers that could be vested in the president in order to do so.<sup>85</sup> However, political violence between the Conservative and Liberal parties became more intense, and after the short military rule of General Gustavo Rojas Pinilla (1953 – 1957) both parties agreed on a series of power-sharing arrangements to end political violence. Only then, the government of liberal President Alberto Lleras Camargo adopted law 155 of 1959, which was the first competition law regime in Colombia.

In a sense, the adoption of law 155 of 1959 was a considerable political feat in a country where economic planning and well-organized business associations had a well-established legal and political support. Perhaps this

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<sup>81</sup> Constitución Política de 1886, Arts 76 (18) and art 78 (5).

<sup>82</sup> Acto Legislativo 1o de 1936 (n 61).

<sup>83</sup> *ibid*, Art 11.

<sup>84</sup> Decreto 928 de 1943.

<sup>85</sup> Acto Legislativo 1 de 1945, Art 28.

is also why the law has been sparsely applied, except for a provision that exempts its application to practices if recommended by the government in office. In general terms, the law deals with i) anticompetitive agreements, either with competitors or suppliers, ii) mergers, iii) vertical restraints, iv) interlocking directories, and v) unfair competition.<sup>86</sup> Also, the law establishes an enforcement system that relied initially on the Ministry of Industrial Development and later on was assigned to the current enforcer, the Superintendence of Industry and Commerce (SIC), which is an agency that depended on the Ministry back then.<sup>87</sup> However, this Ministry was also in charge of establishing price controls for different goods and services, and SIC was in charge of verifying that the controls were followed (among other things, to curb inflation).<sup>88</sup> In spite of the political significance of this law's enactment, the protection of competition in Colombia was not a matter of governmental priority until the 1990s, because members of the ministries and, overall, the political forces, were much more in line with protecting national industries.<sup>89</sup> Some parts of this law are in force today, although important changes took place in 1992 with the issue of Decree 2153 of 1992 and with law 1340 of 2009.

The development of competition law in Chile has important similarities with that of Colombia. The 1925 Chilean constitution does not address directly any competition concerns, but did establish the general capacity of the government to intervene in economic affairs by establishing that property rights have a 'social function'.<sup>90</sup> Like Colombia, Chile adopted laws that established the different ways in which the State would contribute to the development of the national economy, especially as inflation became a matter of deep concern in the late 1950s.<sup>91</sup> The government of President Ibañez hired the consulting firm Klein-Saks in order to design a series of policies for coping with the economic situation of the country at the time. Among other things, the 1958 report issued by the Klein-Saks mission proposed that

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<sup>86</sup> Ley 155 de 1959.

<sup>87</sup> Decreto 3307 de 1963.

<sup>88</sup> As a matter of fact, SIC was created precisely to control the following of price controls. See Superintendencia de Industria y Comercio 'Reseña Histórica' <<http://www.sic.gov.co/es/historia>> accessed 10 October 2013.

<sup>89</sup> Rudolf Hommes, 'Regulation, Deregulation And Modernization In Colombia' (1996) Inter-American Development Bank - Office of the Chief Economist (Working Paper #316) 5.

<sup>90</sup> Constitución Política de la Republica de Chile, Art 10.

<sup>91</sup> Ricardo Paredes, 'Jurisprudencia De Las Comisiones Antimonopolios en Chile'(1995) 58 Estudios Públicos, 229.

governmental price controls should be abolished and the adoption of a competition law regime should be pursued.<sup>92</sup> However, the government of Ibañez did not follow the conclusions of this mission.<sup>93</sup> During the government of President Jorge Alessandri, a conservative, the Chilean congress adopted law 13.305 of 1959, which contains provisions of all sorts regarding economic regulation, and are similar to those proposed by this mission.<sup>94</sup>

Title V of law 13.305 of 1959 contains the provisions relevant to competition law and its enforcement. Article 173 established a general prohibition aiming to capture different sorts of anticompetitive behavior. Although it is a general rule, it is more precise than its Mexican or Colombian counterparts because it describes the practices forbidden in terms closer to competition theory; it refers explicitly to tying arrangements, production quotas, allocation of markets and the like. Like its North American and Mexican counterparts, it establishes that the violation of these prohibitions has criminal consequences, thus giving the law a criminal status.<sup>95</sup> Notably, articles 174 and 181 also allowed for the continuation of the price control system that the establishment of a competition law regime sought to replace. The former empowered the president to authorize acts or agreements that affect competition in the name of economic stability, development and the national interest, while the latter stated that price controls would remain in force.<sup>96</sup>

Another novel introduction of law 13.305 of 1959 was the enforcement system. Article 175 created a competition commission within the Superintendence of Insurance, Stock Corporations, Liability Societies and Brokers that was in charge of enforcing the law. This commission could review the acts and contracts submitted by the businesses and begin investigations by its own accord or following a complain, a procedure that could end with acquittals, orders to amend contracts, orders to end particular practices, the dissolution of businesses, pecuniary fines, or criminal investigations. The Chilean Supreme Court could review the commission's

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<sup>92</sup> *ibid.*

<sup>93</sup> Dale Furnish, 'Chilean Antitrust Law' (1971) 19 *American Journal of Comparative Law* 464, 465.

<sup>94</sup> Paredes, 'Jurisprudencia' (n 95) 229.

<sup>95</sup> Chile, Ley No 13.305 de 1959, Art 173.

<sup>96</sup> *ibid.*, Arts 174 and 181.

decisions.<sup>97</sup> In 1963 the law was amended, expanding the powers of the Commission and creating the figure of the economic public prosecutor within the commission (called ‘fiscal económico’) and who was in charge of presenting the cases before the commission and defending its decisions before the Supreme Court, thus partially distinguishing between prosecution and decision-making functions.<sup>98</sup>

Between 1959 and 1973 the competition commission reviewed 121 cases, most of which were decided in its first three years. By 1965, however, the commission had only reviewed seven. According to Dale Furnish, this change in pace resulted from the government’s decision to return to price control agreements and similar mechanisms in order to address particular economic issues.<sup>99</sup> In part, this reverses begun during Alessandri’s own government, which gradually resorted again to the aforementioned mechanisms. When liberal candidate Eduardo Frei became president in 1964, these mechanisms became even more common, and so Chile continued along the path of economic planning.<sup>100</sup> In 1973, a military junta toppled elected president Salvador Allende and General Augusto Pinochet assumed the government; it was then that competition law enforcement in Chile became prominent again with the enactment of Decree Law 211 of 1973.

As in the case of México and Colombia, the dwindling interest in competition law in Chile during this period of time has been attributed to a lack of political support.<sup>101</sup> Simply stated, the constitutional frameworks that were in place at the time in these countries contributed to the development of political arrangements that viewed industrial development as contrary to competition. Moreover, this state of affairs resulted from a combination of doctrines that viewed the regulation of property rights in the name of development with presidentialist systems that gave executive branches an important role in economic affairs. The result, for most part of the 20<sup>th</sup> century, was a system in which governments and business associations attempted to dictate the outcomes of markets.

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<sup>97</sup> *ibid*, Arts 175, 175(a), (b), bis(a) and Art 177.

<sup>98</sup> *ibid*, Art 175 bis, modified by Ley 15.142 de 1963.

<sup>99</sup> Furnish, ‘Chilean Antitrust Law’ (n 97) 480 – 481.

<sup>100</sup> *ibid*, 483.

<sup>101</sup> *ibid*, 230.

## V. What are the relationships between Protective and Aspirational Constitutionalism and Competition Law Regimes?

In the previous sections of this article we have highlighted some of the substantive arguments and institutional features of both protective and aspirational constitutionalism. We have also shown how these different elements are exemplified in the constitutional traditions of the US and in Latin America, with special focus on México, Colombia and Chile, and how they are played out in the development of their respective competition law regimes between the 1910s and the 1990s. Based on the account presented until now, in this final section we will suggest in broad terms how different constitutional traditions shape competition law regimes.

Regarding protective constitutionalism, one way to assess this relation is to consider, first, structural issues concerning the allocation of law-making authority, and then examine how they interact with substantive arguments. Since protective constitutionalism is concerned with guaranteeing the pre-established rights of individuals from the intrusive forces of government, then the architecture of government itself is paramount in understanding how this goal is achieved. As US constitutionalism shows, this type is based on the idea that the separation of powers is an institutional ‘failsafe’ that prevents governments from encroaching over the rights of individuals.<sup>102</sup> However, once this failsafe is overcome, substantive considerations become relevant because they also establish limits to what governments can do. The nature of these limits is particularly important as well. They should not aim to transform radically the nature of the rights or freedoms enjoyed, because doing so would be in fundamental dissonance with why government was established in the first place. Under this Lockean logic, governmental intervention should only aim to maintain and preserve the rights individuals have and correct those situations that merit interventions without affecting property rights and other freedoms.

From this perspective, protective constitutionalism brings about competition law regimes that interfere with markets only under certain conditions, considered exceptional. After all, competition law regimes establish duties

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<sup>102</sup> Regarding the case of the US, consider this statement of James Madison in *The Federalist* ‘No. 47’ (n 25): ‘Unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.’

that limit how property rights are exercised and what sort of contracts can be negotiated; to place a limit on them requires very demanding justifications. Because of this characteristic, a competition law regime within a protective constitutional tradition should only aim to intervene in a narrow set of scenarios and after overcoming requirements that leave little doubt of the necessity of such interventions.

This insight is useful for considering how competition law regimes allocate different functions among legislatures, enforcement agencies and courts. Allocating investigative and adjudicatory functions to different bodies, with no direct inherence over each other, suggests a concern for preventing arbitrary results that harm rather than strengthen the rights of individuals. Once this institutional capacity is in place, then we can consider the requisites that the claims presented before courts by enforcement agencies or individuals according to the rules laid out by legislatures should fulfill in order to be properly decided. Placing relatively high requisites for standing (such as that only persons affected directly by anticompetitive practices, instead of third parties that claim to be affected indirectly), the burden of proof (concerning which party should prove the harm), and standard of proof (concerning the nature of the harm and how to prove it) work as a filter that separates meritorious causes from those that are not. When considered altogether, these aspects about procedure and evidence establish the conditions that justify intervention in the name of competition under a rather strict scrutiny.<sup>103</sup> The advantage of this system is its stability, resulting from its own cumbersome procedures; its limitations result from rigidity, which eventually leads to the preservation of institutions that become outdated.<sup>104</sup>

While we can conclude that protective constitutionalism is most likely to bring about competition law regimes that rely on how markets work rather than to attempt to correct them, it is hard to reach a similar conclusion for aspirational constitutionalism. This is so because there is no ‘natural’ or necessary connection between conceiving rights as the result of political processes within the State, and competition. Placing property rights under

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<sup>103</sup> For a conscious reflection of these issues in the US, see William F Baxter, ‘Separation of Powers, Prosecutorial Discretion, and the Common Law Nature of Antitrust Law’ (1981) 60 *Texas Law Review* 661.

<sup>104</sup> An inspiring analysis can be found in see Reza Dibadj, ‘Saving Antitrust’ (2004) 75 *University of Colorado Law Review* 745.

considerations of ‘public interest’ or conceiving them as having a ‘social function’ does not point unequivocally to either the protection of competition or its abandonment. In this sense, aspirational constitutionalism provides several starting points for understanding the relationship between property rights and competition, and it is not inclined to adopt one or the other. Simply put, its conception of property rights is not determinate enough to suggest that competition should be protected and strengthened or abandoned. Hence, from this theoretical perspective aspirational constitutionalism can lead to different structural and substantive considerations regarding how constitutionalism and competition are related. Just as well, the examples of particular regimes within the aspirational tradition suggest that particular constitutions can be aspirational and protect competition, while others can renounce to it. Therefore, aspirational constitutionalism does not lead unequivocally to one type of competition law enforcement or the other, as is most likely the case of protective constitutionalism.

Even so, it is important to comment briefly on the development of competition law in Latin America from this perspective. In the case of the countries considered here, the enforcement of competition laws as well as of regulatory regimes has been historically assigned to the executive branch. Undoubtedly this is a manifestation of the presidentialist doctrines developed in Latin America. In some historical periods the idea of having a strong executive to command the resources necessary for development has been translated into government dirigisme, while in others it has led to establishing market-friendly legal regimes that are coupled with the protection and promotion of competition. Latin American States have embraced both protectionism and free markets through the development of administrative structures in charge of their supervision and regulation. Both protectionism and competition are not ingrained in the aspirational tradition. This would explain why Latin American countries like México, Colombia and Chile adopted competition law regimes and have enforced them depending on the prevailing views about the interplay of competition and industrial promotion (and the period considered here exemplifies the decision not to enforce them). Moreover, the prevalence of maintaining regulation within the sphere of the executive branch over other considerations (like the protection of property rights) could explain why the enforcement bodies have been historically administrative in nature, concentrated investigative and punitive functions, and relying more on fines

than on damages awards. The advantage of this system is its flexibility, and its limitations are largely due to the continued demand for political support. Table 1, in Annex 1, summarizes the main elements considered here.

Future research about how constitutional traditions shape competition law regimes can bring further light on the issues analyzed here. So far, we have identified three research venues that may be particularly interesting from this perspective. First, it would be interesting to know more about other constitutional traditions than the ones commented here. Clearly, protective and aspirational constitutional traditions encompass more than the US and Latin America, and one could conceive other traditions that do not fit these two categories, but that nonetheless have their own institutional designs that shape their own competition law regimes. Second, even within these two traditions there are important issues that deserve further clarification. One of these has to do with the nature of the duties created by the competition law regimes. While the regimes that follow from protective constitutional traditions create negative duties to market participants, competition law regimes that follow from the aspirational tradition are likely to create positive duties for the States as well as negative duties to market participants. This difference could suggest that in regimes that follow the aspirational tradition competition law enforcement may be along the lines of the enforcement of social and economic rights, which also create positive duties. Finally, in third place, it seems that the time is ripe for understanding the role that human rights play in the enforcement of competition law regimes. In some jurisdictions investigated parties may challenge the legality of the proceedings undergone by competition enforcement authorities by claiming, *inter alia*, that they violate their rights to the secrecy of their correspondence.<sup>105</sup> We should expect that since rights are viewed differently in each of the traditions considered here, they should affect the enforcement proceedings differently; practitioners and scholars would benefit enormously from future research that describes these differences and explains how they take place. The research of constitutionalism and competition law has other venues of research; this article has tackled some of the most obvious ones in order to show the possibilities that lay ahead.

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<sup>105</sup> Arianna Andreangeli, 'Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention' in Ioannis Lianos and D Daniel Sokol (eds) *The Global Limits of Competition Law* (SUP 2012).

Annex 1

Table 1: Constitutional Traditions and Competition Law Regimes

|  | Protective Constitutionalism  | Aspirational Constitutionalism  |
|--|---|---|
| <b>Influential Authors</b>   | John Locke  | J.J. Rousseau   |
| <b>Views about property rights and other freedoms</b>                    | Property and freedom of contract antecede government  | Property and freedom of contract result from collective decision-making   |
| <b>Examples</b>  | US constitutionalism  | Constitutionalism in México, Colombia, Chile  |
| <b>Views about government intervention (as detailed in the examples)</b> | <ul style="list-style-type: none"> <li>• The structure of government prevents encroachment of private property and other freedoms</li> <li>• Substantive considerations prevent redefining property rights</li> </ul>   | <ul style="list-style-type: none"> <li>• Strong executive branches that are in charge of economic regulation in the name of development.</li> <li>• ‘Public interest’ and ‘social function’ theories that justify limiting them.</li> </ul>   |
| <b>Examples of Competition Law Regimes</b>                               | US Antitrust  | Competition law regimes in México, Colombia and Chile   |
| <b>Influence of constitutional tradition?</b>                            | Implicit; the Sherman Act was interpreted by referring to the common law, thus assuming that it is a justifiable baseline. Similar to Substantive Due Process doctrine.   | <ul style="list-style-type: none"> <li>• Explicit; article 28 of the 1917 Mexican Constitution forbids monopolies, abuse of dominance and establishes exceptions.</li> <li>• Implicit; competition law stems from the government’s constitutional prerogatives to limit private property and regulate economic activities.</li> </ul> |
| <b>Main traits of competition law regimes (formative periods)</b>        | <ul style="list-style-type: none"> <li>• Competition law is understood according to private law entitlements, thus enforceable only after findings of ‘unreasonableness’.</li> <li>• Enforcement under limited conditions related with scope of government intervention.</li> </ul> | <ul style="list-style-type: none"> <li>• Coexisted with other forms of economic regulation, like price controls</li> <li>• Sparse enforcement when in conflict with other economic policies</li> <li>• Anticompetitive behaviors viewed as unfair and exploitative (México)</li> </ul>  |
| <b>Allocation of</b>   | Adjudicative structure; plaintiffs bring  | Administrative; administrative agencies   |

|                               |   |  |
|-------------------------------|---|--|
| <b>enforcement activities</b> | cases before courts, who can award damages          | investigate and decide cases. Reliance on remedies.  |
| <b>Areas</b>                  | Collusion, cartels & monopolization. No exemptions. | Collusion, cartels, abuse of dominance & mergers (Colombia). Exemptions regimes include governments and businesses in certain sectors. |

