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Interview of P. BOUGETTE and F. MARTY on their article: "Information Exchange among Firms: The Coherence of Justice Brandeis's Regulated Competition Approach"

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Resume: *"During the 1920s, two proposals for regulated competition competed in the United States. The first, inspired by trade associations, was advocated by Herbert Hoover. This approach echoes a managerialist view of coordinated competition under state support. The second – promoted by Justice Louis Brandeis – provides an alternative view of what regulated competition should be: avoiding ruinous competition through information exchange among small firms. From his involvement in Wilson's 1912 campaign team to his dissent in the American Column ruling of the US Supreme Court in 1923 and his position against the National Industrial Recovery Act (NIRA) in Schechter Poultry in 1935, we argue that Louis Brandeis was consistent in his opposition to such a convergence between big business and big government. His intemporal coherence relies on his Jeffersonian approach advocating for a dispersion of economic power for both efficiency and political purposes. However, both the trade association movement and the NIRA experience are pertinent to Alexander Hamilton's vision of an equilibrium between the economic gains resulting from concentration or coordination and strong political control".*

Question 1. *Louis Brandeis put forward the idea that market stabilisation and the balance of power can be achieved through the regulated exchange of information. The very idea adopted in view of the various positions he has taken is that the exchange of information between small firms would allow a collective bargaining capacity to counterbalance large firms market power. As long as this doesn't harm consumers by eliminating competition from the market. The final idea would be a "differentiated" treatment according to the size of the firm: a practice considered as anticompetitive as exercised by big firms but considered as justified and legitimate when these restrictions on market freedoms are exercised by small firms. What do you think of this approach? Especially if the question were to use it today?*

Market conditions are very different between the time of Louis Brandeis and ours. Nevertheless, parallels can be drawn. Should we seek to bring together the conditions that allow us to achieve efficiency, or should we aim at broader objectives in parallel? The question arose in the time of Louis Brandeis, it arises today, and we could even draw parallels with intermediate periods.
We can give two examples, one in US law, the other in European law.

The first one is related to the case of the resale price maintenance (RPM) in American jurisprudence. They may or may not be defended on the basis of efficiency – Louis Brandeis does so only because it protects small retailers and can be seen to this respect as "an advance in trade morals[1]". The argument is that of defending a social structure conceived as a political necessity and simultaneously of promoting specific values in trade.

[1] Berk, G., (2009), Louis *D. Brandeis and the Making of Regulated Competition, 1900-1932*. Cambridge, UK: Cambridge University Press

The second one consists in the importance devoted to loyalty as an objective of competition law. This can be found in all good textbooks[2], but what place does it have in the *effects-based approach*? A paradox when one rereads contemporary interpretations of the *Grundig Consten* decision of the Court of Justice. For example, Alexis Jacquemin and Alexis Schrans regretted in 1970 that the precedence of loyalty over the requirements of economic efficiency was called into question[3]. They saw in the position of the CJ the mark of a substantial shift in the scale of values implemented by the legal order.

Over the long history, considering efficiency as the only criterion of competition laws enforcement could seem like a parenthesis opened in late 1970s[4].

The defense of small firms can be seen from different angles, particularly regarding the question of efficiency.
The preservation of a network of small firms could be considered necessary from a political point of view, from a fairness point of view but also with regard to certain efficiency considerations. The asymmetry of treatment can be considered in this light. It is intended to make possible the collective exercise of countervailing market power. By exchanging information, the agents most penalized by information asymmetries on the market can limit their disadvantage vis-à-vis the major players. The impact can be both appreciable in terms of distribution and efficiency, since exchanges would make it possible to secure the investments of the weakest firms by preventing the risk of ruinous competition[5].

Louis Brandeis therefore defends a differentiated treatment of information exchanges among competitors. From Brandeis' perspective, it is a question of moving from a *per se* prohibition to a rule of reason. The effects on the market are differentiated according to the size of the companies concerned. What hampers competition when large firms are involved cannot have an effect on the consumer when the firms involved are neither individually nor collectively capable of influencing prices. By extension, even if their trade limited competition, it would be necessary, according to Louis Brandeis, to balance this effect against the collective gains linked to their maintenance on the market.

Louis Brandeis's positions may seem even more surprising nowadays as he defends asymmetrical rules of the game to advantage small firms in the competition. In our article we quote several of his dissenting opinions in which he defends a discriminatory taxation against chain stores or the limitation of entry into this or that branch to avoid overproduction. These are not rules ensuring a level playing field, but a policy to preserve the presence of a certain type of player on the market. The case of information exchange could be read from the standpoint of tolerance for practices that allow certain stakeholders to coordinate in one way or another to offset a structural imbalance in bargaining power. The logic is the one of Galbraith's countervailing power.[6] This logic of collective suppliers' countervailing power could be applied in the agri-food retail sector[7].

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[2] See for instance Nicolas Petit (2020, p.88) quoting the AstraZeneca and Huawei - ZTE cases.
Petit N., (2020), *Droit européen de la concurrence*, 3rd ed., LGDJ.

[3] Jacquemin A. et Schrans G., (1970), *Le droit économique*, collection Que sais-je ? PUF.

[4] The Sherman Act as a *consumer welfare prescription* (U.S. Supreme Court, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

[5] Bougette P., Budzinski O. and Marty F., (2019), "Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn from an Industrial Organization Approach?", *Revue d'Economie Politique*, 129(2), mars-avril 2019, pp.261-286

[6] *American Capitalism: The Concept of Countervailing Power*. by John Kenneth Galbraith. Boston: Houghton, Mifflin Co., 1952.

[7] See for instance, the French law #EGalim related to the balance of business transactions in the agricultural sector (*Loi pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous*) promulgated the 30 October 2018.

The asymmetry defended by Louis Brandeis may be closer to what we know about sectoral regulation in newly liberalized sectors. The rule can then be conceived as being more favorable for players with small market shares. Where it differs from our tradition is that it does not impose special duties on dominant operators, but rather grants non-dominant players a margin of freedom in terms of compliance with the competition rules. The difference in approach is easily explained. Our European tradition is focused on the protection of the market process: a process that the dominant operator can jeopardize if it does not take into account the impact of its decisions - certain practices, which are accepted by its competitors, are therefore prohibited. In the perspective defended by Louis Brandeis, competition rules must prevent situations of dominance. He even regrets that the Sherman Act did not finally limit the size of firms. It is therefore normal in his view that the competition rules should apply first and foremost to large market players and that the less powerful ones should be subject to a differentiated enforcement, especially since their practices – which could be sanctioned on the basis of the competition rules – contribute to counteract the tendency of large firms to strengthen their market positions.

Question 2. *In this respect, for Louis Brandeis, it appears that the compromise between efficiency and economic freedom is difficult to envisage. The interest of preserving small firms against a cutthroat competition takes precedence for Brandeis and must be transcribed through the primacy of efficiency. Do you still agree with this vision? Can't a more nuanced vision with the same objectives be achieved in your opinion?*

As we show in the article, the nuance is obvious with Louis Brandeis since his position has implicitly evolved over time. Before his arrival at the Supreme Court in 1916, asymmetrical treatment of firms and economic efficiency seemed perfectly reconcilable to him. According to him, the growth in the size of firms resulted in inefficiencies. Market concentration leads to efficiency losses. By counteracting the tendency to crowd out small firms, antitrust law promotes efficiency. Louis Brandeis' perspective foreshadowed the work on diminishing returns to organizations (inefficiency X[8]). At this point, he opposed both the approach of liberal economists and that of institutional economists (Veblen and Commons). His differences with the latter are particularly worth considering. These economists thought that concentration was a guarantee of efficiency. In their view, it allowed them to take advantage of increasing returns and to avoid ruinous competition, especially in industries with high fixed costs. From this appreciation stemmed a preference among progressives - such as President Theodore Roosevelt (who, after two Republican mandates, ran for a third presidential mandate under these colors in 1912) - for regulating large firms rather than calling for their dismantling.

Louis Brandeis' opposition to progressive arguments during the 1912 presidential election can be explained by this divergence. For him, the option of regulation makes no sense since concentration is detrimental to economic efficiency.

However, this "economic" argument is secondary to Louis Brandeis. In his perspective, the dispersion of economic power and the maintenance of a dense network of independent firms are indispensable from a political point of view. The economic independence of citizens and a relative equality of conditions among them are seen as necessary for the life of American democracy.

The importance of political arguments over economic arguments will be even more pronounced after his accession to the

[8] Leibenstein H., (1978), "X-Inefficiency Xists – Reply to an Xorsist", *American Economic Review*, 68(1), pp.203-211.

Supreme Court. This evolution can be considered natural in view of the specificity of the Supreme Court's action. It can also be read as a gradual clarification of Louis Brandeis' position. Even if concentration does not induce damage in terms of efficiency, the defense of small firms may justify giving up part of its potential gains. The protection of a certain market configuration thus justifies arbitration in terms of efficiency. Since this trade-off cannot be based on objective criteria (the two dimensions weighed against each other are immeasurable), an implicit hierarchy is established by Louis Brandeis. Part of economic efficiency can be sacrificed to the defense of a certain market structure whose gains are to be sought in the political sphere and not in the economic sphere.

The specificity of this approach in relation to the antitrust consensus of the last four decades must be emphasized. At the time of Louis Brandeis, the economic and political spheres were considered inseparable[9]. Under this prism, antitrust has first of all a political purpose. In the economic sphere, distributional dimensions are also taken under consideration and not only those related to efficiency.

Question 3. *The United States was marked, particularly in the inter-war period, by an opposition between the Jeffersonians (Thomas Jefferson) and Hamiltonians perspective (Alexander Hamilton). One favoured fairer competition, freedom of enterprise and consumer protection through a sharing of powers, particularly economic ones. While the other was centred around powerful economic and financial institutions often favoured by strong state regulation which could sometimes result in a greater imbalance of market powers. Like the NIRA, which tended to strengthen the bargaining power of big firms through state intervention. To which Louis Brandeis had obviously affirmed his opposition, in contradiction with Franklin Roosevelt. Without asking you the crucial but, at the same time, obvious question, of which movement you would have personally defended; If the Hamiltonian movement had prevailed at that pivotal period, when the economic conception of competition was just beginning to develop, do you think that would have had a detrimental impact on the American conception of competition of today?*

The Hamiltonian approach was only very partially followed in the US in antitrust proceedings and still at very particular times. In a caricatured way, one could exclusively relate it to the two presidents of the Roosevelt family, Theodore and Franklin (they were cousins). To some extent, the experience of the New Deal in Franklin Roosevelt's first term in office can be seen as an attempt to regulate the economy through concertation with large firms[10]. However, the balance between Big Government and Big Business on which the Hamiltonian logic lies on was hardly present. The codes of conduct were in fact established by the large firms and made compulsory by the public authorities. Not only did the government have little weight in their drafting, but they had the effect of neutralizing competition to the benefit of the most powerful actors.

The most interesting experience is to be found in Theodore Roosevelt's actions. He best embodies the notion of balance between public and private economic powers. The Hamiltonian approach is based on the implementation of powers and counter-powers. To use Theodore Roosevelt's expression, "speak softly and carry a big stick; you will go far." The proposals he defended in his 1912 candidacy under the label of the Progressive Party embody this idea of public/private balance and the "regulation"

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[9] Marty F. et Kirat T., (2018), « Les mutations du néolibéralisme américain quant à l'articulation des libertés économiques et de la démocratie » *Revue Internationale de Droit Economique*, volume XXXII, 2018-4, pp.471-498.

[10] Kirat T. and Marty F., (2020), "From the First World War to the National Recovery Administration (1917-1935) - The Case for Regulated Competition in the United States during the Interwar Period", *Cahier Scientifique du CIRANO,* 2020s-66, December.

of competition[11]. However, even when he was president (Republican) his response to the crisis of 1906 showed his preference for a negotiated approach. The US Steel case, which resulted from the agreements reached at the time, was one of the main reasons why Theodore Roosevelt ran for a third term in 1912 against his Republican successor William Howard Taft, whom he blamed for the lawsuits that followed his departure. These two episodes are perhaps the only "Hamiltonian moments" in US antitrust history.

Conversely, the neo-brandeisian approach is inspired by structuralism. The size of firms (or rather their dominance in terms of market shares) is viewed with suspicion in itself (see for instance the recommendations in terms of merger control in the 1960s) and the emphasis is placed on dimensions of fairness reflecting the balance of transactions among firms. Therefore, the perspective sounds Jeffersonian.

Should the Hamiltonian approach be adorned with all the virtues? The risk of capture is never excluded. Three historical moments can show how a regulated approach to competition can be problematic. We have just mentioned the first. The rupture between Roosevelt and Taft over the treatment of the *US Steel* case illustrates the risks associated with a negotiated approach[12]. The second case is, of course, that of the NIRA that Franklin Roosevelt implemented during his first term in office and which benefited "regulated" companies much more than the US economy[13]. The third moment is to be sought in the immediate aftermath of WW2 with the *Alcoa* ruling of 1945. Judge Hand then handed down a ruling that appears on first reading to be Jeffersonian since it indubitably put in place an asymmetrical mechanism benefiting the dominated companies, even if they were less efficient than the dominant operators. However, a reading of the preparatory documents for the ruling shows that this solution was only a second-best option for Hand[14]. His preference was for regulation, but this was out of reach. He opted for a solution that challenged the position of the large firms.

This position also highlights the intellectual coherence of Learned Hand, who in 1912 was part of Theodore Roosevelt's campaign team when Brandeis advised Woodrow Wilson. The interest of analyzing Learned Hand's career between 1912 and 1945 is to show the main limitation of the Hamiltonian approach: the risk of regulatory capture. It can be pointed out that the economist Henry Simons, who after the war was at the origin of the creation of the Second Chicago School, defended a very similar position in the 1930s, though on opposite bases[15]. The dismantling of dominant operators could be accepted to avoid public regulation, which was for him a remedy worse than evil (i.e. the blocking of the competition process due to concentration).

Question 4. *Louis Brandeis has been the subject of much controversy and criticism, firstly by reproaching him for his populism and also sometimes for his lack of coherence in his positions (Shapiro, 2017 ; Crane, 2018 ; Langlois, 2018 ; etc.), an element that you strongly refute in this article. Do you think that these allegations have nonetheless served to advance the debate, as is the case today with your article?*

The difficulty of grasping Louis Brandeis is, after all, common to many historical figures: their vocabulary is no longer really ours, their

[11] Chase J., (2009), *1912: Wilson, Roosevelt, Taft and Debs -The Election that Changed the Country*, Simon and Schuster.

[12] German J.C., (2007), "Taft, Roosevelt, and United States Steel", *The Historian*, 34(4), pp.598-613.

[13] Kirat T. and Marty F., (2020), "The Late Emerging Consensus Among American Economists on Antitrust Laws in the Second New Deal (1935-1941)", *Cahier Scientifique* du CIRANO, 2020s-46, août.

[14] Winerman M. and Kovacic W.E., (2013), "Learned Hand and the Reluctant Application of the Sherman Act", *Antitrust Law Journal*, 79(1), pp.295-347.

[15] Bougette P., Deschamps M. and Marty F., (2015), "When Economics met Antitrust: The Second Chicago School and the Economization of Antitrust Law", *Enterprise and Society*, volume 16, issue 2, June, pp.313-353

positions have evolved over time and according to the context and debates of the moment. It is easy to choose the Brandeis that suits us best by setting aside one or another dimension. Richard Posner, in his critique of originalism as a method of interpreting the American constitution, denounced the use of history as the search for a "convenient past[16]." This is the main pitfall of the use of history in the field of legal research as well as in economics.

The revival of the Brandeisian banner is particularly legitimate on the part of the neo-structuralists in that they do not repeat the SCP model of the 1960s but differ in several respects from the approach defended by the Harvard School. Two points are essential. The first is to consider that the field of economics is not limited to efficiency but also covers distribution. The second is to reject the separation of the economic and political spheres. In this sense, the neo-brandeisian approach is to be read in the more general framework of the contestation of the *law and economics* approach by the *law and political economy* movement[17].

Beyond this dimension, the reference to Brandeis can be legitimately contested on two points. First, it is indisputable that Brandeis' approach is based on the trade-offs that can be made to the detriment of consumers. Protecting small firms in themselves (or even authorizing resale price maintenance schemes) undoubtedly induces an appropriation of part of the surplus by the firms and perhaps generates damage in terms of dynamic efficiency. These trade-offs cannot be ignored. There is no neutrality in distributional terms. Second, the emphasis placed on firm size must be considered in terms of its effects on efficiency. For Brandeis, the Sherman Act should have limited the size of firms. This position can only be understood if one realizes that Brandeis was born before the Civil War! However, the polarization on firm size led to a period of antitrust that today serves as a repulsive for many observers. This is, of course, the period marked by the Brown Shoe decision. Very low levels of concentration were sufficient to prohibit mergers operations without taking into account possible efficiency gains at any time. This approach was obviously counterproductive! But here the influence of Brandeis can be re-read through the action of another Supreme Court justice who prolonged his assault on post-war bigness, William Douglas, whose positions in antitrust matters could be the subject of an extension of the present work.

It should be kept in mind that Douglas is contemporary to the structuralist school of economics, which was not the case with Louis Brandeis, who was evolving within the framework of a radically different economic debate. The constant that can be traced between Brandeis, Douglas and the current neo-Brandeis is, however, the debate on the degree of concentration of the US industry and its effects both politically and economically. The fear of excessive concentration of the economy existed in the interwar period. It was the subject of much debate in the 1960s as the Neal Report[18] and is now the subject of controversy in the economic and political spheres, as shown by the impact of Thomas Philippon's work[19].

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[16] Posner R.A., (2013). *Reflections on Judging*, Harvard University Press.

[17] Britton-Purdy J., Grewal D.S, Kapczynski A. and Rahman K.S, (2020), "Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis", *Yale Law Journal*, vol.129, pp.1784-1835

[18] Hovenkamp H., (2009), « The Neal Report and the Crisis in Antitrust », *University of Pennsylvania Law School Working Paper*

[19] Philippon T., (2019), *The Great Reversal: How America Gave Up on Free Markets*, Harvard University Press