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Book Review. Louis D. Brandeis and the Making of Regulated Competition, 1900-1932 by Gerald Berk

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plished “while continuing to imagine something different” (167). To conform to the feminist ethic, responsible actions must be “grounded in community”: they must be informed by exchanges between lawyers and clients that create “understanding of [each other’s] situations, abilities, and limitations” and reflect “respect for each other’s decisions” (169). Finally, a feminist ethic of risk involves “strategic risk taking” that “challeng[es] authority when it is possible to do so and with full knowledge of the risks involved and awareness of who will bear the burden of failure” (170). As Shdaimah observes, personal relationships are central to this ethic. She argues that scholarship removed to the realm of abstraction misses out on both the empirical realities and the transformative possibilities of progressive lawyers’ practice.

There are other things to like about this book as well. It will be of interest to scholars of the professions, as it nicely illuminates challenges faced by all kinds of professionals who provide direct services to personal clients—for example, doctors, therapists, social workers, teachers, and dentists, as well as some types of lawyers. Among these are tensions between professional expertise and client autonomy, tensions surrounding the boundaries of client-professional relationships and personal intimacy and empathy, and tensions between what professional ethics and knowledge may prescribe and what clients’ and professionals’ capacities may permit. To sociolegal scholars, it will be of interest as a new piece in the growing mosaic of contemporary studies of how legal institutions work in practice. To analysts of poverty, the book provides a valuable portrait of how civil law fits in to the maintenance and, occasionally, the amelioration of inequality. The methodological appendix is a good example of how to do such writing well.

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Louis D. Brandeis and the Making of Regulated Competition, 1900–1932. By Gerald Berk. Cambridge and New York: Cambridge University Press, 2009. 296 pp. \$85.00 cloth.

Reviewed by Ajay K. Mehrotra, Indiana University

Sociolegal scholars and historians of the American regulatory state have long been interested in exploring how democratic institutions in the early twentieth century challenged and accommodated the rise of corporate capitalism. Those scholars who have focused on U.S. antitrust law have tended to characterize the historical policy

response to corporate consolidation as a binary choice between progressive attempts to use public administration to harness and regulate monopoly power and populist desires to diminish the size of large corporations and restore market competition. In his new book, Gerald Berk collapses this conventional dichotomy by persuasively showing that historical actors, led by the jurist and social reformer Louis Brandeis, envisioned and paved a third way between the populists and progressives. Berk refers to this alternative path as “regulated competition,” which he cogently describes as a fusion of progressive faith in scientific expertise and populist affinities for market discipline.

In Berk’s account, Brandeis is rightfully featured as the intellectual fountainhead of a “republican experimentalism” that gave birth to regulated competition. By deploying modern scientific means to achieve republican ends, Brandeis sought to use state power to prod big businesses to think creatively about how they could align their interests with those of consumers and regulators. As a reformer and lawyer, Brandeis worked closely with engineers and cost accountants at the Interstate Commerce Commission, where he learned firsthand about the importance of disaggregating business costs and encouraging information sharing among competitors. Unlike orthodox economists and laissez-faire constitutionalists, who presumed that particular business costs were natural and fixed, and that courts could easily police the line between acceptable competition and impermissible monopoly power, Brandeis and his acolytes contended that industrial production was as much a social as a technological process, and that predatory economic organizations like cartels could be transformed into cooperative trade associations, thus obscuring the line between competition and monopoly.

Brandeis was able to convince powerful lawmakers designing the Federal Trade Commission (FTC), as well as key officials within the nascent agency, to take seriously the idea of regulating big businesses by cultivating industry habits of collaborative reflection, inquiry, experimentation, and evaluation. Consequently, FTC officials were empowered to work with business leaders to channel economic activity away from unproductive, cutthroat competition and toward creative and constructive cooperation. To achieve these ends, the agency hosted trade practice conferences, gathered and disseminated information about different ways to measure costs, developed benchmarking standards and best practices, and revealed alternative methods of conceptualizing industrial production. Officials did all this, Berk argues, not by increasing the FTC’s top-down bureaucratic power over industry, but by blurring the lines of authority within the agency, flattening hierarchical authority, and encouraging lateral communication among departments.

These early achievements seemed doomed when the federal courts, the U.S. Department of Justice, and a branch of the American economics profession began in the 1920s to challenge elements of the FTC's regulated competition. But, as Berk masterfully demonstrates, the judicial setbacks did not simply destroy regulated competition. In chapter 5, which will be of great interest to readers of this journal, Berk lucidly shows how these institutional constraints paradoxically provided creative reformers with new opportunities, for while the courts limited the FTC's *ex ante* coercive authority, they provided space for the agency to experiment with new and innovative forms of public-private "associationalism" through trade practice conferences and other means of information sharing. Ultimately, regulated competition was contained rather than defeated, as certain aspects of it survived in particular industries well into the late twentieth century.

Like Berk's previous book (1994), this study provides a welcome corrective to the existing historical institutionalist literature on regulatory law and American capitalism. Whereas many scholars have tended to see technological and economic conditions as rigid constraints on institutional development and policy choices, Berk maintains that technology and economic activity can be reinterpreted in numerous ways, and that as a result organizational change and policy options can potentially be more flexible and open. Relying on what he refers to as a theory of "creative syncretism," Berk contends that institutions contain multiple components that can be unpacked and repackaged in unpredictable ways, providing imaginative reformers with opportunities to reframe long-standing problems in new ways and to search out, through democratic deliberation, innovative policy solutions. Thus, Brandeis and proponents of regulated competition were unwilling to take for granted the economists' theoretical conclusion that high, fixed business costs always and everywhere dictate the need for high volume production. Instead, they revealed how volume-based accounting shrouded salient differences in the production process. By doing so, creative syncretists like Brandeis paved a possible path for regulated competition.

In addition to challenging standard historical institutionalist accounts, the book complements a growing interdisciplinary, socio-legal historiography that continues to debunk the myth of the weak American state. Berk convincingly demonstrates that one reason why scholars have mistakenly depicted the American regulatory state, and the FTC in particular, as anemic is that they have been preoccupied with measuring state power in classical, Weberian terms. If one examines less conspicuous but equally effective means of governance, such as the collaborative statecraft at the heart of regulated competition, one can see that flattened and disbursed

public power was—and can still potentially be—an effective means of regulation.

Experts in the field might quibble with how Berk uses certain historical constructs as foils for his narrative. His reliance on an outdated and at times monolithic notion of populism and progressivism, for instance, or his implicit characterization of the early-twentieth-century American economics profession as a homogenous and rigid group of thinkers, can correctly be questioned. Still, despite these minor criticisms, Berk's book ought to garner the attention of law and society scholars interested in organizational theory and institutional development. It is without doubt an invaluable contribution to the history of American law and political economy.

Reference

Berk, Gerald (1994) *Alternative Tracks: The Constitution of American Industrial Order, 1865–1916*. Baltimore, MD: Johns Hopkins Univ. Press.

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Statelessness in the European Union: Displaced, Undocumented, Unwanted. By Caroline Sawyer & Brad K. Blitz, eds. New York: Cambridge University Press, 2011. 366 pp. \$105.00 cloth.

Reviewed by Anna Dolidze, Cornell University

The most recent influx of migrants from North African countries to Europe resuscitated the European Union debate on immigration policy. *Statelessness in the European Union* is a welcome and timely addition to the debate. Moreover, the book is a valuable contribution to the more general ongoing discussion on the changing nature of state sovereignty and its effect on noncitizens and the value of citizenship. The book will be of particular interest to individuals studying issues raised by migration, particularly in Europe, as well as those who study the rights of noncitizens.

The book could be divided into three main parts. The introduction by Caroline Sawyer and Brad K. Blitz carefully delineates the analytical framework of the book, explains the methodology, and places it in the relevant scholarship. The second part, which includes more theoretical and general discussion on the issue of statelessness, includes contributions by Monika Krause, Matthew J. Gibney, Caroline Sawyer, and Brad K. Blitz.