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Brandeis in Brussels? Bureaucratic discretion, social learning, and the development of regulated competition in the European Union

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Abstract

Neo-Brandeisian legal scholars have recently revived the ideas of Supreme Court Justice Louis Brandeis, who championed state regulation that preserved market competition and economic liberty in the face of concentrated private power. Yet ultimately and perhaps paradoxically, it has been Europe and not the United States that has proved more hospitable to accommodating key features of the Brandeisian approach. We explain this outcome by tracing the evolution of EU competition law to gain insight into the social learning processes through which such regimes change over time. We argue that the EU's administrative system, which provides the European Commission with significant bureaucratic discretion, has facilitated processes of ongoing deliberative adjustment to policy and practice, which over time has resulted in a system of "regulated competition" with striking similarities to the Brandeisian vision. The analysis highlights how administrative law institutions condition how regulatory regimes evolve in response to acquired experience and knowledge.

Keywords: American antitrust, Brandeis, competition policy, EU, Europe, policy learning, progressive era.

1. Introduction

A marked rise in industrial concentration across a wide range of industries, and the growth to dominance of firms such as Meta, Google, Amazon, and Apple have propelled monopoly power and antitrust policy to the center of contemporary debates across the rich democracies. Within the United States, a new generation of legal scholars who are committed to reforming American antitrust policy and practice has assumed key positions of power in the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Many of these new faces are self-described "neo-Brandeisians" who draw inspiration from ideas promoted by the famed 20th century legal scholar and Supreme Court Justice Louis Brandeis. These reformers argue that competition law should "protect market structures that [distribute] individual opportunity and prosperity" and ensure that "excessive concentrations of private power" do not undermine economic freedom and democracy (Khan, 2018, p. 132). To achieve this goal, they call for a strong but adaptable system of state regulation aimed at promoting economic and industrial liberty while also maintaining technical and productive efficiency.

While the resulting intellectual ferment has opened up important new space for debate, discussion so far has concentrated almost entirely on the United States. Yet, paradoxically it has been Europe and not the United States that has proved more hospitable to the institutionalization of the kind of "regulated competition" that Brandeis promoted at the beginning of the 20th century. The outcome is at first blush puzzling but as we show, less perplexing in light of the evolution of the European model. It is puzzling because at the time Brandeis was writing, European antitrust was virtually nonexistent and cartels were ubiquitous. Moreover, neither the founders of the European Union nor contemporary practitioners in Brussels have demonstrated much interest in

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Brandeis. But closer inspection allows us to explain this outcome by showing how European private and public governance models institutionalized at the beginning of the 20th century served as sources of inspiration for Brandeis' vision of regulated competition. The current EU system has crucially retained many of the features that historically distinguished Europe's approach to competition policy even while adopting a range of institutional innovations. In line with Brandeis' vision for the American FTC, the European Commission (Commission) applies its expertise to permit "healthy" forms of coordination (e.g., among less powerful economic actors such as small businesses and workers) while prohibiting "unhealthy" (e.g., coercive) forms—and to continually update its rules in line with new information, technological developments, and feedback from industry. Placing concerns about preserving open and fair markets at the heart of case law and policy, EU regulators consistently use their powers to limit dominant companies' ability to exploit their economic power while still allowing mergers and restrictive practices that improve technical or productive efficiency.

We argue that Europe's ability to more closely approximate the Brandeisian vision goes back in large measure to a crucial, and longstanding, difference to the US competition regime, which lies in the mirror-image relationship it institutionalizes between administrative and judicial authority. In Europe, regulators retain broad rule-making and direct enforcement authority that holds unless and until it is successfully challenged in courts that usually defer to the Commission's expertise on policy questions. By contrast, in America's juridified system, it is the other way around: agency rules and enforcement actions do not take effect unless and until they are sanctioned by courts, and courts often reject agency conclusions in favor of their own alternative assessments of theory and facts. We argue that this core institutional difference—which was forged in the early 20th century and has been maintained in altered form into the 21st—is what has rendered the European regime more congenial to the development of a system of "regulated competition" that empowers state officials to permit certain forms of inter-firm cooperation while simultaneously policing restraints of trade that exploit private economic power.

We identify two features of the Commission's bureaucratic discretion that have been critical to these outcomes. First, the Commission enjoys significant *procedural discretion* regarding the interpretation of the Treaties and the organization of its own implementation authority in the competition domain. This authority has allowed the Commission to selectively adopt new institutional forms and practices, while simultaneously defending and preserving core elements of the administrative model that Brandeis admired and that characterized European competition regulation during the first half of the 20th century. Second, the Commission's broad administrative rulemaking and enforcement authority provides the competition directorate with *substantive discretion* over how market competition rules are applied in particular cases. This administrative discretion has allowed the Commission to develop the responsive and adaptive approach to competition policy that Brandeis envisioned: placing strong constraints on "coercive" agreements while simultaneously permitting and even encouraging beneficial forms of inter-firm coordination that upgrade competition.

Our analysis combines insights from the literatures in political science and sociology on "social learning" (Hall, 1993; Heclo, 1974) and the public policy literature on cross-national "lesson drawing" (Rose, 1991, 1993). Scholars in these fields have closely analyzed the channels and mechanisms through which the European Commission in particular has shaped the development of competition law, and how its own ambitions have been constrained by external political demands and established competition traditions (Büthe, 2007; Jabko, 2006). However, less attention has been paid to how the organization of bureaucratic discretion and judicial review conditions social learning, defined as the "deliberative attempt to adjust the goals or techniques of policy in response to past experience and new information" (Hall, 1993: 278).

Our analysis points to the design of administrative law as a crucial factor in social learning. In the European Union, the Commission's broad administrative rule-making and block exemption authority combined with its direct administrative enforcement powers has facilitated ongoing social learning in the competition domain. Specifically, because the Commission has procedural discretion to shape the methods used to enforce the law and substantive discretion to interpret how competition rules are applied in practice, it has been able to deliberatively adjust and update policy and practice in response to emerging market developments, new research, and feedback from industry. This contrasts with the adversarial legal antitrust system in the United States, where the judiciary has a history of limiting administrative power in this field and where since the 1980s these efforts have been bolstered by a conservative legal movement committed to disempowering the administrative state. Thus, while America's common law tradition in principle should allow jurisprudence to evolve in ways that incorporates new

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information and permits a significant degree of administrative discretion, in practice the judicialized system of US antitrust has undermined learning processes, creating barriers to updating policy in response to new developments and feedback.

The paper is organized as follows. We begin our analysis by examining the transatlantic transfer of competition law ideas and policies from the early 20th century until today. As we show, Brandeis' own ideas in the 1910s were inspired by his familiarity with—and admiration for—certain aspects of the alternative practices unfolding in some countries across the Atlantic. We then document how, in the postwar period, Europeans retained key features that Brandeis had admired—specifically administrative enforcement and systematic forbearance toward some forms of horizontal coordination—while selectively embracing elements of the American model to produce a distinctively deliberative and adaptive model. We then consider the subsequent development of competition law at the EU level since the 1960s, examining the ways in which European regulators have continued to adapt these inherited institutions in ways that over time have come to embody many of the goals and functions that Brandeis had envisioned for the United States in the 1920s. Furthermore, we document how some of the most recent developments in the EU have moved closer still to the Brandeisian ideal by taking an increasingly strong stand against dominant actors. We conclude by underscoring the lessons the EU case holds for social learning processes across different institutional contexts.

2. Transatlantic exchange, social learning, and administrative structure

The rise of dominant tech firms and signs of growing market concentration across a wide range of industries has reinvigorated policy debates concerning competition policy. Within the United States, a new group of scholars, practitioners, journalists, and regulators associated with a "New Brandeisian" movement have fundamentally challenged the Chicago (Posner, 1979) and post-Chicago (Yoo, 2019) frameworks that have guided American antitrust policy since the early 1980s. Rejecting the Chicago School's consumer welfare standard (Bork, 1978), neo-Brandeisians seek to re-establish a structuralist and process-based standard that is concerned not only with consumer prices, but also other factors such as productive efficiency, technological innovation, the fairness of the competitive process and the threats that concentrated economic power pose to democracy (Khan, 2016, 2019; Steinbaum & Stucke, 2020). To achieve these goals, they have called for an institutional overhaul that shifts the balance of decision-making away from the judiciary and toward federal agencies empowered not only to enforce existing anti-monopoly laws more rigorously, but also to play an active role in developing rules and legislation to proactively address the problem of economic dominance and exclusionary behavior by powerful players (Chopra & Khan, 2020; Paul, 2021). Finally, they have sought to disperse economic power by supporting broader "coordination rights" for weaker parties, particularly workers, while directing horizontal enforcement toward collusion between big companies (Paul, 2020; Vaheesan & Pasquale, 2018).

In a short period of time, neo-Brandeisians have shifted the discourse at leading law schools while also making significant inroads in policymaking circles (Kovacic, 2021). Yet, the scholarly and public debate over the future of American antitrust has focused virtually exclusively on developments—past and present—in US law and policy, thereby ignoring relevant historical and comparative experiences in other parts of the world. The omission is entirely understandable given that reformers have as their immediate goal the transformation of the American competition regime. Certainly, within a legal order that provides little consideration for comparative or international law, it is important to demonstrate that an anti-monopoly program is compatible with existing US antitrust law and jurisprudence and in line with the original intent of Congress when the antitrust laws were enacted.

However, even in a parochial policymaking environment such as the United States, comparison can be a powerful and productive project. Engaging with alternatives and possibilities that have been pursued elsewhere can serve to denaturalize taken-for-granted understandings about how states and markets must work (Hacker et al., 2022). Brandeis himself understood the power of comparison and, along with other progressive reformers in his time, he drew much inspiration from European approaches to common public policy challenges in areas as diverse as city planning, agricultural improvement, and social insurance (Rodgers, 1998). Brandeis was also attuned to specific features of Europe's distinctive approach to competition policy, including forbearance toward coordination among non-dominant competitors in the market and the advantages of an administrative (rather

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than solely judicial) approach to competition policy that focused on actively regulating competition (rather than simply sanctioning monopoly).

Today, the European competition regime shares many common features with the American system, not least because it was directly shaped in important ways by US policymakers and experts in the postwar period (Djelic, 2001; Wells, 2001). Yet EU law and practice still reflect a distinct paradigm, both substantively and procedurally (Gerber, 1998). Over time, the EU system has come to embody aspects of Brandeis' ideal of "regulated competition" that have not been realized as fully in the United States. Not only does the EU competition system contain strong rules that limit the exploitation of economic power, but European regulators have developed concrete and practical ways to reconcile this goal with efficiency concerns and new technological developments. Rules governing horizontal relations empower smaller and weaker parties to coordinate their activities against larger companies while also aggressively policing cartel activity. Finally, the administrative system provides regulators with more authority not only to develop and enforce rules but also to provide forbearance to firms in response to technological and market developments. In each of these areas, the European system contrasts with the predominant American approach since the 1980s, which has been characterized by strict enforcement against horizontal coordination, lax rules regarding dominance, and judicialized policymaking and enforcement that minimizes administrative discretion.

2.1. Social learning and administrative law

The evolution of European competition policy offers an opportunity to more closely investigate how the organization of administrative law conditions social learning, or the deliberative adjustment of the goals and strategies of policy based on accumulated experience, knowledge, and new information (Hall, 1993; Heclo, 1974). While not an explicit focus in the existing literature, there are theoretical and empirical reasons to think that the degree to which bureaucracies rather than courts shape the procedural and substantive rules that define a particular policy arena conditions broader social learning processes. Scholars of regulation have consistently noted how bureaucratic discretion—understood as a regulatory agency's independent decision-making authority within certain bounds (Thatcher & Sweet, 2002)—is a necessary component of deliberative policymaking, where policymakers weigh and reflect preferences, values and interests through factually-informed discussions that consider multiple perspectives (Mansbridge, 2015; Sabel & Zeitlin, 2008). In order to adjust policy in response to new information and experience, regulators require significant independent decision-making authority so they can consider a range of technical, organizational, and practical factors necessary for effective policymaking (Mashaw, 1985; Wilson, 1989). Such learning also often entails cross-jurisdictional lesson drawing, which can help policymakers better understand the nature of a common problem and the likely effects of a range of public policy solutions (Dolowitz & Marsh, 1996; Rose, 1991).

Judicial review, by definition, circumscribes bureaucratic discretion. At a minimum, court review requires agencies to substantiate their decisions with reference to law and precedent, and to follow particular procedures (Mashaw, 2010). But it can also entail stricter and more "aggressive" forms of scrutiny, where courts overturn an agency's substantive findings and substitute judge-made policies for agency ones (Sunstein, 1989). While the judicial review of administrative procedure is widely viewed as a necessary if costly mechanism for protecting the rights of stakeholders and upholding the rule of law in regulatory processes, the aggressive review of an agency's factual and analytical determinations is often seen as an impediment to social learning (Breyer, 1986; Wilson, 1989).[1] As reactive institutions that must wait (sometimes years) for cases to reach them and then assess evidence under the constraints of adversarial legal process, courts usually lack the capacity to devise sound and adaptive regulatory policy (Breyer, 1986). Courts also tend to emphasize abstract theory and logic over the practical, technical, or organizational knowledge needed to implement policy; to devise general rather than the tailored rules appropriate for addressing complex situations; and to rein in rather than empower agencies to achieve their organizational missions (Wilson, 1989, pp. 635–674). Empirical studies of judicialized areas of regulatory policy consistently find that when courts second-guess every administrative determination, social learning processes are more unwieldy and protracted (Horowitz, 2010; Melnick, 2010; Rabkin, 1989). As Wilson has observed in his pathbreaking work on American bureaucracy, aggressive judicial review tends to discourage institutional innovation and adaptation within administrative agencies:

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"Judicializing agency procedures not only takes time and money, it often makes agency heads reluctant to change… The more one has to explain and justify the less one is likely to do. If the cost of issuing a regulation increases, fewer regulations will be issued, especially those that embody novel ideas or approaches" (649).

2.2. Competition law, institutional design, and social learning

Building on these insights, we hypothesize that the structure of administrative law in Europe and the United States will condition social learning processes in the competition arena. Specifically, we expect that in systems where a regulatory agency has more independent decision-making authority within the bounds of a legal mandate, social learning processes will be more dynamic and extensive. In this respect, we expect two dimensions of discretion to matter. *Procedural discretion*, defined as control over the specific legal procedures and methods used to enforce the law, should make it easier to adjust the organization of competition law institutions and enforcement processes in response to past experience. *Substantive discretion*, defined as control over the principles and rules that define the law's interpretation in practice and the factual and analytical conclusions used in enforcement actions, should facilitate adjustments to substantive policy in response to changing market dynamics, empirical studies, or feedback from industry.

Such discretion is likely to be more circumscribed in contexts, such as the American, that are characterized by adversarial legalism, a system of legal contestation and decision-making that is dominated not by government officials but disputing parties before a third-party judge (Kagan, 2019). Most antitrust enforcement occurs through litigation, whether initiated by public or private parties. More even than most other policy areas, federal courts have established the procedural and substantive rules that structure the meaning of antitrust law and the way that it is applied in practice (Hovenkamp, 2005). Historically, US courts have significantly curtailed bureaucratic discretion in this field. Until the late 1930s, courts showed little deference to bureaucratic agencies and developed competition rules in line with their own understanding of sound economic policy (Sklar, 1988). While courts showed more bureaucratic deference during the Warren Court (Gidron & Kaplan, 2017), they have since limited bureaucratic discretion in response to agency criticism (Kovacic, 1982), the rise of law and economics theories of antitrust and public choice theories of regulatory capture (Posner, 1979; Stigler, 1971) and the growing strength of a conservative legal movement that fundamentally opposes the administrative state (Teles, 2008). The resulting low degree of procedural and bureaucratic discretion should make social learning more difficult in the antitrust domain. While institutional change will still occur, it will be a protracted process that is structured by narrow economic theories that presume the efficiency of economic consolidation and inefficiency of regulatory interventions, is characterized by ongoing private legal challenges to administrative determinations, and is biased toward non-enforcement since courts can overrule agencies but not vice versa.

The EU's competition system, by contrast, more closely approximates bureaucratic legalism, a system that relies on a combination of formal rules with hierarchically organized decision-making (Foster, 2023). Whereas adversarial legalism "decentralizes enforcement, putting government officials to the side," bureaucratic legalism reinforces the authority of state officials to implement policy directly through administrative processes (Burke & Barnes, 2017, p. 14). The EU's competition directorate (DG Competition), possesses the authority to initiate preliminary investigations, launch case proceedings, issue statements of objections to companies, conduct oral hearings, issue decisions, and assess fines, all without recourse to courts (Cseres, 2010). Judges only become involved if a sanctioned company requests an appeal and even then, they tend to limit their review to questions of fundamental rights, procedural rules, and factual accuracy while deferring to administrative judgment on most questions of substantive analysis (Ibid).

As we show in the historical case study that follows, the institutional arrangements associated with this administrative model of regulatory governance have facilitated extensive and recursive processes of social learning and ongoing institutional adaptation through rule-making and enforcement that incorporates theoretical and practical knowledge, and that responds to developments at home and abroad. The Commission's discretion over procedural rules has allowed it to selectively "modernize" institutional design and enforcement policies based on administrative expertise and relative autonomy (Wilks, 2005). At the same time, the Commission's discretion over substantive rules has allowed it to make nuanced distinctions regarding different kinds of restrictive agreements and practices and to update these rules in response to new information, acquired experience, and lessons

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drawn from foreign jurisdictions. We argue that over time, this dynamic learning process has led EU competition law to increasingly approximate Brandeis' ideal: to "supplement the prohibition of monopoly by the regulation of competition" (Brandeis, 1913 reprinted in Fraenkel, 1934, p. 124).

This ideal has been more difficult to realize in the judicialized American antitrust system, despite good-faith efforts of many practitioners. Federal judges have consistently limited agencies' procedural discretion, most notably by discouraging the FTC from using its rulemaking authority to develop clear rules regulating "unfair competition" (Chopra & Khan, 2020; Rybnicek & Wright, 2013). The judiciary has played an equally consequential role limiting agencies' substantive discretion in enforcement actions, often substituting its own factual or analytical determinations for that of agencies. Judges operating on the assumption that specific economic theories are superior to administrative expertise have made it more difficult to make the nuanced distinctions between "beneficial" and "harmful" types of interfirm coordination as envisioned by Brandeis. This institutional constellation has also disincentivized and sometimes even prevented regulators from updating policy and practice in response to past experience, new information, and lessons from other countries.

3. Industrialization, competition regimes, and the Brandeisian ideal

The United States and Europe charted distinctive paths of competition policy over a century ago. In the turbulent closing years of the 19th century, political economies on both sides of the Atlantic were upended by financial crises and deep economic depressions. Overcapacity across key markets caused wages and profits to plummet, setting in motion vicious cutthroat competition among firms and provoking considerable industrial strife. American and European firms across a wide range of industries sought to stabilize markets by banding together into arrangements to defend against destructive competition and to restore industrial peace.

The fate of these arrangements turned centrally on the response of the state and the courts. In the United States, where the development of a strong administrative state followed rather than preceded the rise of large corporations, the judiciary played an outsized role in the early development of federal economic regulation (Skowronek, 1982). On the question of economic coordination between firms, the US Supreme Court was unusually—indeed, in comparative perspective, uniquely—hostile to emerging forms of horizontal organization while simultaneously taking a permissive approach to corporate consolidation and economic dominance that fell short of a complete monopoly.[2] The passage of the Sherman Act, or more precisely the Court's interpretation of that law, created strong prohibitions on horizontal coordination, providing tools for employers to attack nascent worker organizations and encouraging large producers to stabilize markets through alternative strategies such as corporate consolidation or the use of vertical restraints to restrict competition from above. The ensuing "great merger movement" in the United States at the turn of the century led to corporate hierarchy and arms-length exchange becoming the dominant modes of coordination (Lamoreaux, 1988; Sklar, 1988). The strong binary between "pure" competition and corporate hierarchy that the American judiciary enforced and policed left a deep imprint on the American political economy (Berk, 1996, p. 108; Paul, 2020; Phillips Sawyer, 2018).

By contrast, competition policy in European countries during this period was characterized by a laissez-faire approach that largely permitted the emergence of private governance structures to stabilize market volatility (Djelic, 2001, pp. 42–64). Where courts did weigh in on private law disputes they showed forbearance toward (if not active support for) these emerging forms of coordination.[3] Such forbearance of course gave rise to cartels, but it also provided a more hospitable context for the growth of centralized labor unions and strong trade associations that would come to define Europe's more "coordinated" variety of capitalism (Hall & Soskice, 2001; Thelen, 2020). So, while cartels were legal and widespread, national courts and governments also took a more neutral stance toward organizations of workers, farmers, and small producers, all of which were consistently undercut by judge-made law in the United States.[4]

When European countries did eventually enact public statutes and create regulatory offices to address competition concerns, they adopted administrative models that maintained a forbearing approach to many forms of horizontal agreements. The first German Cartel Law, enacted in 1923, became the blueprint for other early European competition regulations, including in Sweden (1925), Holland (1935), and Denmark (1937) (Harding & Joshua, 2010, pp. 80–81). Unlike in the United States, these laws were not designed to suppress cartels, but were instead meant to root out cartel "abuses" through public monitoring and sanctions

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(Feldenkirchen, 1992; Harding & Joshua, 2010, pp. 74–81; Lapidus, 2013). Crucially, all European systems depended on administrative—rather than judicial—models of cartel regulation. Under these systems, economics ministries were given wide legal discretion to directly intervene in cartel activity if it was deemed to endanger public welfare, while leaving it largely up to expert administrators how to define these specific conditions (Fellman & Shanahan, 2015; Gerber, 1998, p. 120).

In the interwar period, these regulatory systems came to be rightly criticized as overly-permissive, particularly in Germany, where cartels grew powerful and reactionary. But virtually all European countries—including Austria, Belgium, Finland, the Netherlands, Norway, Sweden, Switzerland, Spain, Italy, and the United Kingdom—took a comparatively permissive stance toward horizontal coordination (Schröter, 1996).[5] Moreover, these arrangements were not captured by powerful private interests everywhere, nor was administrative regulation inevitably ineffective. In Norway, for example, all cartel agreements were required to be published and explicitly approved by a politically independent regulator that was granted broad authority to demand information from companies and to investigate the conduct of cartels and dominant firms. During the interwar period, this Norwegian Cartel Control office decided more than 800 cases, placing significant constraints on "price discrimination, exclusive dealings and certain boycotts" if they were found to be harmful to the public interest (Gerber, 1998, pp. 156–159). Large firms were subject to special scrutiny, and enforcement centered, among other things, on ensuring fair terms and conditions for weaker cartel members (Espeli, 2015). The competition authority possessed considerable discretion, including the ability to alter cartel terms, block cartel enforcement actions and even to dissolve cartel organizations, although the most extreme of these measures were rarely invoked (Espeli, 2015, pp. 145–148; Gerber, 1998). While the Norwegian experience was in some ways exceptional, that country's competition laws shared with a far wider range of European countries an orientation that focused on policing abuse rather than enforcing strict prohibitions, and that was therefore distinct from the hard-lined prohibitions developed by courts in the United States (Gerber, 1998, pp. 158–164).

Europe's distinct approach to competition policy was a choice not an oversight. Lawmakers in the late 19th and early 20th centuries had often drawn "negative lessons" from US antitrust policy, explicitly considering—and rejecting—the American approach. They saw the US Supreme Court's interpretation of the Sherman Antitrust Act and the strict prohibition against horizontal combinations as detrimental for the way it encouraged monopoly power while allowing cutthroat competition among firms to go unchecked. Indeed, coordination among firms was viewed as highly desirable to prevent the growth of large US-type monopolies—both to forestall "destructive" competition and to protect against the "ravages of hyper-individualism" (Nörr, 1995, p. 7).

In the same way that Europeans were looking to the United States in this period (albeit in the case of antitrust, as a negative model), American observers in the early 20th century had looked across the ocean from the other side, and some of them found much to recommend in Europe's alternative approach to social and economic institutions (Rodgers, 1998). In the area of competition policy specifically, the Progressive Era lawyer and anti-monopolist Louis Brandeis admired some elements of Europe's alternative model of "organized" or "managed" capitalism, especially its cooperative associations and strong trade organizations (Berk, 2009; Brandeis, 1912; Strum, 1993, p. 41; Winerman, 2003, p. 36). Brandeis had observed how unrestricted competition in the United States often led to monopoly by fueling cycles of overproduction and destructive competition, what he called "competition that kills" (Brandeis, 1913). He was struck by the fact that in many European countries industrialization had not resulted in the same degree of corporate consolidation, and "ruinous competition" had been more limited, in large part because of the role these cooperative and trade associations played in regulating—and in important ways limiting—competition. He expressed particular admiration for Europe's vibrant cooperative movements, which combined efficiencies of scale with local democratic control. He praised Danish cooperatives for allowing small producers to hold their own against dominant actors, and held up Britain's Cooperative Wholesale Society as a "beneficent" alternative to concentrated power in American industry (Brandeis, 1914).

Like many American progressives of the period, Brandeis was familiar with the German Historical School of Economics, which opposed the laissez-faire system defended by classical economists and contended that state regulation and private associations could foster economic and social progress by, among other things, raising the plane of competition (Dorfman, 1955; Nörr, 1995). Similarly, Brandeis' approach to economics was based more on inductive reasoning through empirical historical analysis of how the economy actually worked than the

deductive and formalistic reasoning preferred by classical and marginalist economists (Adelstein, 1989, pp. 632–634). Applying this inductive approach to German and Danish trade associations, Brandeis observed that industry-led coordination on price or output could upgrade competition in ways that allowed smaller firms (often catering to niche markets) to survive, without sacrificing productivity. Indeed, such agreements could be productivity-enhancing because they channeled competition away from price and toward innovation and quality (Berk, 2009, pp. 60–62; Brandeis, 1912). In Brandeis' words, "the proper role of the government is to encourage not combination, but co-operation" (Winerman 2003, p. 1). Practices such as information sharing among non-dominant competitors in an industry, joint standard setting, and transparency in pricing could facilitate scale economies through cooperation rather than consolidation, while also preventing the cycles of over-production and cutthroat price competition that foster economic centralization in capitalism (Phillips Sawyer, 2011).

Brandeis was well aware of the potential abuses that could occur within private regulatory structures, particularly when dominant companies were permitted to coerce smaller firms. Without a neutral state arbiter that could direct competition and coordination toward beneficial ends, while also policing the abuses of dominant players, trade associations and cartels brought with them the risk of private exploitation (Berk, 2009, p. 57). The solution for Brandeis, however, was not to develop strict rules that enforced competition in every case. He called instead for a system of "regulated competition" that empowered state officials to permit certain forms of inter-firm cooperation especially among non-dominant players that encouraged meritorious competition or upgraded production into higher value-added products while also policing restraints of trade that suppressed competition or exploited private economic power (Berk, 2009; Phillips Sawyer, 2011, 2018). In short, Brandeis envisioned a system of competition regulation characterized by significant bureaucratic discretion to write and enforce rules directly, and to update these policies and practices on an ongoing basis as they acquired new experience and knowledge about how competition worked in practice.

Thus, in debates over the Clayton Act, Brandeis articulated a vision for the FTC designed to re-center decision-making away from the federal courts and toward a more responsive and proactive expert administrative agency. Noting that the decades since the Sherman Act had laid bare the failures of the previous regime, he joined the call for judicial remedies to be "supplemented by other adequate machinery to be administered by a federal board or a commission" (Brandeis, 1913 reprinted in Fraenkel, 1934, p. 124 and p. 131). Administrative expertise would be brought to bear not just to prohibit monopoly but to regulate competition: "We need the inspector and the policeman, even more than we need the prosecuting attorney; and we need for the enforcement of the Sherman law and regulation of competition, an administrative board with broad powers…." (Brandeis, 1913 in Fraenkel, 1934, p. 134). In fact, he envisioned a board whose authority would grow over time: "it is probable that whatever powers are conferred upon the board at the outset will be increased from time to time as we learn from experience what powers may be safely conferred upon the board" (Brandeis, 1913 in Fraenkel, 1934, p. 134).[6]

In short, Brandeis foresaw regulators using their expertise and discretion to distinguish "good" from "bad" coordination—i.e., combining rules that *permit* some forms of cooperation between competitors, while also *protecting* coordination among firms by embedding competition within a body of rules that limits aggressive forms of competition that would jeopardize the economic freedom of smaller producer groups and workers. In Brandeis' view, such a distinction would be difficult to achieve through judicial processes that emphasized abstract, universally applied legal principles over the technical knowledge and practical experience relevant to the operation of competition in practice and where the prevailing interpretation of the law often varied from judge to judge (McCraw, 1986, p. 116). Rather, he envisioned expert administrators, ideally with previous regulatory experience working closely with industry, developing stable and predictable rules through deliberative processes characterized by extensive fact-finding and research and ongoing consultation with stakeholders.

The FTC was initially granted significant bureaucratic discretion, including the authority to regulate unfair competition, to determine the meaning of these provisions, and to enforce them directly through "cease-and-desist" orders (Averitt, 1979). For a time, the early FTC used this authority to facilitate "cooperative competition," developing programs to foster industrial standard setting, uniform accounting methods, information sharing regarding inventory and shipments, and the adoption of best practices through trade associations (Hawley, 1979; Peritz, 1996, pp. 76–77). Through its Trade Practices Conference Division, the agency finalized more than 100 standardization and conservation agreements and more than 50 trade practice codes across a wide range of industries (Hawley, 1979, pp. 102–104). As Phillips Sawyer (2018) has shown in a detailed study, the

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experiment with associationalism during this period was important for American political development, generating "lasting effects on the development of state police powers, bureaucratic capacity, and antitrust policy, not to mention private trade associations" (3).

However, the fact that antitrust had been institutionalized within an adversarial legal system that severely circumscribes bureaucratic discretion made it difficult to stabilize a durable system of regulated competition along the lines Brandeis envisioned. The FTC's efforts were consistently frustrated or blocked by federal courts, which prevented the agency from developing an independent, directive role over the economy (Kovacic, 1982, p. 616). Courts largely prevented the FTC from using its delegated rulemaking authority to establish clear and predictable rules to regulate both competition and monopoly as envisioned by Brandeis and intended by Congress (McCraw, 1986).[7] When the agency sought to approve "beneficial" agreements that it believed upgraded competition, it found itself stymied by the decentralized judicial enforcement system, which allowed public and private actors to challenge approved trade practices, limiting their enforceability (Hawley, 1979; Himmelberg, 1976). The DOJ proved to be a particular problem, prosecuting trade associations for antitrust violations and challenging many of the FTC's agreements in court (Berk, 2009, pp. 228–232).

Agency efforts to curtail "unfair competition" also ran into problems. When the agency sought to investigate or limit corporate abuses, its orders were often dismissed by judges or overturned on appeal (Winerman & Kovacic, 2010, pp. 176–192). In its first ruling on the FTC's authority, the Supreme Court overturned an FTC order forbidding a tying arrangement by a dominant steel company on the grounds that this practice had not previously been forbidden in case law. As Justice McReynolds explained in the majority opinion: "it is for the courts, not the commission, ultimately to determine as a matter of law what they include."[8] FTC challenges to other unfair competition practices, including exclusive dealing in the publishing industry, exclusive contracts between dominant oil companies and retailers, price discrimination against cooperatives and individual retailers, and base point pricing in the oil and steel industries were all struck down by judges (2010, 177-187). FTC monopolization cases against Eastman Kodak, General Electric, and the Aluminum Company of America were similarly blocked by courts (2010, 188-190). All in all, 82% of the restraint-of-trade orders issued during its first decade were either dismissed by judges outright or eventually overturned during judicial review.[9] The one area where the FTC did find some courtroom success was in prosecuting horizontal conspiracies—a category of agreements that were already prohibited in Sherman Act case law, and where Brandeis had long argued for a more permissive approach (2010, pp. 192–193).

4. The development of regulated competition in Europe

The upheaval of World War II—and the monumental political and economic changes it inspired in the postwar—created a rare opportunity to completely overhaul European economic policy, including in the competition field. During the occupation of Germany, Americans presided over the dismantling of that country's most notorious cartels, forcing a break with the industrial production model that predominated at the beginning of the 20th century (Djelic, 2001). The war and its aftermath had also profoundly shaken European elites' belief in the economic effectiveness and political legitimacy of cartels, which now had strong associations with fascism (Djelic, 2001; Wells, 2001).

Yet even as outright cartels were delegitimized, most national competition laws in the postwar maintained core aspects of the administrative system of cartel control developed during the interwar period. At the core of the model was the idea that "law should protect the process of competition by administratively controlling the harmful conduct of economically powerful firms rather than by prohibiting particular types of conduct" (Gerber, 1998, pp. 163–164). Toward that end, most European countries established variants of "cartel registries" that empowered regulators to approve "beneficial" forms of coordination while proscribing discrete forms of cartel abuse (Fellman & Shanahan, 2015).

At the supranational level, US government officials were again heavily involved in designing the competition provisions of the European Coal and Steel Community and the US experience with the Sherman Act provided a primary reference point for the competition regime established a few years later in the European Economic Community (EEC) (Djelic, 2001; Wells, 2001). In particular, the stricter approach to price agreements and output restrictions would have a lasting effect on European Community law, contributing to the decartelization of

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European industry and the instantiation of market competition as a core principle of the European Union (Djelic, 2001; Jabko, 2006). Nonetheless, in several important respects, the EU competition system preserved significant features of the historically evolved understandings and practices reviewed in the previous section (Freyer, 2006, pp. 278–314; Gerber, 1998). The European system would essentially blend these orientations inherited from the past (including, centrally, administrative enforcement and forbearance toward coordination among non-dominant actors) with elements of the so-called "ordoliberal" school of competition that crystallized in Germany in the post war period and that called for a "constitutional" framework to limit the power of dominant actors (Gerber, 1994).

The supranational European system established under the Treaties of Paris and Rome stemmed from a series of political compromises. The enactment of substantive rules that prohibited cartels while providing broad exemptions for "beneficial" horizontal agreements reflected a compromise between "cross-national liberal modernizers" supportive of the American cartel prohibition model and European business associations and unions, which saw horizontal cooperation as essential for rationalization, standardization, and specialization in European industry (Djelic, 2001, pp. 232–235). The instantiation of an administrative enforcement system whose decisions could be reviewed by independent courts reflected a compromise between Germany, which preferred a strong juridical element, and France, which wanted to maintain a more discretionary administrative control approach (Gerber, 1998, pp. 343–344).

The "hybrid" combination of a French-style administration with a German-inspired ordoliberal framework developed into a set of institutions that are arguably closer to Brandeis' vision of "fair trade" and "regulated competition" than most observers recognize, and certainly closer to that vision than ever achieved in the United States. In particular, the current system embodies key features that Brandeis had identified as important to managing markets and preserving competition. Some of these are procedural—in particular, the central role assigned to agencies staffed with experts to preside over an administrative system aimed at preserving a competitive market structure while also encouraging forms of cooperation seen as improving economic performance. Others are substantive—in particular, recognizing the benefits of providing weaker parties with coordination rights as a form of countervailing power, while also aggressively policing large companies to combat their efforts to exploit their economic clout. In what follows, we discuss the emergence and evolution of EU competition law, highlighting parallels to America's own "lost historical alternative" of the Brandeisian vision on each of these dimensions (Schneiberg, 2007).

4.1. Proactive administrative enforcement

Central to Brandeis' model of "regulated competition" was a proactive system of administrative governance. Toward this end, he supported the establishment of an expert administrative agency, empowered to devise tailored rules that were based on economic studies and consultation with industry. As he explained in a 1913 article outlining his preferred approach, "In the complicated questions involved in dealing with 'Big Business', the first requisite is knowledge—comprehensive, accurate, and up-to-date—of the details of business operations" (reprinted in Fraenkel, 1934: 134). While Brandeis preferred a cooperative relationship between business and government, he also recognized that for such a system to be effective, administrators would need to be delegated an authoritative say over the rules of competition as well as "coercive" powers to police abuses, particularly by dominant players (Berk, 2009, p. 101). As he noted: "The time has come to utilize that experience and to embody its dictates into rules of positive law, which will instruct the many business men who desire to obey the statute, what they should avoid—and admonish those less conscientious what they must avoid" (Brandeis, 1913 in Fraenkel, 1934: 131).

From the start, the European Community's system of competition law hewed to older European traditions in opting for an administrative rather than judicial system of enforcement that empowered an expert agency to write rules that permitted as well as prohibited certain categories of restrictive agreements. During the negotiations over the Treaties of Paris and Rome, the six founding member states (all steeped in a civil law rather than a common law tradition) explicitly rejected proposals modeled on the US antitrust system that would criminalize all horizontal intercompany agreements and be enforced by private and public litigants in courts. Across all six of the founding countries of the EEC, industry (organized into strong trade associations) joined with labor unions to

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oppose, to varying degrees, the establishment of a "Sherman Act" in Europe, which they saw as undermining their ability to pursue cooperative arrangements that were needed for economic recovery and reconstruction (Gillingham, 2004; Milward, 1984).

Member states chose instead to grant the Commission significant procedural and substantive discretion over the development and enforcement of competition policy (Majone, 2001; Pollack, 2003). Reflecting continental traditions of bureaucratic legalism, the system was both hierarchical and formalistic. Decision-making was dominated by the European Commission, which was empowered to develop authoritative norms and standards regarding both the structure of its own implementation authority as well as the specific rules that companies should follow. At the same time, individual bureaucratic decisions conformed to written legal guidelines and procedures that set out in great detail the kinds of restrictive practices that were permitted and prohibited and the specific processes involved in enforcement.

The foundational procedural rules enacted by the new EEC gave the Commission the exclusive authority both to enforce violations of competition rules and to provide forbearance to registered business agreements determined to be economically or socially beneficial (Kelleher, 1967). A few years later, this authority was expanded to include block exemptions, providing the Commission with a quasi-legislative power over inter-firm agreements (Gerber, 1998, pp. 350–351). The Commission's broad administrative authority was made subject to judicial review. But unlike US courts, which have a long history of overruling antitrust regulators, the Court of Justice of the European Union (CJEU) has generally supported the Commission's substantive determinations, establishing the precedent of deferring to the Commission's expertise in questions involving "complex evaluations of economic matters" even as it also demanded a strong evidentiary basis for decisions and strict compliance with procedural and rule of law norms (Kalintri, 2016). In practice, this provided the Commission with "sufficient discretion to resolve difficult competition issues, including the granting of exemptions" (Freyer, 2006, p. 285).

During the 1960s and 1970s, the European Commission used its bureaucratic discretion to develop rules and procedures that sought to distinguish between "healthy" and "unhealthy" forms of cooperation that bear a strong resemblance to the role that Brandeis had envisioned for the FTC in the 1910s. Whereas the US DOJ has long been skeptical of the benefits of business cooperation, the European Commission developed rules that were more permissive and sometimes even supportive of cooperation agreements that were viewed as serving the purpose of either breaking down national barriers or increasing productive efficiency. As Hans von der Groeben, the first competition commissioner explained in an early policy document, the enforcement of European competition law should not be based on overly broad legal presumptions such as the *per se* ban against horizontal cartels developed by American courts (von der Groeben, 1961). Rather, the Commission would develop tailored rules that were informed by the economic analysis of agreements in practice. Whether considering a horizontal arrangement between a group of small manufacturers, the marketing practices of a large company, or a member state government's industrial policy, the evaluation could not be determined by legal content alone, but instead required an "economic interpretation in each case" (13).

Despite significant changes over time, this model of proactive administrative management has generally proved resilient. Following a political impasse in the 1960s and 1970s, the Commission's administrative powers have steadily grown, with the Commission increasingly using legislation and guidelines to establish competition law norms, substituting "an administrative institution for a judicial institution as the driving force within the system" (Gerber, 1998, p. 381). This administrative rulemaking authority allows the Commission to "provide lists of specific clauses that are considered, respectively, acceptable, unacceptable, and possibly acceptable," and then "induce firms to structure their agreements to conform to these checklists" (Gerber, 1998, pp. 378–379). In effect, this makes it possible for the Commission to distinguish between "good" and "bad" restrictive agreements (Georgieva, 2015). Even after substantial "modernization" reforms enacted in 2004 that decentralized enforcement by empowering national regulators and courts to also enforce the law, the Commission still retains broad substantive discretion in this arena (European Commission, 2009). The Commission not only maintained its authority to issue block exemptions and directly enforce the law through administrative processes, but also received new remedial and investigative powers, including the ability to impose structural remedies, to provide leniency to cooperative companies, and to enter settlements with parties under investigation (Wilks, 2005).

4.2. Recognizing the benefits of horizontal coordination among weaker parties

As indicated earlier, Brandeis strongly supported arrangements that endowed weaker parties—smaller competitors, workers, farmers—with what Paul (2020) terms "coordination rights" as a way of countervailing the power of large corporations. Far from demanding the suppression of all forms of coordination, therefore, Brandeis called for nurturing precisely those forms of coordination that safeguard competition by channeling it away from price (and labor sweating) into quality and innovation. Beyond providing certain weaker parties such as farmers and workers with antitrust immunity and supporting collective bargaining with labor, Brandeis also thought state regulators should actively facilitate "economic improvement and collaborative learning" among firms by organizing trade practice conferences or setting best practices in areas such as cost accounting and providing firms with incentives to adopt them (Berk, 2009, p. 96). Specifically, he advocated for the FTC to be "empowered and directed to obtain detailed and comprehensive knowledge" [of agreements among companies]—noting that some of these agreements are "doubtless reasonable and beneficent restraints upon trade and should be permitted [while] others are doubtless vicious and should be abrogated" (Brandeis, 1913 reprinted in Fraenkel, 1934: 135). The FTC should be authorized to scrutinize such agreements, and to offer relief from criminal liability to the firms that furnish the Commission with the requisite information about their agreements, unless and until the agency or the DOJ deems them to be in contravention of law (135-36).

In the European Union, policymakers have established a similar set of arrangements, to investigate and make such determinations. The Treaty of Rome, which prohibits certain restrictive practices, includes a broad exception for any agreement "which contributes to improving the production or distribution of goods or to promoting technical or economic progress" and does not run afoul of other general principles. As the European Commission has developed and adjusted its policies and practices, these exceptions came to include a wide range of horizontal inter-firm collaborations and joint ventures. Thus, during the EEC's first two decades, the Commission generally approved horizontal coordination beyond the boundaries of the firm where agreements were viewed as increasing productivity, diffusing new technology, or fostering cross-border cooperation (Buch-Hansen & Wigger, 2011, pp. 65–68). For instance, the Commission issued early block exemptions to permit and encourage competing firms under some circumstances to pursue specialization agreements, to cooperate in research and development, to jointly advertise their products, and to develop common trademarks and standardization processes (Hawk, 1972, pp. 257–265).

To encourage coordination and technology transfer between small- and medium-sized enterprises (SMEs), the Commission also exempted companies with a level of economic activity below a certain threshold, covering an estimated 90% of all companies (Buch-Hansen & Wigger, 2011, p. 67). Indeed, the EEC competition authority actively sought to promote cooperation between SMEs as a way to allow them to more effectively compete against larger companies (Mestmacker, 1972). As von der Groeben explained, "cooperation between SMEs of different Member States was not only irrelevant in terms of EC cartel law, but actually politically much desired" (Buch-Hansen & Wigger, 2011, p. 67). By 1980, more than 4000 cooperation agreements between SMEs had been approved by the Commission (European Commission, 1980, p. 16).

The kind of overt price-fixing cartels of the interwar period are long gone, and indeed cartel enforcement has dramatically increased in the EU (Harding & Joshua, 2010; Ordóñez-De-Haro et al., 2018). However, the Commission has continued to provide significant exemptions for horizontal cooperation between competitors in areas it deems to be economically or socially beneficial.[10] These include: (1) research and development agreements, where competitors pool their research efforts and jointly exploit research findings; (2) specialization agreements, where firms with complementary assets agree to cease production of a certain product or service and instead purchase it from a competitor; (3) purchasing and commercialization agreements, which allow smaller firms to achieve economies of scale through cooperation; (4) standardization agreements, which lower production costs, improve quality, or ensure interoperability and compatibility; and (5) information exchange agreements about market conditions or best practices, which reduce information asymmetry, facilitate benchmarking, or economize production and distribution.[11]

In fact, these block exemptions have, if anything, been widened not narrowed, as the Commission continues to expand and clarify its policy in response to acquired experience, new research, and consultation with industry groups (Gerber, 1998, p. 379). For instance, over the past three decades the market share threshold for many types of horizontal agreements has gradually increased, allowing more companies to fall under the exemption.

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The Commission has also increased the range of permitted activities in response to new developments in technology and new political imperatives to address climate change. For instance, the draft 2022 Horizontal Block Exemption Regulations (HBER) specifically seeks to adapt to "economic and societal developments of the last ten years, such as digitalization and the pursuit of sustainability goals."[12] Toward this goal, a 19-page chapter on sustainability has been added, one that defines sustainability broadly to include not only environmental concerns but also social objectives such as labor and human rights, and gives companies substantial space to coordinate activities aimed at decarbonization and the green transition. The HBER also adds new guidance for companies operating in digital markets, including rules for exchanging algorithms, sharing mobile infrastructure, and pursuing joint commercialization agreements within digital markets.

In the United States, certain kinds of cooperation are also in principle permissible if they represent efficiency-enhancing collaborations. The US regulatory agencies rarely prosecute joint ventures and have established "safe harbor" guidelines that share some similarity to the European approach.[13] However, because agency guidelines are embedded in an adversarial legal system, where judges rather than bureaucrats determine the law's substantive and procedural rules, American antitrust law is "riddled with uncertainties that discourage potential collaboration" (Nathani, 1992, p. 164). In particular, the risk of paying treble damages to private plaintiffs in a field where courts have not established clear standards has led firms to forego collaboration where in principle it is allowed (Nathani, 1992, pp. 170–173). In practice, research joint venture rates are far more common in Europe than in the United States (Nathani, 1992, p. 176).[14]

Beyond a more forbearing stance on coordination among small firms, the original Brandeisian vision also foresaw strong coordination rights for workers. Like other progressives, Brandeis recognized that labor's coordination rights are critical to unions' ability to challenge autocratic power at all levels, including within corporations themselves (Khan, 2018, p. 131). The European integration project, with its early emphasis on "negative" over "positive" integration has not always been kind to organized labor (Höpner & Schäfer, 2012; Scharpf, 2010). But when it comes to competition law, the EU Commission continues a broader European tradition of overall greater support for worker organization than we find in the United States.

While the founding documents of EU competition law did not explicitly address labor's rights to coordinate, labor unions and collective bargaining agreements were viewed as protected by other parts of the European Treaties that promoted high levels of employment and social protection and were never challenged under EU competition law (Monti, 2021). In an important 1999 case on the boundaries between European labor law and competition policy, the European Court of Justice expressly reaffirmed that collective bargaining agreements between one firm and its employees as well as inter-firm collective labor agreements that apply to an entire sector were fully compatible with European competition law.[15]

European policymakers have also signaled greater support for labor rights in the face of employer strategies of fissurization, for example, relying on "independent contractors" to avoid or minimize their obligations under collective labor contracts. In Europe, a key court ruling in 2014 expanded on the precedent set by the 1999 case in ways that signal stronger support for such "fissurized" workers. This ruling extended the antitrust exemption to protect the organizing efforts of what are termed "false [or "fake"] self-employed" workers who are *de jure* independent but *de facto* dependent wage employees (Šmejkal, 2015). Following on these decisions, the Commission adopted Guidelines in 2022 that explicitly protect independent contractors who seek to organize as long as they are "in a situation comparable to workers" and are in a "weak negotiating position" (European Commission, 2022).

In the United States, by contrast, antitrust law was historically weaponized to hobble labor unions. Well into the 20th century, US courts interpreted the Sherman Act to prohibit many union activities, and even allowed companies to collect damages from workers who went on strike. While Congress enacted explicit antitrust labor exemptions that became fully institutionalized in case law during the New Deal period, labor organizing involving independent contract workers is still subject to antitrust liability (Paul, 2015).[16] Efforts on the part of gig workers to organize have thus been met with private antitrust challenges and charges of illegal price fixing (Steinbaum, 2019). One of the most high-profile such cases involved the Chamber of Commerce's successful challenge to the City of Seattle's enactment of legislation that would have allowed rideshare drivers to bargain collectively with Uber and Lyft.[17] Such lawsuits have so far undermined virtually all legislative efforts to expand collective bargaining rights to cover independent contractors.[18]

4.3. Policing the exploitation of private economic power

The dominant through line in Brandeis' work is his concern about economic concentration and the many abuses that can stem from it. While many economists of his day viewed monopoly as inevitable, reflective of technological developments and economies of scale, Brandeis argued that consolidation often emerged through predatory tactics that had more to do with the exertion of economic power than with economies of scale or technical innovation (Berk, 2009; McCraw, 1986). Although he recognized that certain industries were characterized by technical requirements that required a degree of scale, he also argued that large-scale production in many instances undermined economic progress because monopolistic industries were likely to squash innovations that challenged established, standardized processes. Brandeis was therefore highly attuned to questions of economic power—and the ways such power could undermine both the freedom of producer groups and the legitimacy of democracy itself. Consequently, he believed that larger companies should be subjected to more stringent rules than smaller companies and that certain predatory, exclusionary, and abusive practices should be forbidden in most cases.

The European Union also places concerns about the exploitation of economic power at the center of its competition law. The Treaty of Rome dedicates an entire article to the "abuse of dominance," which regulates the restrictive practices and agreements of undertakings with substantial market shares. Under the Treaty, this includes such things as "unfair purchase or selling prices or other unfair trading conditions," "applying dissimilar conditions to equivalent transactions with other trading parties," and "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations." In its first abuse of dominance investigation, which involved the American Continental Can Company, at the time the world's largest producer of metal cans, the Commission charged the company with distorting the competitive process by creating barriers to entry and restricting the liberty of its smaller European distributors. In developing the case, the Commission drew directly from competition rules based on the ordoliberal economic ideology outlined above (Behrens, 2018). The CJEU upheld the Commission's decision, affirming the bureaucratic body's substantive determination that abuse of dominance covered not only exclusionary practices that directly harmed consumers but also those that caused indirect harm through "their impact on an effective competition structure" (Schweitzer, 2008). Subsequent Commission and court decisions reinforced this orientation, establishing a "special obligation" on large companies not to exploit their economic power, and prohibiting a range of "unfair" methods of competition (Behrens, 2018).

Empirical analyses suggest that, at both the European and national levels, regulators actively apply the abuse of dominance provision to address a wide range of exclusionary practices that reflect concerns over private economic power. There are now extensive rules, adopted into both hard and soft law, that prohibit dominant companies from engaging in a range of practices, including the creation of barriers to entry, the use of predatory pricing and price discrimination, the refusal to sell or buy products from competitors, and "squeezing" the profits of suppliers or distributors below a certain margin (Graf & Mostyn, 2022). Dominant companies also have extensive obligations to facilitate access to core infrastructures (i.e., essential facilities), to license intellectual property, and to provide interoperability information if such access is deemed necessary for a company to effectively compete. Since the year 2000, the European Commission has finalized more than 70 infringement and commitment decisions under this article across a wide range of industries (Foster, 2022). Commission decisions have generated more than €13B in fines and mandated sweeping behavioral changes to some of the world's most powerful companies.

Most of these cases have sought to address power inequalities between larger and smaller firms. Of the 39 Commission abuse of dominance decisions finalized between 2009 and 2019, nearly half involved facilitating access for a competitor to an "essential facility," resource, or other infrastructure controlled by a dominant player; 21% involved stopping a dominant company from leveraging its power in one market over another one in a way that limited opportunities for competitors to compete; and 15% involved preventing predatory behavior that was seen as foreclosing the competitive process (Foster, 2022). Perhaps most notably, the European Commission has pursued major cases against dominant online platform companies such as Google, Amazon, Apple, and Meta (Facebook), which required them not only to pay large fines in some cases but also to make major changes to their business models.[19]

The EU has also established a Merger Regulation that prohibits mergers or acquisitions that create or enhance forms of dominance that would distort or impair effective competition. Although the EU has increasingly made economic efficiency a key criterion, it has taken a tougher line than the United States on vertical and

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conglomerate mergers (Gifford & Kudrle, 2015, pp. 57–62). Recent empirical studies demonstrate that the EU has a systematically higher merger challenge rate in proposed mergers involving dominant firms (Bergman et al., 2019).

Many of these previous interventions and ongoing investigations were and are of course *post hoc*. They stem from investigations that are initiated long after violations have occurred and which usually take years to investigate and finalize. Brandeis, as discussed earlier, preferred "prophylactic" approaches to economic dominance by encouraging business rivalry to take productive rather than predatory forms (Winerman, 2003, pp. 34–38). As he explained to the US House of Representatives in 1914, an effective competition regulator would "create conditions which will render less likely the existence of restraints of trade and monopolies," rather than just "correct them when they are discovered" (quoted in Berk, 2009, p. 95). The new European Digital Markets Act is clearly designed to confront economic coercion more preemptively—preventing abuses before they occur. This legislation was spearheaded by the European Commission and deeply shaped by its previous experience enforcing competition law in the high technology sector. It designates a number of large online platforms as "gatekeeper" firms and then subjects these firms to a range of stringent requirements designed to ensure market fairness and contestability (Larouche & de Streel, 2021). For instance, the DMA will obligate companies to apply fair and non-discriminatory conditions to the ranking of services and products, a principle that was first developed in the Google cases. The broader requirement for business users to receive the data that they generate on the platform parallels in many ways Brandeis' concern for preserving the freedom of all market players and preventing predation by the powerful over the weak.

The robust enforcement record seen in Europe is the mirror image of the United States, where US regulators have not successfully prosecuted a major anti-monopoly case since the 1990s. Much of this relates to the substantive and procedural rules developed by courts. For instance in a 2018 Supreme Court decision, *Ohio v. American Express Co*., the Court blocked a state Attorneys General lawsuit challenging American Express' practice of contractually forbidding merchants from encouraging customers to use cheaper payment options, ruling that such restrictive practices were "pro-competitive" since they had created incentives for American Express to invest in expanding its credit card network (Wu, 2018b). In 2019, a key appellate court blocked an FTC challenge to Qualcomm's exclusive licensing agreements as anticompetitive, ruling that the agency had failed to demonstrate that the company's policies had hurt consumers. Most recently, FTC efforts to take a more proactive approach to merger regulation involving dominant companies such as Microsoft and Meta, have similarly been blocked by US courts.[20] This suggests that even in an area where Congress has delegated to regulators significant discretionary authority under legislation, the broader adversarial legal structure limits this discretion in practice.

5. The role of social learning in the evolution of competition law

Over a century ago, progressive reformers such as Brandeis looked to Europe for inspiration as they sought to develop governance systems to upgrade competition without encouraging consolidation. In the meantime, America's "monopoly problem" has once again worked its way to the center of public debate, and the emergence of a strong "new Brandeisian" critique of American antitrust has opened up new possibilities for addressing it (Khan, 2016, 2018; Wu, 2018a). President Biden's appointment of Lina Khan and Jonathan Kanter, two leading figures in the neo-Brandeisian movement, to head the FTC and Division of Antitrust, respectively, may herald important changes. In this article, we have traced the origins and trajectory of European competition law and argued that the EU's administrative institutions have facilitated processes of social learning that have contributed to the development of a more "Brandeisian" approach in European competition law and policy in the present.

Although it is far from a perfect expression, the EU competition regime embodies some of the core features of the system that Brandeis envisioned and championed. In particular, the EU's more proactive and responsive administrative system of economic management allows expert administrators to distinguish between healthy (competition-enhancing) and unhealthy (competition-destroying) forms of coordination and to continually update these rules in line with rapidly evolving markets. EU competition law thus *permits* a good deal of cooperation, especially between smaller competitors, while also helping to *protect* coordination among these firms by embedding competition within a body of rules that limits aggressive forms of competition and exploitative behaviors by dominant firms that would jeopardize the economic freedom of less powerful producer groups.

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In line with Brandeis' original vision for the FTC, the European competition regime has made it possible for smaller firms to pursue a range of cooperative strategies that have allowed them to more effectively compete against bigger firms. As long as firms, workers, and the associations that represent them do not clearly discriminate against economic actors located in other EU member states or violate a limited number of hard-core prohibitions, they have rarely faced a challenge from the Commission. Indeed, as we have seen, many forms of coordination have been explicitly endorsed by the Commission, especially if they were seen as increasing economic productivity, facilitating economic cooperation across member states, or achieving important social functions.

This model, as we have shown, does not reflect a static approach that is impervious to change or external influence. Quite the contrary: it is the culmination of a process of long-term social learning, one in which European policy makers have drawn insights from Europe's own experience and traditions, while responding as well to the influence of foreign regulatory regimes—including, of course the United States. The EU system has been able to adapt its institutions and practices in response to rapidly changing markets and new research in part because it has been outward-looking and because regulators possess significant discretion over the procedures and principles used to apply competition law in response to practical experience, economic analysis, and changing market dynamics.

By contrast, social learning in the United States has been funneled through federal courts that are committed to views that are deeply hostile toward administrative agencies, and have therefore circumscribed regulators' discretion. This has resulted in general rules that are based on particular economic ideologies more than empirical knowledge of how the economy works in practice, and a protracted and cumbersome process of institutional change that limits regulators' ability to proactively respond to new developments. The adversarial legal structure has also made social learning more parochial, with policy evolution drawing largely on American precedents, American doctrines, and studies of American experiences—all interpreted through the lens of a particular set of economic theories. This inward-looking approach to social learning stands in sharp contrast to the Progressive Era, when US policymakers were deeply engaged in cross-national lesson-drawing in antitrust as well as a variety of other policy fields. Indeed, as we saw, many of Brandeis' core ideas—from the benefits of trade association governance to the need for an independent but flexible administrative system of "regulated competition"—were directly inspired by industry practices and private governance structures prominent in western and northern Europe at the turn of the last century.

Our analysis has implications for the comparative literature in antitrust as well as the broader literature on social learning. A growing literature in comparative political economy and economic sociology have noted an Atlantic Divide in Antitrust, especially on the question of economic dominance. In explaining these differences, some scholars have emphasized the role of business interests (Philippon, 2019) while others stress the distinct professional ideas (Ergen & Kohl, 2019) and "competition paradigms" that have been institutionalized into policy and jurisprudence (Foster, 2022). Our study builds on these insights by highlighting how differences in administrative law may contribute to this divide, by shaping how particular ideas or methodologies are institutionalized and put into practice.

Relatedly, the study has implications for the role of economics in competition policy. While the contemporary antitrust debate in the United States usually associates "economics" with non-enforcement, this is neither faithful to Brandeis' vision nor the European approach. Indeed, the EU case shows that economic analysis is an essential component of an effective system of regulated competition. Instead of asking *whether* economics should be a criterion in decision-making, it may be more helpful to consider *how* economics is institutionalized and especially how broadly economic impact is construed.

Finally, our study contributes to the broader literature on social learning. The organization of administrative law has not been an explicit focus of the literatures in social learning and cross-national lesson drawing. Yet as Wilson (1989) reminds us: "Judges and bureaucrats see the world differently, partly because of their different backgrounds but mostly because of the tasks they perform and the organizations in which they operate" (666). As we have shown in this case study, administrative systems that give expert agencies the discretion to develop substantive and procedural rules may be better capable of developing and enforcing tailored rules that incorporate both theoretical and practical knowledge and nimbler in updating these rules in response to acquired experience and new information. Judicialized regulatory policy can be important for

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establishing some checks on bureaucratic power, but administrative policy may be better suited to more dynamic, ongoing social learning.

Taking a step back to observe the long history of antitrust, from its emergence in North America at the turn of the 20th century to its ongoing evolution in the European Union today, it becomes clear that social learning and cross-national borrowing have played essential roles in the evolution of the European competition regime. Today, as the American competition policy system itself undergoes significant reform, there is once again an opportunity for social learning and meaningful cross-national lesson drawing. Much as Brandeis learned from the European model at the beginning of the 20th century, New Brandeisians can benefit from a consideration of European competition law today.

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DATA AVAILABILITY STATEMENT

The data that support the findings of this study are available from the corresponding author upon reasonable request.

Endnotes

[1] For a more positive account of the deliberative qualities of "aggressive judicial review," see Sunstein (1989).

[2] Paul (2021), Roy (1999), and Sklar (1988) all emphasize that common law itself was not entirely hostile toward combinations among firms, and indeed Roy in particular documents the existence of many such arrangements in the United States before the Sherman Act. However, scholars agree that the Supreme Court's interpretation of the Sherman Act was particularly intolerant of most forms of coordination across different firms.

[3] For instance, in 1890, the German Reichsgericht ruled that businesses were permitted to regulate the market through "self-help on a cooperative basis." The German High Court affirmed this precedent in the 1897 Saxon Wood Pulp decision, which made cartel agreements legally enforceable. See generally Nörr (1995).

[4] Thus, for example, cooperatives—both worker and small producer and retailing cooperatives—enjoyed forbearance in Europe on a scale unknown in the United States (Spicer, 2024; Thelen, 2023).

[5] Even in Britain, America's closest European (and common-law) cousin, trade associations grew unencumbered throughout the early 20th century and the interwar period, taking an active role in managing competition among their members (Mercer, 1995: especially chapter 2).

[6] He went on to specify that at a minimum, such a board should have "ample powers of investigation, not only as mainly for the purpose of detecting and exposing lawless business, but in order to foster and build up law-abiding business" … to co-operate with the Department of Justice in "supply[ing] the court with … detailed and expert knowledge" to inform the administration of the Sherman law" … [and] "to aid in securing compliance with the law" (Brandeis, 1913 in Fraenkel, ed. 1934, pp. 134–35).

[7] Still today, the agency's authority to write rules regulating unfair competition remains dormant, and recent efforts to revive this authority face stiff opposition in the courts. See generally CRS (2023).

[8] See FTC v. Gratz, 253 U.S. 421 (1920).

[9] From 1915 to 1924, courts dismissed 287 of 382 FTC restraint-of-trade orders; an additional 28 orders were lost by the FTC during judicial review. Calculations by the authors using Posner (1970).

[10] For a complete list of Horizontal Block Exemption Regulations, see https://competition-policy.ec.europa.eu/antitrust/legislation/horizontal-block-exemptions_en.

[11] Australia's competition law similarly allows for forbearance to be granted to cooperative arrangements between businesses where the competition authority determines that the benefits to the public outweigh the possible anti-competitive effects (McCrystal, 2022).

[12] The 2023 Horizontal Block Exemption Regulations and Horizontal Guidelines are available at https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990.

[13] See for instance "Antitrust Guidelines for Collaborations Among Competitors," Federal Trade Commission, 2000. https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[14] For instance, Link (2021) identifies 614 registered research joint ventures in the United States from 1986 to 1996. In Europe, over the same period, 4754 were registered in the European Union. See Hernan, Marin, and Siotis (2003, pp. 79–80).

[15] See *Becu*, C-22/98, EU:C:1999:419, paragraph 26 and *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (1999) C-67/96, [1999] ECR I-5751, [2000] 4 CMLR 446.

[16] See Hovenkamp (2023) for a different, more sanguine perspective on labor and antitrust.

[17] *Chamber of Commerce v. Seattle 890 F.3d 769* (*9th Cir. 2018*). For an overview of the case, see https://harvardlawreview.org/print/vol-132/chamber-of-commerce-v-city-of-seattle/. The city responded to the loss by extending its statutory minimum wage laws to rideshare drivers; see https://www.nytimes.com/2020/09/29/business/economy/seattle-uber-lyft-drivers.html.

[18] An exception to this pattern is a ruling by the First Circuit in 2022 that allowed jockeys to bargain collectively. See: https://www.scotusblog.com/2022/10/in-puerto-rico-horse-racing-dispute-a-looming-question-over-independent-contractors/.

[19] The Amazon cases were closed after the company agreed to extensive commitments. See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777. For the Commission's Statement of Objection against Meta, see https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728. For the Commission's statement of objection against Apple, see https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2764.

[20] From January 2021 to July 2023, the FTC/DOJ initially lost 4 of 4 litigated cases involving non-horizontal mergers, and 4 of 7 litigated cases involving horizontal mergers. See https://www.reuters.com/legal/transactional/assessing-state-affairs-ftcdoj-merger-enforcement-2023-07-10/.

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