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LOUIS BRANDEIS AND CONTEMPORARY ANTITRUST ENFORCEMENT

*Kenneth G. Elzinga**
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I. INTRODUCTION***

Mark Twain purportedly claimed that history does not repeat itself—but it does rhyme.¹ Twain’s observation aptly describes the policy questions that once occupied the energies of Louis Brandeis (1856–1941), almost all of which rhyme with today’s news: social security, minimum wage legislation, corporate social responsibility, privacy and income redistribution.²

Social Security: Brandeis wrote of the “urgent need [for] an adequate system of old-age annuities for wage-earners.”³ He contended that Europe was ahead of the United States in tackling this problem.⁴ Were Brandeis alive today, no doubt he would be in the thick of the debate about social security’s solvency and reform.

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¹ JOHN ROBERT COLOMBO, *NEO POEMS* 46 (1970).

² The only major policy issue that Brandeis did not address is environmental degradation. He did, however, coauthor several articles dealing with contemporary law and the environment and was, in general, a conservationist. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 193 (1890).

³ LOUIS D. BRANDEIS, *Massachusetts’s Substitute for Old-Age Pensions*, in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 25 (Osmond K. Fraenkel ed., 1935) [hereinafter *THE CURSE OF BIGNESS*].

⁴ *Id.*

Minimum Wages: Brandeis wrote a Constitutional defense of minimum wages.⁵ Today his tripartite defense, based upon the protection of women, may seem quaint, even politically incorrect.⁶ But if Brandeis were alive today, he would certainly weigh in on proposals to change the minimum wage.

Corporate Social Responsibility: Before business schools got on the bandwagon, Brandeis was predicting: “The man of the future will think more of giving Service than of making money . . . whether you are conducting a retail shop or a great railroad. . . . That will be the spirit of business in the future.”⁷ For Brandeis, profit maximizing was out; corporate social responsibility was in; *homo economicus* was to be replaced by *homo servus*.⁸

Privacy and Surveillance: Even before social media raised concerns about the loss of privacy and individual liberty, Brandeis was concerned that “[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’ ”⁹ Brandeis believed “solitude and privacy” are “essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”¹⁰ Were he alive today, Brandeis would be concerned about public and private surveillance violating the *sacred precincts* of privacy.

Income redistribution: Brandeis did not believe that taxing the top 1 percent could significantly improve the well-being of the 99 percent.¹¹ He wrote: “No mere redistribution of the profits of indus-

⁵ LOUIS D. BRANDEIS, *The Constitution and the Minimum Wage*, in THE CURSE OF BIGNESS, *supra* note 3, at 52.

⁶ Brandeis based his argument on the “facts” that absent minimum wages, the salaries of women would be insufficient, leading to “bad health and to immorality;” that “women need protection against being led to work for inadequate wages;” and that “adequate protection can be given to women only by . . . refusing to allow them to work for less than living-wages.” BRANDEIS, *The Constitution and the Minimum Wage*, in THE CURSE OF BIGNESS, *supra* note 3, at 55.

⁷ BRANDEIS, *An Interview*, in THE CURSE OF BIGNESS, *supra* note 3, at 40.

⁸ BRANDEIS, *An Interview*, in THE CURSE OF BIGNESS, *supra* note 3, at 40.

⁹ BRANDEIS, *The Right to Privacy*, in THE CURSE OF BIGNESS, *supra* note 3, at 291.

¹⁰ BRANDEIS, *The Right to Privacy*, in THE CURSE OF BIGNESS, *supra* note 3, at 292.

¹¹ BRANDEIS, *Efficiency and Social Ideals*, in THE CURSE OF BIGNESS, *supra* note 3, at 51.

try could greatly improve the condition of the working classes.”¹² However, Brandeis did support redistribution from the corporate sector.¹³ He claimed that the “principal gain” from the taxation and redistribution of corporate profits was to “remove the existing sense of injustice and discontent”¹⁴

Brandeis also was concerned with the question of big business in America or, what he called, the “trust problem.”¹⁵ He pondered how the U.S. could capture the benefits of the modern corporation while thwarting the abuses of firms that dominated particular industries.¹⁶ The title of his essay *A Curse of Bigness* reveals that, for Brandeis, business monopoly was not simply a technical problem for public policy wonks to solve.¹⁷ Rather, it was a curse to be removed.¹⁸ Brandeis could restrain his enthusiasm for the giant enterprises of the time and he did not hesitate to name names: United States Steel, American Tobacco, United Shoe Machinery, the Pullman Car Company and other so-called trusts that held significant market share in major industries.¹⁹

In the period 1910-1940, when the nexus between big business and antitrust was up for grabs, Brandeis was a *player* behind the

¹² BRANDEIS, *Efficiency and Social Ideals*, in THE CURSE OF BIGNESS, *supra* note 3, at 51.

¹³ BRANDEIS, *Efficiency and Social Ideals*, in THE CURSE OF BIGNESS, *supra* note 3, at 51.

¹⁴ BRANDEIS, *Efficiency and Social Ideals*, in THE CURSE OF BIGNESS, *supra* note 3, at 51. Brandeis’ concerns with the concentration of wealth made him suspicious of the foundations laid by the early industrialists. In Congressional testimony, Brandeis was asked about foundations such as Rockefeller and Russell Sage. BRANDEIS, *On Industrial Relations*, in THE CURSE OF BIGNESS, *supra* note 3, at 81. While conceding that he had not made a “close study” of these institutions, he had a “grave apprehension” as to the ultimate “effect of these foundations when the control shall have passed out of the hands of those who at present are administering them to those who may not be governed by the excellent intent of the creators.” BRANDEIS, *On Industrial Relations*, in THE CURSE OF BIGNESS, *supra* note 3, at 81. Brandeis did not anticipate, nor did the founders, that the tilt of these foundations would be to the political left, funding causes and programs that would have been anathema to their founders. Even before they became brobdingnagian, Brandeis also had “grave apprehensions” of the size of the endowments of elite private universities. BRANDEIS, *On Industrial Relations*, in THE CURSE OF BIGNESS, *supra* note 3, at 81-82.

¹⁵ On November 8, 1913, Brandeis wrote an article for *Harper’s Weekly* entitled *The Solution of the Trust Problem*. BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 129.

¹⁶ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 130.

¹⁷ LOUIS D. BRANDEIS, *A Curse of Bigness*, in OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 162 (1914) [hereinafter OTHER PEOPLE’S MONEY].

¹⁸ *Id.* at 186-87.

¹⁹ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 129.

scenes and on center stage.²⁰ The question we address is: what is the importance of Brandeis today with regard to the *trust problem*? Is his perspective still influential? To address this topic, we divide our analysis into two parts. The first examines what Brandeis wrote about the trust problem.²¹ The second analyzes how others have responded to what Brandeis wrote. To evaluate Brandeis himself, we break our analysis into five questions. To examine the influence Brandeis had on others, we survey the citations to Brandeis in federal antitrust decisions and contemporary antitrust scholarship.

II. BRANDEIS AND ANTITRUST: WHAT HE WROTE AND WHAT HE DID

To understand and assess Brandeis' influence on contemporary antitrust policy, an understanding of his writings and his political endeavors is essential. We tackle this by answering five questions about Brandeis.

A. Brandeis' understanding of *competition* and *monopoly*. These two terms are portmanteau expressions. How did Brandeis unpack them?

B. Brandeis' proposed solution to the *trust problem*.²² Did he favor what he called *judicial machinery* or *administrative machinery*?

C. Brandeis' position toward the United States Steel Corporation. In his writing on the *trust problem*, Brandeis singled out the Steel Trust as the *bête noire* of big business gone awry.²³ When he focused on this paradigmatic company, did he get it right?

D. Brandeis looked favorably on resale price maintenance

²⁰ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 131.

²¹ Brandeis' writings on competition and monopoly appear in diverse sources, ranging from magazine articles to judicial opinions. When Osmond Fraenkel gathered a collection of Brandeis' papers, he entitled the volume *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis* after Brandeis' essay with the title *A Curse of Bigness*. BRANDEIS, THE CURSE OF BIGNESS, *supra* note 3. Fraenkel's book is the most accessible repository of Brandeis' writing on competition and monopoly. See generally BRANDEIS, THE CURSE OF BIGNESS, *supra* note 3. Most of the quotations from Brandeis used in this article come from the Fraenkel book. We use the expression *Brandeis wrote* to incorporate the influence Brandeis wielded through personal contacts as well. BRANDEIS, THE CURSE OF BIGNESS, *supra* note 3, at 38.

²² BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 129.

²³ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 129.

contracts.²⁴ For almost one hundred years, the Supreme Court held such agreements to be *per se* illegal under the Sherman Act.²⁵ Why did Brandeis cut from the pack with regard to this particular pricing practice?

E. Brandeis self-identified as an “economic student.”²⁶ Who were the economists that influenced Brandeis? What kind of a student was he?

A. Brandeis on Competition and Monopoly

In his 1912 essay, *Shall We Abandon the Policy of Competition?*, Brandeis addressed the fundamental question of how a nation should allocate its scarce resources.²⁷ To economists, there are two paradigms: decentralized markets or centralized planning, with variations and permutations in the form of mixed economies.²⁸ Brandeis was opposed to centralized planning of the economy, and he rejected proposals that would involve government ownership of the means of production.²⁹ He also objected to policies that would leave large corporations in private hands but would regulate their prices or profits.³⁰ Brandeis wrote: “The establishment of any rule fixing a maximum return on capital would, by placing a limit upon the fruits of achievement, tend to lessen efficiency.”³¹ A Chicago School economist could have written these words—but they come from Brandeis.³²

²⁴ BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 125.

²⁵ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 131.

²⁶ BRANDEIS, *On Industrial Relations*, in THE CURSE OF BIGNESS, *supra* note 3, at 88.

²⁷ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 104.

²⁸ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 104.

²⁹ Brandeis did, however, in particular instances, support the government administration of monopoly. Letter from Louis D. Brandeis to Joseph Little Bristow (May 13, 1912), in II LETTERS OF LOUIS D. BRANDEIS (1907-1912): PEOPLE'S ATTORNEY, 618-19 (Melvin I. Urofsky & David W. Levy eds., 1971) [hereinafter II LETTERS]. We are indebted to Larry Zacharias for calling our attention to this letter.

³⁰ *Id.* at 618-19.

³¹ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 106.

³² For the most influential book that embodies the Chicago School approach to antitrust, see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978). For the most influential scholarly journal for the Chicago School of Economics, see generally JOURNAL OF LAW & ECONOMICS. For critiques of the Chicago School, see generally ROBERT

For Brandeis, the question was not socialism versus free enterprise but rather “Shall we have regulated competition or regulated monopoly?”³³ At first glance, *regulated competition* seems like an oxymoron. What did Brandeis mean by making *regulated* an adjective for *competition*? Unpacking this question reveals Brandeis’ belief about the consequences of unfettered competition and reveals why Brandeis favored regulating market forces by his version of anti-trust enforcement.

What Adam Smith described as an “obvious and simple system of natural liberty,” Brandeis saw as an economy that contained the seeds of its own demise.³⁴ Left to themselves, Brandeis believed that many markets would devolve into monopolies.³⁵ The result was not survival of the fittest firms, whose efficiencies were passed on to workers and consumers.³⁶ Rather, corporate Darwinism benefited the capitalists and the bankers.³⁷ Brandeis rejected the proposition that an industry that had morphed into a single dominant firm was the result of economic efficiency.³⁸ To the contrary, he saw the trusts of his day as the consequence of manipulated human action, not natural evolution.³⁹ He wrote:

There are no natural monopolies today in the industrial world. The Oil Trust and the Steel Trust have been referred to as natural monopolies, but they are both most unnatural. The Oil Trust acquired its control of the market by conduct . . . which enabled it to destroy its small competitors by price-cutting and similar practic-

PITOFSKY, *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK* (2008); see also INGO L. O. SCHMIDT & JAN B. RITTALER, *A CRITICAL EVALUATION OF THE CHICAGO SCHOOL OF ANTITRUST ANALYSIS* 114 (1989).

³³ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 104.

³⁴ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 379 (1776).

³⁵ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 109.

³⁶ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 109.

³⁷ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 110.

³⁸ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 110-11.

³⁹ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 110.

es.

The Steel Trust acquired control not through greater efficiency, but by buying up existing plants and ore supplies at fabulous prices.⁴⁰

After illustrating his argument with the examples of Standard Oil of N.J. and United States Steel, Brandeis makes this remarkable statement, which is key to understanding his conception of antitrust: “It is believed that *not a single industrial monopoly exists today which is the result of natural growth.*”⁴¹ In order to prevent monopoly, business firms required regulation of some form, lest they form alliances through cartels and mergers, and lest they use predatory forms of conduct to thwart competition from smaller competitors and new entrants.⁴² Hence his term, “regulated competition.”⁴³

Brandeis believed so deeply in the economic merits of free enterprise that he was willing to unleash federal regulation—in the form of antitrust—to keep free enterprise from self-destructing into monopoly.⁴⁴ As he put it, “the right to competition must be limited in order to preserve it.”⁴⁵ To illustrate his argument, Brandeis drew a parallel between the preservation of individual liberty and the preservation of free markets:

We learned long ago that liberty could be preserved only by limiting in some way the freedom of action of individuals; that otherwise liberty would necessarily lead to absolutism and in the same way we have learned that unless there be regulation of competition, its excesses will lead to the destruction of competition, and monopoly will take its place.⁴⁶

⁴⁰ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 105.

⁴¹ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 105-06 (emphasis added) (conceding that some industries might have characteristics requiring direct regulation, such as transportation.).

⁴² BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 104.

⁴³ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 104.

⁴⁴ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 104.

⁴⁵ BRANDEIS, *Shall We Abandon the Policy of Competition?*, in THE CURSE OF BIGNESS, *supra* note 3, at 104.

⁴⁶ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in THE

In short, Brandeis believed the antitrust laws were, as Dirlam and Kahn put it later, “a departure from laissez faire in the ultimate interests of laissez faire.”⁴⁷

B. Brandeis and Enforcing Competition

When it came to the nation’s *trust problem*, Brandeis wrote that there were only two big questions. First, should the nation rely on competition or monopoly?⁴⁸ He made his preference clear: competition.⁴⁹ Second, “[H]ave we adequate governmental machinery to enforce whatever industrial policy America concludes to adopt, whether that policy be competition or monopoly?”⁵⁰

Based on his study of monopolies, Brandeis concluded that the “governmental machinery” of the federal courts, initially tasked with interpreting the Sherman Act, was not up to the job.⁵¹ History had shown the federal courts hesitant to condemn some trusts, *e.g.*, the Steel Trust, and reluctant to impose adequate remedies upon others when Sherman Act violations were found, *e.g.*, the Tobacco and Standard Oil Trust.⁵² When it came to the question of judicial machinery versus administrative machinery, Brandeis sided with the Progressives of the time who supported the establishment of an independent commission to study and then solve the problem of monopoly.⁵³ This administrative machinery would take form as the Federal Trade Commission (‘FTC’).⁵⁴

Thomas McCraw writes that “No individual person played the role of ‘father’ of the Federal Trade Commission.”⁵⁵ But he goes on to write:

Insofar as the career of a single person illustrates

CURSE OF BIGNESS, *supra* note 3, at 109.

⁴⁷ JOEL B. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 17 (1954).

⁴⁸ BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 112.

⁴⁹ BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 113.

⁵⁰ BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 112.

⁵¹ BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 112.

⁵² BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 115.

⁵³ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 135-36.

⁵⁴ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 134.

⁵⁵ THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 81 (1984).

both the problems that led to the FTC's creation and the reasons for its subsequent failure, that person is Louis D. Brandeis. The most influential critic of trusts during his generation, Brandeis served from 1912 until 1916 as Woodrow Wilson's chief economic adviser and was regarded as one of the architects of the FTC. Above all else, Brandeis exemplified the anti-bigness ethic without which there would have been no Sherman Act, no antitrust movement, and no Federal Trade Commission.⁵⁶

In response to Brandeis' writing and his political influence with the administration of President Wilson, the United States today has antitrust enforcement lodged in the Executive branch (the Antitrust Division of the Department of Justice) *and* the administrative branch (the Federal Trade Commission).⁵⁷ The FTC came into being in 1914.⁵⁸ So closely did President Wilson identify Brandeis with the FTC that he invited Brandeis to be a Commissioner in this new agency.⁵⁹ Brandeis declined.⁶⁰

While scores of foreign governments have copied the American institution of antitrust in some form or another, the particular configuration of antitrust's dual enforcement is unique to the United States.⁶¹ The jurisdictional overlap between the Antitrust Division and the Federal Trade Commission is now so embedded in American antitrust enforcement that there is little enthusiasm for dissolving one of the agencies or merging the two.⁶² Brandeis did not consider dual

⁵⁶ *Id.* at 81-82.

⁵⁷ Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025, 2028 (2015).

⁵⁸ *Id.* at 2037. For a summary of the tugs and pulls upon the course of antitrust in the 1912 presidential race between Debs, Roosevelt, Taft, and Wilson, and the influence of Brandeis on Wilson's antitrust position, see *Id.* at 2025-38.

⁵⁹ McCRAW, *supra* note 55, at 94.

⁶⁰ McCRAW, *supra* note 55, at 94, 110 (quoting Wilson's biographer Arthur Link, McCraw recounts that even before President Wilson met Brandeis, he was an admirer of Brandeis: "Because Brandeis understood the problem [of big business] thoroughly, because he was ready with a definite plan for the bridling of monopoly, he [Brandeis] became the chief architect of [Wilson's] the New Freedom").

⁶¹ Barry E. Hawk & Laraine L. Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 FORDHAM INT'L L.J. 18, 18 (1996).

⁶² *The Enforcers*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Jan. 13, 2017).

enforcement to be problematic.⁶³ In supporting the establishment of the FTC, he never advocated shuttering the Antitrust Division.⁶⁴ Instead, Brandeis believed the two agencies should share the task of solving the trust problem.⁶⁵

McCraw offers a succinct and accurate depiction of the theory of antitrust that Brandeis communicated to President Wilson.⁶⁶ He wrote:

First, [Brandeis] advocated a strengthening of the Sherman Act by prohibition “of the specific methods or means by which the great trusts . . . crush rivals.” Then he suggested an invigoration of the judicial process, so as to ensure that antitrust convictions were followed by reparations to the victims and also by genuine dissolutions. . . . Finally, Brandeis endorsed the creation of “a board or commission to aid in administering the Sherman law.”⁶⁷

The Clayton Act of 1914 became the vehicle for “strengthen[ing] the Sherman Act.”⁶⁸ The FTC, established the same year, became the “board or commission to aid in administering” the institution of antitrust.⁶⁹ With its mandate to thwart “unfair competition,” the FTC would be able to go beyond the capabilities of the Antitrust Division, which was constrained to enforcing the Sherman Act and the Clayton Act.⁷⁰

Brandeis made clear that the new administrative agency dedicated to antitrust enforcement should not mimic the Interstate Commerce Commission (‘ICC’), which had been established in 1887.⁷¹ In this regard, the contemporary institution of antitrust owes a huge debt to Brandeis. Brandeis recognized that the ICC was a wholly inappropriate model for what became the FTC.⁷² The ICC operated on a full-

⁶³ MCCRAW, *supra* note 55, at 111.

⁶⁴ MCCRAW, *supra* note 55, at 111.

⁶⁵ MCCRAW, *supra* note 55, at 111-12.

⁶⁶ MCCRAW, *supra* note 55, at 111.

⁶⁷ MCCRAW, *supra* note 55, at 111.

⁶⁸ *Allen Bradley Co. v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 325 U.S. 797, 803 (1945).

⁶⁹ MCCRAW, *supra* note 55, at 111.

⁷⁰ MCCRAW, *supra* note 55, at 116.

⁷¹ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 122.

⁷² BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 122.

blown price and entry control model.⁷³ Brandeis contended that there was a “radical difference between attempts to fix rates for transportation and similar public services and fixing prices in industrial businesses.”⁷⁴

To make his point, Brandeis argued that rail freight is “the same throughout the whole country, and they [the railroads] are largely the same yesterday, today, and tomorrow.”⁷⁵ The task of regulating the railroads, he claimed, “would be a relatively simple one as compared with that which would necessarily arise if prices were to be fixed in the field of industry. In industry we have, instead of uniformity, infinite variety; instead of stability, constant change.”⁷⁶

Having conceded that rail transportation would be one of the more viable candidates for rate regulation, Brandeis then argued that even so, the ICC already faced problems that

[F]ar exceed the capacity of that or any single board. A single question of rates, like that involved in the Spokane and intermountain rate cases has been before the Commission awaiting final adjudication nearly twenty years. Think of the infinite questions which would come before an industrial commission seeking to fix rates It would require not only one but hundreds of commissioners to protect the American people from the extortions of monopolies, even if protection were possible at all.⁷⁷

Brandeis’ rejection of establishing an administrative agency that would assess and validate whether prices were reasonable became baked into antitrust enforcement in the United States.⁷⁸

Thirteen years after the FTC was born, the Supreme Court rejected the proposition that the courts could undertake a complex inquiry into the reasonableness of prices set by a cartel. In *U.S. v. Trenton Potteries Company*,⁷⁹ Justice Stone wrote:

The reasonable price fixed today may through eco-

⁷³ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 122.

⁷⁴ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 122-23.

⁷⁵ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 123.

⁷⁶ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 123.

⁷⁷ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 123.

⁷⁸ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 122-23.

⁷⁹ 273 U.S. 392 (1927).

conomic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through mere variation of economic conditions.⁸⁰

Brandeis deserves applause for not structuring the FTC as a regulator of prices and a gatekeeper for firms entering or exiting manufacturing, wholesaling, and retailing sectors of the economy. He recognized that this would be too complex a task even with “hundreds of commissioners.”⁸¹

The institution of antitrust in the United States would be very different if the perspective of jurists like Brandeis and Stone had been rejected. For example, if ICC-like price regulation had become an acceptable weapon in the antitrust arsenal, cartel members convicted under Section 1 of the Sherman Act as a “conspiracy in restraint of trade” might have had (by way of antitrust remedy) their future prices regulated by the DOJ, the FTC, or the federal Courts.⁸² Antitrust enforcement would be radically different if antitrust agencies or courts

⁸⁰ *Id.* at 397-98.

⁸¹ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 123. What Brandeis did not fully appreciate is how his early concerns about ICC regulation would be proven well-founded by history. His qualms about ICC regulation were not fully heeded at the time. Today, the abolishment of the ICC and the concomitant deregulation of surface freight transportation are widely applauded as the source of significant gains in transportation efficiency and innovations in logistics. Thomas Gale Moore, *Trucking Deregulation*, LIBRARY OF ECONOMICS AND LIBERTY, <http://www.econlib.org/library/Enc1/TruckingDeregulation.html> (last visited Jan. 29, 2017); *see also* Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1185 (2012). The FTC has suffered stern criticism for its enforcement of the antitrust laws and consumer protection statutes. *See generally* Richard A. Posner, *The Federal Trade Commission*, 37 U. OF CHICAGO L. REV. 47 (1969). But critics of the FTC can be grateful that Brandeis steered the agency's operational model away from that of the ICC.

⁸² 15 U.S.C. § 1 (2004).

used the antitrust laws to prohibit the entry of some firms, subsidize the entry of others, and oversee the prices of all.⁸³ Instead, the Antitrust Division and the FTC are the government's in-house critics of those who would use the power of the state to fix prices and control the entry and exit of private business.⁸⁴

C. Brandeis and the United States Steel Company

The government's antitrust case against United States Steel ("USS") remains one of the most prominent in the antitrust pantheon, if only because of the famous words from Justice McKenna:

The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law and, the law *does not make mere size an offense*, or the existence of unexerted power an offense.⁸⁵

To Brandeis, sitting on the Court at the time, these words stung; as the author of *A Curse of Bigness*, his colleagues' lack of concern with size was myopic and injudicious.⁸⁶

USS prevailed in this encounter with the Sherman Act, but by the skin of its corporate teeth.⁸⁷ The vote was 4-3, with Justice McReynolds and Justice Brandeis abstaining.⁸⁸ McReynolds did not participate because earlier he had been an advocate in the case against USS when he was at the Department of Justice.⁸⁹ Brandeis abstained because of his past writings about the company.⁹⁰ Had these two men voted, the decision in favor of USS would have gone the other way.⁹¹ One can only guess at what kind of remedy would have been imposed and how effective it would have been had the Antitrust Division prevailed. One can be confident, however, that

⁸³ *The Antitrust Laws*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Jan. 14, 2017).

⁸⁴ *The Enforcers*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Jan. 14, 2017).

⁸⁵ *U.S. v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920) (emphasis added).

⁸⁶ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 116.

⁸⁷ *U.S. Steel Corp.*, 251 U.S. at 457.

⁸⁸ *Id.* at 436, 457.

⁸⁹ *Id.* at 457.

⁹⁰ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 116-18.

⁹¹ *U.S. Steel Corp.*, 251 U.S. at 457.

Brandeis would not have wanted to hand the Antitrust Division a pyrrhic victory, *i.e.*, one that did not involve the dissolution of USS.

Brandeis believed the extensive horizontal and vertical integration of USS was a source of inefficiency.⁹² He wrote:

[USS] inherited through the Carnegie Company the best organization and the most efficient steel makers in the world. . . . And yet in only ten years after its organization, high American authority—the *Engineering News*, declares:

We are today something like five years behind Germany in iron and steel metallurgy, and such innovations as are being introduced by our iron and steel manufacturers are most of them merely following the lead set by foreigners years ago.

. . . We believe the main cause is the wholesale consolidation which has taken place in American industry. A huge organization is too clumsy to take up the development of an original idea. With the market closely controlled and certain profits by following standard methods, those who control our trusts do not want the bother of developing anything new.⁹³

Brandeis' faith in competition was based on an economic assumption that he held throughout his career: the optimal size firm was not so large as to serve the entire market.⁹⁴ The point is so fundamental to Brandeis that it merits full quotation:

In every business concern there *must be* a size-limit of greatest efficiency. What that limit is will differ in different businesses and under varying conditions in the same business. But whatever the business or organization there is a point where it would become too large for efficient and economic management, just as there is a point where it would be too small to be an efficient instrument. The limit of efficient size is exceeded when the disadvantages attendant upon size outweigh the advantages, when the centrifugal force

⁹² BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 117-18.

⁹³ BRANDEIS, *Competition*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 118.

⁹⁴ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 109.

exceeds the centripetal Organization can do much to make larger units possible and profitable. But the efficiency of organization has its bounds; and organization can never supply the combined judgment, initiative, enterprise, and authority which must come from the chief executive officers. *Nature sets a limit to their possible accomplishment.*⁹⁵

In the language of economics, Brandeis contended that the minimum efficient size firm was not so large that a monopoly was required to serve the entire market.⁹⁶ He did not, however, believe all industries could be atomistic in their structure.⁹⁷ Brandeis wrote: “It is, of course, true that the unit in business may be too small to be efficient.”⁹⁸ But he added: “It is also true that the unit in business may be too large to be efficient, and this is no uncommon incident of monopoly.”⁹⁹

Brandeis was a stern critic of earlier decisions by the Court in which, even when the Sherman Act was found to have been violated, the remedy was wholly inadequate in restoring competition.¹⁰⁰ His humor barely disguises his disdain when he dissects the economic inadequacies of the dissolution of the Tobacco Trust.¹⁰¹ Brandeis wrote:

A combination heretofore illegal has been legalized. . . .

Eminent counsel who appeared to represent committees of the security holders . . . declared that they would resist to the uttermost the adoption of those provisions that were urged as necessary for the restoration of competition. They invoked the Constitution, assuming that it protects not only vested rights, but

⁹⁵ BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 116-17 (emphasis added).

⁹⁶ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in THE CURSE OF BIGNESS, *supra* note 3, at 109.

⁹⁷ BRANDEIS, *The Regulation of Competition Against the Regulation of Monopoly*, in THE CURSE OF BIGNESS, *supra* note 3, at 109.

⁹⁸ BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 116.

⁹⁹ BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 116.

¹⁰⁰ BRANDEIS, *An Illegal Trust Legalized*, in THE CURSE OF BIGNESS, *supra* note 3, at 101-03.

¹⁰¹ BRANDEIS, *An Illegal Trust Legalized*, in THE CURSE OF BIGNESS, *supra* note 3, at 101-03.

vested wrongs. And they appear to have discovered in the Constitution a new implied prohibition:

“What man has illegally joined together, let no court put asunder.”¹⁰²

With the benefit of hindsight, how is one to evaluate Brandeis’ case against USS? The short answer is that he was right, and he was wrong.

Brandeis was right that USS was not a Darwinian evolution of economic efficiency. Its size was not the consequence of internal organic growth. Rather, USS was the result of over one hundred mergers and acquisitions assembled by Andrew Carnegie, J.P. Morgan and others.¹⁰³ Price competition between USS and its remaining rivals was subdued by the dinners Elbert Gary (the head of USS) hosted with USS’s competitors (the so-called “Gary dinners” mentioned by the Court).¹⁰⁴ Brandeis was right, generally, that the trusts of his day were not what economists would call a “natural monopoly.”¹⁰⁵ They did not enjoy scale economies and cost advantages that smaller firms could not match.¹⁰⁶

Where Brandeis went wrong—with regard to USS and other trusts as well—was his failure to appreciate the corrective nature of markets to unravel positions of market dominance that, to Brandeis,

¹⁰² BRANDEIS, *An Illegal Trust Legalized*, in THE CURSE OF BIGNESS, *supra* note 3, at 103. See generally Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951); see also KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS chs. 3, 6 (1976) (discussing Brandeis’ quip about the lack of an adequate remedy in the *U.S. v. American Tobacco* case is sacramental). Years later, Steven Salop’s quip about the lack of an adequate remedy in *U.S. v. Microsoft* was piscatorial. Salop described the Government’s consent decree with Microsoft as a “catch and release” policy. Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 ANTITRUST L.J. 601, 632-33 (2014).

¹⁰³ BRANDEIS, *Competition*, in THE CURSE OF BIGNESS, *supra* note 3, at 118. Brandeis opposed the USS trust in part because of his well-known antipathy to overcapitalization and mismanagement in gigantic corporations. Gerald Berk, Louis D. Brandeis and the Making of Regulated Competition, 1900-1932 *passim* (2009). In this instance, J.P. Morgan essentially bribed Andrew Carnegie to step away from the steel business, leading to a lack of competition in the industry and widespread mismanagement. *Control of Corporations, Persons, and Firms, Engaged in Interstate Commerce: Hearings Before the Comm. on Interstate Commerce U.S. S., on a Resolution Directing the Comm. on Interstate Commerce to Investigate and Report Desirable Changes in the Laws Regulating and Controlling Corporations, Persons, and Firms Engaged in Interstate Commerce*, 62d Cong. 9 (1912).

¹⁰⁴ *U.S. Steel Corp.*, 251 U.S. at 440, 460.

¹⁰⁵ Stephen G. Breyer, *Justice Brandeis as Legal Seer*, 42 BRANDEIS L.J. 711, 719 (2004).

¹⁰⁶ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (2d ed. 1942).

seemed intractable.¹⁰⁷ What he did not understand is that because of their size and inefficiencies, firms like USS were vulnerable to what Joseph Schumpeter later would call the “perennial gale of creative destruction.”¹⁰⁸ Brandeis never understood how markets disciplined inefficient firms.¹⁰⁹ USS is Exhibit #1. Unlike the Standard Oil Trust and the Tobacco Trust, USS won the Sherman Act case brought against it.¹¹⁰ And yet, even in absence of antitrust remedy, USS fell from its monopoly perch.¹¹¹

By the 1950s, USS’s market share of steel production in the U.S. had declined to 40% due to the growth of independent steel-makers, product demand shifts, and the company’s sluggishness in adopting important new technologies.¹¹² None of this Brandeis anticipated. He also did not foresee the role of international trade in transforming the U.S. steel industry from the most powerful in the world into one that went, hat-in-hand, to the federal government seeking import protection and filing anti-dumping actions against foreign firms.¹¹³

The introduction of mini-mills in the U.S. and the ability of coastal steel consumers to draw their steel at low transportation costs from foreign sources exacerbated the decline of USS.¹¹⁴ The domestic market share of USS continued to erode from 40% in 1950 to 16.5% in 1994.¹¹⁵ Foreign rivals and smaller domestic producers were the early adopters of continuous casting mills, scrap-using furnaces, and the basic oxygen furnace.¹¹⁶ Mini-mills could reach effi-

¹⁰⁷ *Id.* at 82-83.

¹⁰⁸ *Id.* at 84.

¹⁰⁹ BRANDEIS, *Efficiency and Social Ideals*, in *THE CURSE OF BIGNESS*, *supra* note 3, at 51.

¹¹⁰ *U.S. Steel Corp.*, 251 U.S. at 457.

¹¹¹ Andrew Beattie, *A History of U.S. Monopolies*, INVESTOPEDIA, <http://www.investopedia.com/articles/economics/08/hammer-antitrust.asp> (last visited Jan. 30, 2017).

¹¹² *See generally* Walter Adams, *Steel*, in *THE STRUCTURE OF AMERICAN INDUSTRY*, *infra* note 122.

¹¹³ *See generally* Greg Mastel & Andrew Szamosszegi, *Leveling the Playing Field: Anti-dumping and the U.S. Steel Industry*, *ECON. STRATEGY INST.* (Feb. 1999) http://www.econstrat.org/images/ESI_Research_Reports_PDF/leveling_the_playing_field.pdf.

¹¹⁴ *See generally* Walter Adams, *Steel*, in *THE STRUCTURE OF AMERICAN INDUSTRY*, *infra* note 122.

¹¹⁵ *See generally* Walter Adams, *Steel*, in *THE STRUCTURE OF AMERICAN INDUSTRY*, *infra* note 122.

¹¹⁶ Frank Giarratani, Ravi Madhavan, & Gene Gruver, *Steel Industry Restructuring and Location passim* (May 7, 2012) (Chapter contribution for Frank Giarratani, Geoffrey Hew-

cient operating levels at much smaller scales and with much lower investment costs than the giant furnaces operated by USS.¹¹⁷ By 1982, there were 58 electric arc mini-mills operating in the United States.¹¹⁸ By 1995, they accounted for 40% of U.S. steel industry output.¹¹⁹ The little guys produced more steel than USS, and did so without antitrust protection.¹²⁰

What the institution of antitrust failed to accomplish in *U.S. v. United States Steel*,¹²¹ the entry of new firms and the innovation of new steel-making technologies did. USS today is a shell of its former self.¹²² Brandeis would be pleased—and likely surprised.

D. Brandeis on Resale Price Maintenance

One of the most curious relationships in antitrust is that between Brandeis and resale price maintenance ('RPM'). In *Dr. Miles Medical Co. v. Park & Sons Co.*,¹²³ the Supreme Court conferred the status of *per se* illegality on RPM contracts.¹²⁴ This was the law of the land for almost a century.¹²⁵ Brandeis was a critic of the Court's condemnation of this pricing practice.¹²⁶ Then, in 2007, the Court reversed itself in the *Leegin Creative Leather Prods. v. PSKS, Inc.*¹²⁷ opinion.¹²⁸ Business firms engaging in vertical price arrangements now have their contracts evaluated under a rule of reason standard.¹²⁹

ings, & Philip McCann, eds., *Handbook of Economic Geography and Industry Studies*, forthcoming).

¹¹⁷ See *Id.* at 16-19.

¹¹⁸ See generally Walter Adams, *Steel*, in THE STRUCTURE OF AMERICAN INDUSTRY, *infra* note 122.

¹¹⁹ *Metallurgical Industry*, EPA 1 (Apr. 2009), <https://www3.epa.gov/ttnchie1/ap42/ch12/final/c12s0501.pdf>.

¹²⁰ See generally Walter Adams, *Steel*, in THE STRUCTURE OF AMERICAN INDUSTRY, *infra* note 122.

¹²¹ 251 U.S. at 417.

¹²² For a survey of the steel industry, and USS's role, see WALTER ADAMS, THE STRUCTURE OF AMERICAN INDUSTRY (1995).

¹²³ 220 U.S. 373 (1911).

¹²⁴ *Id.*

¹²⁵ *Dr. Miles Medical Co.* was overruled by *Leegin Creative Leather Prods. Inc., v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

¹²⁶ *Nomination of Louis D. Brandeis: Hearings Before the Subcomm. of the Comm. on the Judiciary U.S. S., on the Nomination of Louis D. Brandeis to be an Assoc. Justice of the Supreme Court of the U.S.*, 64th Cong. 1035 (1916).

¹²⁷ 551 U.S. at 877.

¹²⁸ *Id.* at 882.

¹²⁹ *Id.*

Brandeis would have applauded the *Leegin* opinion. But his early criticism of *Dr. Miles Medical* played no role in the decision being overruled. Indeed, Brandeis is never mentioned in the *Leegin* opinion.¹³⁰ Rather, the authorities on which the Court relies are primarily economists; it cites fourteen in the majority opinion.¹³¹ In addition, the Court refers to an amicus brief signed by twenty-three prominent antitrust economists who, like Brandeis many years earlier, endorsed the end of the *per se* rule against RPM contracts.¹³² The Chicago School of Economics deserves more credit for the Court's eventual change of opinion than does Brandeis.¹³³

Critics of RPM often referred to this pricing practice as *vertical price-fixing*, as though there was no economic distinction between horizontal price-fixing among purported competitors and contracts between a manufacturer and its downstream vendors that specify resale prices.¹³⁴ For many years, it was easier to conflate the two, because horizontal and vertical agreements on price were both *per se* illegal under the Sherman Act.¹³⁵ Brandeis saw through this confusion (if not deception):

[M]en have failed to draw the distinction between a manufacturer fixing the retail selling-price of an article of his own creation and to which he has imparted his reputation, and the fixing of prices by a monopoly or by a combination tending to a monopoly.¹³⁶

In economic terms, vertical agreements on price between a manufacturer and downstream vendors can expand output; horizontal agreements on price between competitors restrict output.¹³⁷

¹³⁰ *Id.* at 877.

¹³¹ *Id.*

¹³² Brief for Amici Curiae Economists in Support of Petitioner at 17, 19, *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480), 2007 WL 173681, at *17, *19.

¹³³ *See generally Id.*

¹³⁴ Paul Gift, *Price Fixing and Minimum Resale Price Restrictions Are Two Different Animals*, 12 GRAZIADO BUS. REV. (2009), <https://gbr.pepperdine.edu/2010/08/price-fixing-and-minimum-resale-price-restrictions-are-two-different-animals/>.

¹³⁵ Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II*, 75 YALE L.J. 373, 391 (1966); *see also* BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 125.

¹³⁶ BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 125.

¹³⁷ BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 125.

Brandeis understood that a manufacturer's reputation in the company's brand was affected by what happened to that product at retail.¹³⁸ Referring to the brand equity a manufacturer is developing, Brandeis wrote:

That which is specifically mine, that which I create, and the good-will which attends it . . . which now extends throughout the whole country . . . – that is my specific property; I have made it valuable to myself, and I make it valuable to the consumer because I have endowed that specific property with qualities on which everyone who purchases my goods may rely. That certainly is of value to the consumer, as it is of value to the maker.¹³⁹

Years later, economists such as Phillip Nelson (1970, 1974) would elaborate upon the pro-consumer characteristics of advertising and promoting brand identity that Brandeis recognized.¹⁴⁰

In language that anticipates the attack launched by the Chicago School of Economics on the *per se* rule against RPM, Brandeis explained:

Operating as an independent manufacturer under competitive conditions, you fix the (downstream retail) price at your peril. If you fix it too high, one of two things is likely to happen; either the community won't buy it, or, if it does, despite the high prices, some other person will come in and share your prosperity, so long as you have a field open to competition To so fix the ultimate selling price in a competitive business is not a restraint of trade in any proper case. On the contrary, it stimulates trade, because it gives an appropriate reward to the man who creates As long as we maintain conditions favorable to competition—conditions which leave the individual's effort untrammelled by superior power—so long may we

¹³⁸ BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 125.

¹³⁹ BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 126.

¹⁴⁰ See generally Phillip Nelson, *Information and Consumer Behavior*, 78 J. POLITICAL ECON. 311 (1970).

safely allow men to make what profit they can get from an expectant public, and to exercise the largest degree of liberty in the marketing of their products.¹⁴¹

Decades of antitrust mischief under the *per se* prescription of *Dr. Miles Medical* could have been avoided had Brandeis' views on RPM been adopted. Brandeis understood:

The Sherman law . . . seeks to preserve to the individual both the opportunity and the incentive to create, it seeks to encourage individual effort; and a right in the individual manufacturer of a competitive business to market his goods in his own way, by fixing, if he desires, the selling price to the consumer¹⁴²

Note that while making the case for RPM, Brandeis is careful to point out a caveat: "the manufacturer [using RPM must be engaged in] a *competitive business*."¹⁴³ Brandeis recognized that if manufacturers in the same industry were engaged in the concerted setting of downstream prices, all bets were off.¹⁴⁴ Congruent with his concerns, in overturning the *per se* prohibition on RPM in *Leegin*, the Court made clear that the price contracts were to be *vertical agreements*, and not horizontal agreements between manufacturers or retailers disguised as vertical contracts.¹⁴⁵

Brandeis would have admired the pluck and independence of the defendant in *Leegin*, a manufacturer of women's fashion accessories that sold its products under the brand name Brighton.¹⁴⁶ The company was started by a young man, Jerry Kohl, who had no college education.¹⁴⁷ Without Wall Street financing (or today's Venture Capital), the firm adopted a business model using RPM and grew internally to a medium size business that is still owned by the founder

¹⁴¹ BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 126.

¹⁴² BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 127.

¹⁴³ BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 127.

¹⁴⁴ BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 127.

¹⁴⁵ *Leegin Creative Leather Prods. Inc.*, 551 U.S. at 882.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

and his wife.¹⁴⁸ Leegin inhabits an industry with many small firms.¹⁴⁹ No firm dominates either the retailing or the manufacturing of women's fashion accessories, and this is not an industry with high entry barriers.¹⁵⁰ Women's fashion accessories are sold by independent boutique stores, department stores, mass merchandisers, women's clothing stores, at kiosks in shopping centers, and often by street vendors in urban areas.¹⁵¹ In Brandeis' terms, Kohl was someone who produced "an article of his own creation and to which he has imparted his reputation."¹⁵²

The critics of the Court's opinion in *Leegin*—those who want RPM to retain its *per se* illegal status—can be divided into two camps: the antitrust hawks who do not understand the hidden economic logic of RPM, and the State Attorneys General and the private plaintiffs' bar who are disappointed to lose the negotiating lever that a *per se* rule against RPM afforded them.¹⁵³ Brandeis, normally considered a hawk on antitrust, would not be aligned with either group *vis-à-vis* RPM.¹⁵⁴ He would have been appalled by the use of the antitrust laws to thwart what is an efficient business practice for the sake of private gain or the extortion of revenues from an innocent business to a state treasury.

Brandeis did not have the necessary economic principles at his disposal to understand the free rider problem that downstream vendors like Jerry Kohl faced—which was central to the Court's decision calculus in *Leegin*.¹⁵⁵ But given his willingness to dig into the facts of business operations,¹⁵⁶ there is little doubt that Brandeis would have understood the free rider problem and that RPM was a

¹⁴⁸ *Id.* at 883-84; Kenneth G. Elzinga & David E. Mills, *Leegin and Procompetitive Resale Price Maintenance*, 55 ANTITRUST BULLETIN 2, 359-379 (2010).

¹⁴⁹ *Leegin Creative Leather Prods. Inc.*, 551 U.S. at 882.

¹⁵⁰ See Elzinga & Mills, *Leegin and Procompetitive Resale Price Maintenance*, *supra* note 148, at 27; see also Kenneth G. Elzinga & David E. Mills, *Antitrust Predation and The Antitrust Paradox*, 57 J. LAW & ECON. 181, 444-50 (2014).

¹⁵¹ See Elzinga & Mills, *Leegin and Procompetitive Resale Price Maintenance*, *supra* note 148, at 27.

¹⁵² BRANDEIS, *On Maintaining Maker's Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 125.

¹⁵³ *Leegin Creative Leather Prods. Inc.*, 551 U.S. at 906-07.

¹⁵⁴ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 131.

¹⁵⁵ *Leegin Creative Leather Prods. Inc.*, 551 U.S. at 878.

¹⁵⁶ BRANDEIS, *The Solution of the Trust Problem*, reprinted in THE CURSE OF BIGNESS, *supra* note 3, at 130.

means to solve the problem. A pricing practice that Brandeis thought would be *protective* of small businesses, like Leegin, also turned out to be *protective* of consumer welfare and economic efficiency.¹⁵⁷

E. Brandeis the “economic student”

Notwithstanding the iconic status Brandeis has in the law, he considered himself to be an “economic student.”¹⁵⁸ But his knowledge of economics was slim. The standard economic textbook of Brandeis’ time was Alfred Marshall’s *Principles of Economics*.¹⁵⁹ Brandeis shows no evidence of being acquainted with Marshall. While Brandeis had an abiding concern with economic welfare, there is no sign of his having read the work of A. C. Pigou, Marshall’s successor at Cambridge, and the father of modern welfare economics.¹⁶⁰ The classics before Marshall and Pigou, from Adam Smith through John Stuart Mill and David Ricardo, are never cited in Brandeis’ legal opinions or in his other writings.¹⁶¹ Three other books that were foundational to modern economics in the late 19th century were: Carl Menger’s *Principles of Economics*, William Stanley Jevons’ *Theory of Political Economy*, and Leon Walras’ *Elements of Pure Economics*.¹⁶² None seem to have influenced Brandeis. Robert Cochran’s book shows that Brandeis never referenced or assigned the work of these economists in his 1892–1894 MIT lectures on law.¹⁶³

Either Brandeis was unfamiliar with the writings of the prominent economists of his time or he wrote his legal opinions like briefs, citing only those economic authorities who supported his argument.¹⁶⁴ After extolling the brilliance of Brandeis, McCraw con-

¹⁵⁷ BRANDEIS, *On Maintaining Maker’s Prices*, in THE CURSE OF BIGNESS, *supra* note 3, at 126-27.

¹⁵⁸ BRANDEIS, *On Industrial Relations*, in THE CURSE OF BIGNESS, *supra* note 3, at 88.

¹⁵⁹ See generally ALFRED MARSHALL, PRINCIPLES OF ECONOMICS (8th ed. 1920).

¹⁶⁰ BRANDEIS, *On Industrial Relations*, in THE CURSE OF BIGNESS, *supra* note 3, at 88.

¹⁶¹ BRANDEIS, *On Industrial Relations*, in THE CURSE OF BIGNESS, *supra* note 3, at 88.

¹⁶² STANLEY JEVONS, THE THEORY OF POLITICAL ECONOMY (5th ed. 1957); CARL MENGER, PRINCIPLES OF ECONOMICS (James Dingwall trans., 1981); LEON WALRUS, ELEMENTS OF PURE ECONOMICS (William Jaffe trans., 1954).

¹⁶³ ROBERT COCHRAN, LOUIS D. BRANDEIS’S MIT LECTURES ON LAW (1892-1894) (Robert F. Cochran Jr. ed., 2012).

¹⁶⁴ However, the title Brandeis gave to one of his most enduring publications, *Other People’s Money*, is taken from Adam Smith’s *The Wealth of Nations* (Book V, Ch.1, Section 107); see Jessica Wang, *Neo-Brandeisianism and the New Deal: Adolf A. Berle, Jr., William O. Douglas, and the Problem of Corporate Finance in the 1930s*, 33 SEATTLE U. L. REV. 1221, 1221 n.1 (2010).

cludes that in the area of antitrust, “Brandeis offered regulatory solutions grounded on a set of economic assumptions that were fundamentally wrong.”¹⁶⁵ This may be the result of Brandeis’ failure to read these economists.

III. BRANDEIS AND ANTITRUST: HIS CITATIONS

Thus far, we have explored Brandeis’ understanding of the *trust problem* evident in his many writings as a social reformer and in his appearances as a witness before investigative committee hearings. Now we turn to the epicenter of Brandeis’ influence on antitrust enforcement: his opinions as a judge. A century has passed since Louis Brandeis was appointed to the highest court in the land.¹⁶⁶ This affords an ample window to measure the effect of his judicial writings.

Any attempt to paint in detail the picture of a legal icon like Louis Brandeis is bound to leave important features out-of-frame. Some details will remain blurry in the background as others come into focus. Even an attempt to quantify Brandeis’ influence by a citation measure may not capture all of his significance. That said, it is useful to quantify the shadow he casts over the history of antitrust enforcement.

Brandeis served on the Supreme Court from June 1, 1916 to February 13, 1939.¹⁶⁷ During this time, he wrote 453 opinions and 65 dissents.¹⁶⁸ He cast his vote in many cases that directly dealt with antitrust issues, and of these, Brandeis authored ten opinions and ten dissents explicitly focused on antitrust enforcement.¹⁶⁹ Table 1 pro-

¹⁶⁵ MCCRAW, *supra* note 55, at 81-82, 84.

¹⁶⁶ Barak Orbacha & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 626 (2012).

¹⁶⁷ *Id.* at 627.

¹⁶⁸ *The Collected Supreme Court Opinions of Louis D. Brandeis*, LOUIS D. BRANDEIS SCHOOL OF LAW LIBRARY, <https://louisville.edu/law/library/special-collections/the-louis-d-brandeis-collection/the-collected-supreme-court-opinions-of-louis-d-brandeis> (last visited Jan. 29, 2017).

¹⁶⁹ For Brandeis’ antitrust opinions, see *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 305 U.S. 124, 128 n.1 (1938) (Black, J., dissenting) (arguing that Brandeis relied on an antitrust case to decide a patent infringement suit); *U.S. v. Griffin*, 303 U.S. 226, 232 (1938); *Standard Oil Co. v. U.S.*, 283 U.S. 163, 165 (1931); *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 34 (1931); *U.S. v. Cal. Coop. Canneries*, 279 U.S. 553, 555 (1929); *Swift & Co. v. U.S.*, 276 U.S. 311 (1928); *Lumiere v. Mae Edna Wilder, Inc.*, 261 U.S. 174, 177 (1923); *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156, 159 (1922); *Bd. of Trade of Chicago v. U.S.*, 38 S. Ct. 242, 244 (1918); *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261 (1917). For Brandeis’ antitrust dissents, see *Louis K. Liggett Co. v. Lee*,

vides a summary of Supreme Court cases throughout the century that deal with disparate antitrust concerns. The 221 cases indicated are those in which Brandeis makes an appearance.¹⁷⁰ The cases are organized according to when the matter was decided.

Table 1

| A Century of Brandeis and Antitrust in the Supreme Court | | | |
|---|-------|-----------|-------|
| Decade | Cases | Decade | Cases |
| 1916-1919 | 13 | 1970-1979 | 27 |
| 1920-1929 | 54 | 1980-1989 | 18 |
| 1930-1939 | 46 | 1990-1999 | 14 |
| 1940-1949 | 16 | 2000-2009 | 4 |
| 1950-1959 | 10 | 2010-2016 | 5 |
| 1960-1969 | 14 | Total | 221 |

The highest congregation of cases lies in the decades of Brandeis' active career on the Court. References to Brandeis in Supreme Court antitrust decisions increase in the 1960s, peak in the 1970s, and continually decline after the 1980s.¹⁷¹ Whether this is due more to legal reliance on Brandeis as an antitrust figure, the number of antitrust cases filed or the rate at which they were decided is unclear.

The vast majority of the 221 citations to Brandeis are to his antitrust opinions or dissents, rather than to his writings or testimony as a private citizen.¹⁷² The crux of Brandeis' legal significance for antitrust enforcement is found in the ten opinions he authored and the

288 U.S. 517 (1933) (Brandeis, J., dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting); *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927) (Brandeis, J., dissenting); *FTC v. W. Meat Co.*, 272 U.S. 554 (1926) (Brandeis, J., dissenting); *U.S. ex rel. Hughes v. Gault*, 271 U.S. 142 (1926) (Brandeis, J., dissenting); *Am. Column & Lumber Co. v. U.S.*, 257 U.S. 377 (1921) (Brandeis, J., dissenting); *Truax v. Corrigan*, 257 U.S. 312 (1921) (Brandeis, J., dissenting); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (Brandeis, J., dissenting); *FTC v. Gratz*, 253 U.S. 421 (1920) (Brandeis, J., dissenting); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) (Brandeis, J., dissenting).

¹⁷⁰ See *supra* Table 1.

¹⁷¹ See *supra* Table 1.

¹⁷² See *supra* Table 1.

ten dissents he wrote that specifically involve antitrust.¹⁷³ Table 2 measures the effect of Brandeis' ten antitrust opinions. Brandeis' opinions are organized in descending order by the number of decisions (all state and federal courts included) which cite to each opinion. A further breakdown of decisions exclusively from the Supreme Court that cite Brandeis' opinions is also provided.

Table 2

| Brandeis' Influence | Citing Decisions | | | |
|---|---|--------------------|---------------------|---------------|
| | Brandeis' Opinions Referencing "Antitrust" | State & Federal | Supreme Court Only | |
| | | | Citing Decisions | Cited Most In |
| <i>Board of Trade of Chicago v. United States</i> , 246 U.S. 231 (1918) | 847 | 49 | 1980s, '70s & '60s | 2010 |
| <i>Keogh v. Chicago & N. R. Co.</i> , 260 U.S. 156 (1922) | 606 | 26 | 1980s & '30s | 2007 |
| <i>Swift & Co. v. United States</i> , 276 U.S. 311 (1928) | 357 | 26 | 1940s & '30s | 2003 |
| <i>Carbice Corp. of America v. American Patents Dev. Corp.</i> , 283 U.S. 27 (1931) | 275 | 28 | 1940s & '30s | 2006 |
| <i>Standard Oil Co. v. United States</i> , 283 U.S. 163 (1931) | 166 | 21 | 1940s & '30s | 2013 |
| <i>United Copper Sec. Co. v. Amalgamated Copper Co.</i> , 244 U.S. 261 (1917) | 157 | 4 | 1970s | 1984 |
| <i>United States v. Griffin</i> , 303 U.S. 226 (1938) | 132 | 20 | 1940s, '30s & '70s | 1986 |
| <i>United States v. California Cooperative Cameries</i> , 279 U.S. 553 (1929) | 106 | 17 | 1940s & '30s | 1973 |
| <i>Lumiere v. Mae Edna Wilder, Inc.</i> , 261 U.S. 174 (1923) | 73 | 3 | 1920s | 1942 |
| <i>General Talking Pictures Corp. v. Western Electric Co.</i> , 305 U.S. 124 (1938) | 72 | 5 | 1940s & '60s | 2008 |

As antitrust scholars would expect, Brandeis' opinion in *Board of Trade of Chicago v. United States*¹⁷⁴ is cited more frequently and, in general, more recently than any of his other opinions.¹⁷⁵ In

¹⁷³ See cited cases, *supra* note 169.

¹⁷⁴ *Bd. of Trade of Chi.*, 38 S. Ct. at 242.

¹⁷⁵ *Cont'l T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 n.15 (1977).

the Court's opinion in *American Needle, Inc. v. NFL*,¹⁷⁶ *Chicago Board of Trade* was relied upon for its exegesis of the rule of reason as applied to Section 1 of the Sherman Act.¹⁷⁷ In *Alberta Gas Chemicals, Ltd. v. E. I. Du Pont de Nemours & Co.*,¹⁷⁸ Judge Becker's dissenting opinion alludes to Brandeis' clarification of how "the law uses intent to explain the significance of anticompetitive activity."¹⁷⁹ In the original opinion, Justice Brandeis famously stated: "This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."¹⁸⁰

Brandeis' opinion in *Keogh v. Chicago & N. R. Co.*¹⁸¹ was influential, as measured by the number of decisions citing it.¹⁸² In 2009, *Williams v. Duke Energy*¹⁸³ references the "filed rate doctrine" observed in *Keogh*.¹⁸⁴ Brandeis is not credited with first establishing the doctrine that antitrust action cannot be taken on the grounds of prices which have been approved, and made legal, by a "legislatively created agency."¹⁸⁵ But he is recognized for *enunciating* it.¹⁸⁶ *Keogh* has in many ways sparked considerable controversy, drawing the historical battle lines for a polarizing legal debate.¹⁸⁷

In *Standard Oil Co. v. United States*,¹⁸⁸ which is also frequently cited, Brandeis clarified the role patents play in affecting competition.¹⁸⁹ His opinion was cited recently in *FTC v. Actavis, Inc.*¹⁹⁰ In *United States v. Krasnov*,¹⁹¹ Judge Clary explains:

¹⁷⁶ *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

¹⁷⁷ *Id.* at 203, n.10.

¹⁷⁸ *Alberta Gas Chemicals, Ltd. v. E. I. Du Pont de Nemours & Co.*, 826 F.2d 1235 (3d Cir. 1987).

¹⁷⁹ *Id.* at 1251 (Becker, J., dissenting).

¹⁸⁰ *Bd. of Trade of Chi.*, 38 S. Ct. at 242.

¹⁸¹ *Keogh*, 260 U.S. at 156.

¹⁸² Vonda Mallicoat Laughlin, *The Filed Rate Doctrine and the Insurance Arena*, 18 CONN. INS. L.J. 373, 379 (2012).

¹⁸³ 606 F. Supp. 2d 783 (2009).

¹⁸⁴ *Id.* at 789.

¹⁸⁵ *Sun City Taxpayers' Ass'n v. Citizen's Utils. Co.*, 847 F. Supp. 281, 288 (D. Conn. 1994).

¹⁸⁶ *Id.* at 287.

¹⁸⁷ *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985).

¹⁸⁸ 283 U.S. 163 (1931).

¹⁸⁹ *Id.* at 174-80.

¹⁹⁰ 133 S. Ct. 2223 (2013).

¹⁹¹ 143 F. Supp. 184 (E.D.Pa. 1956).

Mr. Justice Brandeis established the rule that a pooling arrangement or cross-licensing between competitors is not illegal in and of itself, but that it may become illegal if it is part of a larger plan to control interstate markets, stating,

“Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the circumstances, or whether their effect is to suppress or unduly restrict competition.”¹⁹²

Brandeis’ ability to create influential precedents is shown in his opinion in *United Copper Securities Co. v. Amalgamated Copper Co.*¹⁹³ He set forth the “business judgment rule” which clarified the legality of a corporate decision to bring or not to bring antitrust charges against another entity.¹⁹⁴ Judge Carter explains in *Gall v. Exxon Corp.*¹⁹⁵:

This principle, which has come to be known as the business judgment rule, was articulated by Mr. Justice Brandeis speaking for a unanimous Court in *United Copper Securities Co. v. Amalgamated Copper Co.* In that case the directors of a corporation chose not to bring an antitrust action against a third party. Mr. Justice Brandeis said:

Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management, and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judg-

¹⁹² *Id.* at 199 (emphasis omitted).

¹⁹³ 244 U.S. 261 (1917).

¹⁹⁴ *Id.* at 263-64.

¹⁹⁵ 418 F. Supp. 508 (S.D.N.Y. 1976).

ment.¹⁹⁶

Brandeis also was influential in dissent. Table 3 follows a similar format to Table 2. It differs only insofar as the citations being counted are confined to Brandeis' dissents.

Table 3

| Brandeis's Influence | Citing Decisions (citing Brandeis's dissent specifically) | | | |
|--|--|--------------------|----------------------|-----------------|
| | State & Federal | Supreme Court Only | | |
| | | Citing Decisions | Cited Most In | Latest Citation |
| <i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932) | 192 | 39 | 1980s, 2000s & 2010s | 2015 |
| <i>Duplex Printing Press Co. v. Deering</i> , 254 U.S. 443 (1921) | 54 | 14 | 1940s | 2002 |
| <i>Truax v. Corrigan</i> , 257 U.S. 312 (1921) | 35 | 5 | 1940s & '50s | 1972 |
| <i>Louis K. Liggett Co. v. Lee</i> , 288 U.S. 517 (1933) | 21 | 7 | 1930s | 2010 |
| <i>FTC v Gratz</i> , 253 U.S. 421 (1920) | 17 | 3 | 1940s, '60s & '70s | 1972 |
| <i>Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n</i> , 274 U.S. 37 (1927) | 7 | 2 | 1960s & '80s | 1987 |
| <i>Hitchman Coal & Coke Co. v. Mitchell</i> , 245 U.S. 229 (1917) | 6 | 2 | 1930s & '70s | 1971 |
| <i>United States ex rel. Hughes v. Gault</i> , 271 U.S. 142 (1926) | 4 | 3 | 1930s | 1935 |
| <i>American Column & Lumber Co. v. United States</i> , 257 U.S. 377 (1921) | 3 | 1 | 1930s | 1933 |
| <i>FTC v Western Meat Co.</i> , 272 U.S. 554 (1926) | 0 | 0 | NA | NA |

Like *Chicago Board of Trade* did with Brandeis' other majority opinions, *New State Ice Co. v. Liebmann*¹⁹⁷ far outstrips the other dissents by Brandeis.¹⁹⁸ References to this dissent are numerous and recent. Brandeis' words ring distinctly, in part because of the sweep-

¹⁹⁶ *Id.* at 515 (citations omitted).

¹⁹⁷ 285 U.S. 262 (1932).

¹⁹⁸ *Id.* at 280-311 (Brandeis, J., dissenting).

ing and dramatic language he employs, in part because of the bold, unequivocal ideas he embodies. In this dissent, Brandeis warns against mechanisms of the federal government that would seek to stifle experimental legislation within states.¹⁹⁹ This dissent is often cited in defense of such legislation and general ideology.²⁰⁰ It also betrays Brandeis' proclivity for small-government.²⁰¹ He writes:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.²⁰²

Justice Brandeis' dissent in *Duplex Printing Press v. Deering Co.*²⁰³ is the most significant of his antitrust dissents as reflected by citation count.²⁰⁴ Here, Brandeis draws attention to an implicit *labor exemption* from judicial antitrust enforcement. Since that time, as Justice Breyer asserts, both Congress, by enacting new statutes which encourage the exemption, and the Court have followed suit in the aim "to prevent judicial use of antitrust law to resolve labor disputes."²⁰⁵ In his opinion in *Brown v. Pro Football, Inc.*,²⁰⁶ Breyer writes:

¹⁹⁹ *Id.* at 311.

²⁰⁰ *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

²⁰¹ *New State Ice Co.*, 285 U.S. at 280-311.

²⁰² *Id.* at 311.

²⁰³ 254 U.S. 443 (1921).

²⁰⁴ *Id.*

²⁰⁵ *Brown v. Pro Football*, 518 U.S. 231, 236 (1996).

²⁰⁶ *Id.* at 231.

This implicit exemption reflects both history and logic. As a matter of history, Congress intended the labor statutes (from which the Court has implied the exemption) in part to adopt the views of dissenting Justices in *Duplex Printing Press Co. v. Deering*, . . . which Justices had urged the Court to interpret broadly a different *explicit* “statutory” labor exemption that Congress earlier (in 1914) had written directly into the antitrust laws.²⁰⁷

Duplex Printing mirrors the sentiments of Brandeis’ earlier dissent in *Hitchman Coal & Coke Co. v. Mitchell*:²⁰⁸ that judicial enforcement of antitrust law should not directly interact with labor disputes, because these matters were matters for the legislative branch.²⁰⁹ While in some ways less remarkable than his opinions (and certainly less widely known), Justice Brandeis’ dissents have influenced the course of antitrust enforcement.

The last index of Brandeis’ influence on antitrust, as measured by citations to Supreme Court decisions, merits a brief discussion. The Court occasionally cited Brandeis’ work as a lawyer in private practice or during his hearings as a private citizen; for example, in *California v. Am. Stores Co.*²¹⁰ his testimony before a Congressional committee was cited.²¹¹ Brandeis argued, during debates on the scope of the Sherman Act, that individuals should not wield the same power as the arm of the government when it came to bringing antitrust actions against large corporations.²¹² Likewise, Brandeis’ testimony in 1914 regarding the Clayton Act was cited in 1972 in *United States v. Falstaff Brewing Corp.*²¹³ Here the Court quoted Brandeis: “You cannot have true American citizenship, you cannot preserve political liberty, you cannot secure American standards of living unless some degree of industrial liberty accompanies it.”²¹⁴

As measured by citations, Brandeis permeates deeply the soil of antitrust enforcement. However, the roots of much of his influ-

²⁰⁷ *Id.* at 236 (emphasis in original) (citation omitted).

²⁰⁸ 245 U.S. 229 (1917).

²⁰⁹ *Id.* at 265 (Brandeis, J., dissenting).

²¹⁰ 495 U.S. 271 (1990).

²¹¹ *Id.* at 288.

²¹² MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 316 (2009).

²¹³ 410 U.S. 526, 540 (1973) (Douglas, J., dissenting).

²¹⁴ *Id.* (Douglas, J., dissenting) (footnote omitted).

ence have gradually disappeared to create space for the growth of new, more economically sophisticated and more consumer-welfare oriented antitrust enforcement.²¹⁵

Just as Brandeis was not thoroughly influenced by economists in forming his views on antitrust, economists today seem uninfluenced by Brandeis in shaping their views on antitrust. As judged by references, the impact of Brandeis' views on monopolies and antitrust found in Industrial Organization textbooks is *de minimis*.²¹⁶ In *Modern Industrial Organization*, by Dennis W. Carlton and Jeffrey M. Perloff; in F.M. Scherer's, *Industrial Market Structure and Economic Performance*, and in *Industrial Organization, Contemporary Theory and Empirical Applications* by Lynne Pepall, Dan Richards, and George Norman, there are no references to the writings of Brandeis.²¹⁷ Even in textbooks specifically devoted to antitrust economics, such as *Antitrust Economics*, by Roger D. Blair and David L. Kaserman and *Antitrust Law and Economics*, edited by Keith H. Hylton, Brandeis was not credited nor mentioned.²¹⁸ The same is true for prominent antitrust handbooks. For example, in *The International Handbook of Competition*, edited by Manfred Neumann and Jurgen Weigand and in the *Handbook of Antitrust Economics*, edited by Paolo Buccirossi, neither mention Brandeis' influence on antitrust economics.²¹⁹ One of the leading books on antitrust in the Chicago School vein, Richard Posner's *Antitrust Law*, contains no reference to Brandeis.²²⁰

In the comprehensive two-volume, *The Oxford Handbook of International Antitrust Economics*, edited by Roger D. Blair and D. Daniel Sokol, Brandeis makes only two appearances.²²¹ The first is

²¹⁵ *Antitrust Enforcement and the Consumer*, U.S. DEP'T OF JUST., <https://www.justice.gov/atr/file/800691/download> (last visited Jan. 9, 2016).

²¹⁶ Jill Lepore, *The Warren Brief*, THE NEW YORKER (Apr. 21, 2014), <http://www.newyorker.com/magazine/2014/04/21/the-warren-brief>.

²¹⁷ DENNIS W. CARLTON & JEFFERY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION (4th ed. 2005); F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1970); LYNNE PEPALL, DAN RICHARDS, & GEORGE NORMAN, INDUSTRIAL ORGANIZATION: CONTEMPORARY THEORY AND EMPIRICAL APPLICATIONS (4th ed. 2008).

²¹⁸ ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS (1985); ANTITRUST LAW AND ECONOMICS (KEITH H. HYLTON ed., 2010).

²¹⁹ THE INTERNATIONAL HANDBOOK OF COMPETITION (Manfred Neumann & Jurgen Weigand eds., 2004); HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi ed., 2008).

²²⁰ RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001).

²²¹ 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (ROGER D. BLAIR & D. DANIEL SOKOL EDS., 2015) [hereinafter 1 OXFORD HANDBOOK].

in Daniel Crane's chapter on Rationales for Antitrust.²²² Under "Noneconomic Objectives" of antitrust, Crane mentions the "Brandeisian" tradition—which purportedly favored antitrust not for its effects on economic efficiency, but for its "beneficial effects on personal liberty and autonomy."²²³ Crane points out that even "in defending his vision for an aggressive antitrust policy, Brandeis engaged in explicit economic reasoning, challenging the theory of natural monopoly in high fixed cost industries and contrasting the short-term efficiencies of monopoly with its long run waste."²²⁴

The second reference to Brandeis in *The Oxford Handbook* is in the chapter, "Tying Arrangements" by Erik and Herbert Hovenkamp.²²⁵ They cite the so-called Brandeis doctrine of the "leverage" theory.²²⁶ While Brandeis put this theory forward in a case involving patent law, the case had significant antitrust implications.²²⁷ Brandeis argued that when the defendant tied its dry ice to the patented refrigeration, this allowed the firm "to derive its profit, not from the invention on which the law gives it a monopoly, but from the unpatented supplies . . . [which are] wholly without the scope of the patent monopoly."²²⁸

However, the Hovenkamps set up Brandeis only to take him down. They credit Ward S. Bowman as being primarily responsible for undermining Brandeis' view on leverage.²²⁹ Bowman demonstrated that one can raise the price of a tied product only by reducing the price of the tying good.²³⁰ As the Hovenkamps explain:

The leverage theory [of Brandeis] is clearly a fallacy

²²² Crane, *Rationales for Antitrust: Economics and Other Bases*, in 1 OXFORD HANDBOOK, *supra* note 221, at 3, 13.

²²³ Crane, *Rationales for Antitrust: Economics and Other Bases*, in 1 OXFORD HANDBOOK, *supra* note 221, at 3, 13.

²²⁴ Crane, *Rationales for Antitrust: Economics and Other Bases*, in 1 OXFORD HANDBOOK, *supra* note 221, at 3, 13.

²²⁵ Hovenkamp & Hovenkamp, *Tying Arrangements*, in 2 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (ROGER D. BLAIR & D. DANIEL SOKOL EDS., 2015) 329 [hereinafter 2 OXFORD HANDBOOK].

²²⁶ *Id.* at 333.

²²⁷ *Id.*

²²⁸ *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 31-32 (1931) (quoting *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917)).

²²⁹ Hovenkamp & Hovenkamp, *Tying Arrangements*, in 2 OXFORD HANDBOOK *supra* note 225, at 333-34.

²³⁰ Hovenkamp & Hovenkamp, *Tying Arrangements*, in 2 OXFORD HANDBOOK *supra* note 225, at 333-34.

in situations where the tying product is monopolized and the tied product is competitive. It is also incorrect in cases where both products are subject to the exercise of some market power, because in these situations the elimination of double marginalization is likely to produce lower rather than higher prices²³¹

Even in volumes critical of the Chicago School approach to antitrust economics, Brandeis goes unmentioned. For example, no reference to Brandeis appears in *A Critical Evaluation of the Chicago School of Antitrust Analysis*, by Ingo L.O. Schmidt and Jan B. Rittaler or in *How the Chicago School Overshot the Mark*.²³²

Going back in time, in 1959 Donald Dewey's *Monopoly in Economics and Law* contained no reference to Brandeis nor were any found in Joel B. Dirlam's and Alfred E. Kahn's, *Fair Competition: The Law and Economics of Antitrust Policy* in 1954.²³³ Carl Kaysen and Donald F. Turner's *Antitrust Policy: An Economic and Legal Analysis* has one reference to Brandeis' dissent in *Gratz*, which Turner and Kaysen quote with approval.²³⁴ In this dissent, Brandeis warned against the easy application of *per se* rules:

Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration however comprehensive of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions arising novel unfair methods would be devised and developed.²³⁵

This language would appeal to antitrust economists who understand that mergers or pricing strategies found to be anticompetitive in one market may be competitively benign in another.

²³¹ Hovenkamp & Hovenkamp, *The Law and Antitrust Economics of Tying* 6, (Mar. 2012) (unpublished) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1999063.

²³² See generally PITOFSKY, *supra* note 32; SCHMIDT & RITTALER, *supra* note 32.

²³³ Donald Dewey, *Monopoly in Economics and Law* (1959); DIRLAM & KAHN, *supra* note 47.

²³⁴ CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS*, 241-42 (3rd ed. 1971).

²³⁵ *Id.* at 242 (citing Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 436-37 (1920) (Brandeis, J., dissenting)).

One of the most influential works on contemporary antitrust policy law is Robert Bork's *The Antitrust Paradox*.²³⁶ But unlike most contemporary antitrust scholarship that ignored Brandeis, Bork cited Brandeis as one of only six Supreme Court justices who shaped "the main outlines of antitrust policy . . ."²³⁷ Bork spotlighted Brandeis' opinion in *Chicago Board of Trade*.²³⁸ Bork argued that Brandeis opposed the rule of *per se* illegality on restraints of trade and price-fixing arrangements primarily because he valued, first and foremost, the wellbeing of the small business firm.²³⁹ And this wellbeing was sometimes best served by a restraint of competition, even if that meant harm to the consumer.²⁴⁰

Bork wrote, "Brandeis was not so much a believer in competition as a believer in safety and smallness in the economic world."²⁴¹ Contra Brandeis, Bork argued that a fundamental value of consumer welfare in antitrust policy would result in rules of *per se* illegality and that Brandeis' insertion of an alternative value (small-producer welfare) confused and muddled antitrust law.²⁴² He faulted Brandeis for favoring and, in part, introducing ambiguity into the Court's antitrust rubric, which both encouraged future "judicial subjectivism" and stagnated into paradoxical, self-defeating policies.²⁴³ That said, Bork acknowledged that much of what Brandeis wrote on the rule of reason was "clearly correct" and that the call for the importance of investigating an agreement's intent "was only good sense."²⁴⁴

Notwithstanding the accuracy and wisdom of his specific statements on the rule of reason, Brandeis, in effect, became Bork's primary foil in deciding antitrust law.²⁴⁵ Bork's overarching thesis was that until antitrust law explicitly acknowledges an ultimate telos of consumer welfare, its enforcement practices and policies will be self-contradictory and counter-productive.²⁴⁶ *The Antitrust Paradox* is credited with redirecting the course of antitrust enforcement in a

²³⁶ Bork, *supra* note 32.

²³⁷ Bork, *supra* note 32, at 21.

²³⁸ Bork, *supra* note 32, at 41-47.

²³⁹ Bork, *supra* note 32, at 41-47.

²⁴⁰ Bork, *supra* note 32, at 41-47.

²⁴¹ Bork, *supra* note 32, at 47.

²⁴² Bork, *supra* note 32, at 21-23.

²⁴³ Bork, *supra* note 32, at 45-47.

²⁴⁴ Bork, *supra* note 32, at 42-44.

²⁴⁵ Bork, *supra* note 32.

²⁴⁶ Bork, *supra* note 32.

fashion with which Brandeis would largely disagree.²⁴⁷

Aside from Bork, one of the few antitrust scholars who pays serious attention to Brandeis is Herbert Hovenkamp.²⁴⁸ Hovenkamp called Brandeis' statement of the rule of reason as "perhaps the *most quoted passage in antitrust case law*."²⁴⁹ Brandeis' rule of reason is as follows:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.²⁵⁰

Even here, the reference to Brandeis having written the most quoted passage in antitrust is faint praise.²⁵¹ Hovenkamp later argued that, "Brandeis' [] version of the rule of reason created one of the most costly procedures in antitrust practice. Under it courts have engaged in unfocused, wide-ranging expeditions into practically everything about the business of large firms in order to determine whether a challenged practice was unlawful."²⁵² Hovenkamp described the distinction Brandeis drew "between a restraint that 'merely regulates' or 'promotes' competition and those that 'may suppress or even destroy' it [as one that] can expand and contract like a blowfish, meaning almost anything at all."²⁵³

Another book edited by Hovenkamp and Daniel Crane, *The Making of Competition Policy*, referred often to Brandeis' influence on antitrust.²⁵⁴ Brandeis' article *Shall We Abandon the Policy of Competition?*, and his book *Other People's Money* are both sur-

²⁴⁷ For a detailed analysis of Bork's contribution and influence on antitrust policy with regard to predatory practices, see Elzinga & Mills, *Antitrust Predation*, *supra* note 150.

²⁴⁸ See Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 105-07 (2005) [hereinafter Hovenkamp, *The Antitrust Enterprise*].

²⁴⁹ *Id.* at 105 (emphasis added).

²⁵⁰ *Id.* (quoting *Bd. of Trade of Chicago*, 246 U.S. at 238).

²⁵¹ *Id.* at 105.

²⁵² *Id.* at 105.

²⁵³ Hovenkamp, *The Antitrust Enterprise*, *supra* note 248, at 105.

²⁵⁴ *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* (Daniel A. Crane & Herbert Hovenkamp eds., 2013).

veyed.²⁵⁵ Crane and Hovenkamp assessed Brandeis' philosophy in connection to the problem posed by the separation of ownership from control, the case for atomistic competition voiced in the making of the New Deal, the contention that exploiting economies of scale does not require huge corporate size, and the Ordoliberal ideals of social and political welfare.²⁵⁶ In addition, Brandeis' opinion on tying clauses in the *Carbice Corporation of America v. American Patents Development Corporation*²⁵⁷ and his dissent in *American Column & Lumber Co. v. United States*²⁵⁸ are considered worthy of discussion.

IV. CONCLUSION

The enduring importance of Brandeis is reflected by the fact that so many of the policy questions he addressed—income redistribution, social security, minimum wages, the proper goals of the corporation, the right to privacy—remain issues at the front and center in today's society. Antitrust is the anomaly. Why? There are two reasons why Brandeis casts such a faint shadow on the institution of antitrust today.

First, contemporary antitrust policy has an almost singular focus on consumer welfare.²⁵⁹ Brandeis, however, put most of his antitrust policy chips on small business, not the consumer.²⁶⁰ The Supreme Court, contra Brandeis, contended that “Congress designed the Sherman Act as a ‘consumer welfare prescription’ ”²⁶¹ and any “restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.”²⁶²

²⁵⁵ BRANDEIS, OTHER PEOPLE'S MONEY, *supra* note 17.

²⁵⁶ THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES, *supra* note 254.

²⁵⁷ 283 U.S. 27 (1931).

²⁵⁸ 257 U.S. 377, 413-19 (1921) (Brandeis, J., dissenting).

²⁵⁹ See Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405 (2013), regarding the evolution of the welfare standard in antitrust enforcement. The authors spotlight Robert Bork's, *The Antitrust Paradox*, as catalyzing the change to a consumer welfare benchmark. *Id.* at 2406. The authors also quote the Antitrust Modernization Commission, pointing out that “for the last few decades courts, agencies, and antitrust practitioners have recognized consumer welfare as the unifying goal of antitrust law.” *Id.* at 2416 (internal quotation omitted).

²⁶⁰ See THE CURSE OF BIGNESS, *supra* note 3.

²⁶¹ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Bork, *supra* note 32, at 66).

²⁶² *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984).

The *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission illustrates the difference. The *Guidelines* are neither law nor court opinion.²⁶³ However, they are regularly consulted as a how-to guide by the Agencies, anti-trust practitioners, and the courts.²⁶⁴ Economic analysis provides the foundation of the *Merger Guidelines*.²⁶⁵ The *Guidelines*' lodestar is the effect of a merger on consumer welfare.²⁶⁶ In the Overview, the *Guidelines* make clear: "Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers."²⁶⁷

At no place in the *Guidelines* is the effect of a merger upon small business considered.²⁶⁸ In this regard, the *Guidelines*, and the enforcement philosophy behind them, run against the antitrust grain of Brandeis. Brandeis was willing to burden consumers with higher prices if those prices provided an umbrella of protection for small business.²⁶⁹ Thomas McCraw cited the testimony of Brandeis before Congress:

Brandeis: The practice of cutting prices on articles of a known price tends to create the impression among the consumers that they have been getting something that has not been worth what they have been paying for it.

Congressman Decker [Democrat of Missouri – who avowed that he had been "raised on a farm"]: That is presuming that the people have not much sense.

Brandeis: Well, everybody has not as much sense as some people.

Congressman Decker: Some people have more sense than other people think they have.²⁷⁰

²⁶³ 2010 WL 8334323 F.T.C. REP. 1 [hereinafter F.T.C. REP.].

²⁶⁴ *Id.* at 2.

²⁶⁵ *Id.* at 1, 2.

²⁶⁶ *Id.* at 2.

²⁶⁷ *Id.* at 2.

²⁶⁸ F.T.C. REP., *supra* note 263.

²⁶⁹ MCCRAW, *supra* note 55, at 105.

²⁷⁰ MCCRAW, *supra* note 55, at 105 (quoting *Nomination of Louis D. Brandeis: Hearings Before the Subcomm. of the Comm. on the Judiciary U.S. S., on the Nomination of Louis D. Brandeis to be an Assoc. Justice of the Supreme Court of the U.S.*, 64th Cong. 141 (1916), reprinted in 3 THE SUPREME COURT OF THE UNITED STATES NOMINATIONS 1916-1975 (Roy M. Mersky & J. Myron Jacobstein comps., Buffalo, Wm. S. Hein & Co. 1977)).

In describing Brandeis' aversion to price competition, McCraw concluded:

Nor is there anything in Brandeis' many discussions of the Federal Trade Commission, in 1915 or earlier, to suggest that he conceived of it as a consumer-protection agency. Rather, he confined his attention to the small producer, wholesaler, and retailer. There was no sense of the clash between the price-fixing and other associational activities of small firms and the interest of the consumer.²⁷¹

One can find strains of Brandeis in two of the most prominent cases in the antitrust canon: *United States v. Aluminum Co. of America*²⁷² and *Brown Shoe Co. v. United States*.²⁷³ In *Aluminum Co.*, Judge Learned Hand wrote:

[Congress in passing the Sherman Act] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.²⁷⁴

Brown Shoe was the Supreme Court's first decision under the Celler-Kefauver Act that amended Section 7 of the Clayton Act.²⁷⁵ Chief Justice Warren wrote, "[i]t is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business[es]. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets."²⁷⁶

Brandeis would have applauded these sentiments favoring

²⁷¹ McCRAW, *supra* note 55, at 134.

²⁷² 148 F.2d 416 (2d Cir. 1945).

²⁷³ 370 U.S. 294 (1962).

²⁷⁴ *Aluminum Co.*, 148 F.2d at 427.

²⁷⁵ William J. Baer, Assistant Attorney General, *Remarks by Assistant Attorney General Bill Baer at the American Bar Association Clayton Act 100th Anniversary Symposium*, (Dec. 4, 2014), (transcript at <https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-bill-baer-american-bar-association-clayton-act-100th>).

²⁷⁶ *Brown Shoe*, 370 U.S. at 344.

small business. But in contemporary antitrust enforcement, both the Antitrust Division and the Federal Trade Commission can restrain their enthusiasm for this Brandeisian perspective.

Brandeis' theories limit the relevance of antitrust today. Big business—with the exception of major banks—is not the *bête noire* that it once was.²⁷⁷ The trust problem is no longer exclusive to election campaigns.²⁷⁸ Antitrust has become the realm of experts, not political figures.²⁷⁹ No major antitrust case is tried today without each party having at least one economic expert as part of the litigation arsenal.²⁸⁰ Indeed, each case may have multiple economic experts.²⁸¹ If the antitrust case is brought as a class action, there will probably be battling experts over class certification.²⁸² The issue of liability will also lead to economic experts on both sides, assisting the court in understanding the case.²⁸³ If the case moves to the assessment of damages, economic experts on both sides typically will generate dueling econometric models to help illumine who was harmed, if anyone, and if so, by how much.²⁸⁴

In general, anti-merger enforcement today is more administrative than litigious because of the Hart-Scott-Rodino pre-notification requirement for mergers and acquisitions of any substance.²⁸⁵ The concerned parties now wrangle over how a proposed combination might be structured, before the deal is consummated, so that the anti-trust authorities are satisfied.²⁸⁶ As a result, the number of lawsuits filed and litigated under Section 7 of the Clayton Act is small and masks the actual clout of contemporary anti-merger enforcement.²⁸⁷ In addition, the Antitrust Division and the Federal Trade Commission

²⁷⁷ Neil Irwin, *Americans are O.K. with Big Business. It's Business Lobbying Power They Hate*, N.Y. TIMES (Sept. 23, 2014), http://www.nytimes.com/2014/09/24/upshot/americans-are-ok-with-big-business-its-business-lobbying-power-they-hate.html?_r=0.

²⁷⁸ Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 81 (2015).

²⁷⁹ Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1261 (2012).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Joseph M. Rebein & Laurie A. Novion, *Effective Use of Experts: From Class Issues to Damages* 49, 54 SHOOK, HARDY & BACON L.L.P. (2003).

²⁸³ *Id.* at 67.

²⁸⁴ *Id.* at 65.

²⁸⁵ 15 U.S.C.A. § 18a (Westlaw through P.L. 114-244).

²⁸⁶ *Id.* at 18a(d)(1).

²⁸⁷ ABA ANTITRUST SECTION: MONOGRAPH NO. 16, PRIVATE LITIGATION UNDER SECTION 7 OF THE CLAYTON ACT: LAW AND POLICY 72 (1989).

today employ dozens of economists with doctoral degrees from top universities.²⁸⁸ At the Antitrust Division, the top economist now sports the title: Deputy Assistant Attorney General.²⁸⁹ Private plaintiffs and defendants now turn to a number of economic consulting firms with specialties in antitrust economics to assess the “trust problem.”²⁹⁰ Brandeis could not have anticipated any of this. In a sense, antitrust is now the phenomenon despaired of by Edmund Burke when he wrote: “[T]he age of chivalry is gone. That of sophisters, economists, and calculators, has succeeded”²⁹¹

McCraw’s criticism that Brandeis’ posture on the “trust problem” was deficient in terms of economic analysis, while accurate, also (as is fitting in a paper on Brandeis) merits a dissent. Melvin Urofsky, in his exhaustive biography on the Justice, argues that Brandeis’ deeply embedded antipathy to bigness was not fundamentally economic but moral.²⁹² Urofsky writes:

[t]o understand his analysis, however, one has to recognize that it relied far more on principles of morality and political theory than on economics. Brandeis opposed large businesses because he believed that great size, either in government or in the private sector, posed dangers to democratic society and to individual opportunity.²⁹³

Urofsky invites readers to assess Brandeis’ thoughts through an interdisciplinary lens.²⁹⁴ He labels this perspective as that of an “idealistic pragmatist:” a man rooted in both principle and political realities simultaneously.²⁹⁵

This perspective of Brandeis is underscored in Stephen W.

²⁸⁸ *Bureau of Economics: Research Analyst Recruiting*, FED. TRADE COMMISSION <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/research-analyst-program> (last visited Jan. 12, 2017).

²⁸⁹ *New Leadership in the Division: Nancy Rose*, THE U.S. DEP’T OF JUST. <https://www.justice.gov/atr/division-update/2015/new-leadership-division-nancy-rose> (last visited Jan. 12, 2017).

²⁹⁰ Haw, *supra* note 279, at 1292.

²⁹¹ 24 EDMUND BURKE, *Reflections on the Revolution in France* (1790), in ON TASTE; ON THE SUBLIME AND BEAUTIFUL; REFLECTIONS ON THE FRENCH REVOLUTION; A LETTER TO A NOBLE LORD 143, 212-13 (Charles W. Eliot ed., 1909).

²⁹² UROFSKY, *supra* note 212, at 300.

²⁹³ UROFSKY, *supra* note 212, at 300.

²⁹⁴ UROFSKY, *supra* note 212, at xiii.

²⁹⁵ UROFSKY, *supra* note 212, at xiii.

Baskerville's book: *Of Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis*.²⁹⁶ Brandeis may not have drunk deeply from the well of economic scholarship in his day, but, as Baskerville contends, the seminal "Brandeis Brief" provided the initial impetus to include expert study, economic and otherwise, in judicial briefs and decisions.²⁹⁷ Brandeis was the first to blaze a trail into the world of expert testimony—a world where economists now find a well-established home.²⁹⁸

While Urofsky covered the overarching moral facet of Brandeis' opinions, Baskerville points out that these opinions were often rigorously informed by copious detail and "firsthand experience that he [Brandeis] gained in the carrying on of his legal practice."²⁹⁹ Baskerville wrote:

It will be recalled that the clientele of his [Brandeis'] law firms . . . were mainly merchants and independent manufacturers, especially in the paper, shoe, and leather industries. Significantly, neither practice had clients in the textile business, nor among Massachusetts's financial and transportation interests. Small and medium-sized companies predominated. Not only did they impress Brandeis with their sense of vigor and enterprise, but their owners tended to share and reinforce his own views on money and the tariff.³⁰⁰

Brandeis was a fastidious curator of detail when it came to social reform and Congressional hearings regarding the giant firms of his day.³⁰¹ Baskerville summarized: "As far as we can see, the opinions he held on *this* subject [of corporate bigness], as distinct from those he had developed concerning monopoly, owed little to any formal economic theory, be it classical or heterodox; their formulation was almost wholly empirical."³⁰² Brandeis was a man of minutiae *and* moral ideals.

A perspective on Brandeis that is complementary to Urofsky's

²⁹⁶ STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* (1994).

²⁹⁷ *Id.* at 134.

²⁹⁸ *Id.* at 134-35.

²⁹⁹ *Id.* at 135.

³⁰⁰ *Id.*

³⁰¹ Baskerville, *supra* note 296, at 135, 171.

³⁰² Baskerville, *supra* note 296, at 171 (emphasis in original).

is offered by Larry Zacharias.³⁰³ Zacharias acknowledged that, increasingly, lawyers are confronted with (and often discouraged by) “the foreign language of economics.”³⁰⁴ He maintained that “the lawyer must come to grips with economics” but that economics cannot provide “the values on which we intend to found our future as a society.”³⁰⁵ Zacharias used this tension—aligning law with sound economics and yet rooting the law in more fundamental values—to explain Brandeis’ connection to economics.³⁰⁶

While there is no evidence that Brandeis read or was influenced by such titans in the field of economics as Marshall, Menger, Mill, and Ricardo, Zacharias argued that Brandeis read and was influenced by other economists.³⁰⁷ For example, Brandeis was familiar with the work of the American economist Frank Taussig at Harvard; the two, in fact, were friends.³⁰⁸ Brandeis also was familiar with the writings of the heterodox economist Thorstein Veblen.³⁰⁹ Zacharias quoted a law clerk of Brandeis as stating that Brandeis’ book, *Other People’s Money* “was little more than a popularization of Veblen’s book,” *The Theory of Business Enterprise*.³¹⁰ Anyone who admired Veblen as an economist would most likely find Marshall, Menger, Mill and Ricardo somewhat unappealing. Veblen was influential, for Brandeis and others, but his theory on economics was not mainstream.³¹¹

Zacharias argued that McCraw’s critical assessment of Brandeis failed to appreciate the political context in which Brandeis tried to affect economic policy.³¹² Brandeis’ response to the trust problem arose out of a desire to preserve or reconstitute a culture of enterprise rather than maximize economic efficiency.³¹³ Additional-

³⁰³ For a thorough discussion of Brandeis’ views on bigness and the modern corporation, see L.S. Zacharias, *Repaving the Brandeis Way: The Decline of Developmental Property*, 82 NW. U. L. REV. 596 (1988).

³⁰⁴ *Id.* at 596.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 636 n.187.

³⁰⁸ Zacharias, *supra* note 303, at 629 n.149. As Larry Zacharias informed us, Jennie Taussig (Professor Frank Taussig’s sister) was Brandeis’ sister-in-law.

³⁰⁹ Zacharias, *supra* note 303, at 617.

³¹⁰ Zacharias, *supra* note 303, at 627.

³¹¹ For a contrast between Marshall and Veblen, see WILLIAM BREIT & ROGER RANSOM, *THE ACADEMIC SCRIBBLERS* (1971).

³¹² Zacharias, *supra* note 303, at 617.

³¹³ Zacharias, *supra* note 303, at 613.

ly, Zacharias argued that Brandeis' economic views were not always "the curse of bigness" perspective with which he is identified: "Brandeis . . . came by 1910 to understand the economic utility of industrial combinations that he might have opposed in 1895 on strictly economic grounds."³¹⁴ Indeed, Brandeis was aware of the "technological superiority" of some large firms and understood that neither mere decentralization nor mere bigness would absolutely determine a firm's operational efficiency.³¹⁵

Zacharias rooted Brandeis' reasoning in the necessity, at that time, for a system of regulation that would provide immediate, tangible hope to beleaguered laborers who might otherwise be susceptible to class warfare.³¹⁶ Brandeis was concerned with what might be called the "social inefficiency" of bigness (a concept not addressed by McCraw) and with the political unrest caused by its new wave.³¹⁷ Likely influenced by Veblen's work, Brandeis distrusted the "separation of ownership and control" in large corporations, which provoked the shirking of the corporate social responsibility Brandeis so valued and promoted.³¹⁸ Adolph Berle and Gardiner Means later identified and effectively addressed this issue (a duo of both a lawyer and an economist).³¹⁹

Brandeis was *concerned* that the separation of ownership from control in giant firms could result in economic inefficiency.³²⁰ He was *convinced* that it would result in social inefficiency that would prove culturally and politically detrimental.³²¹ To understand Brandeis' actions, then, one cannot simply stack his work up against modern economic analysis (where Zacharias admitted Brandeis falls short). Rather, one must realize that Brandeis would have ceded economic inefficiency for the moral and political good that smaller business enterprises ultimately provided. Brandeis was, in some fashion, seeking to provide a future for those with little hope of one.

A quote from Raymond Chandler's classic work of detective fiction, *The Long Goodbye*, aptly captured the pathos and ethos of

³¹⁴ Zacharias, *supra* note 303, at 626.

³¹⁵ Zacharias, *supra* note 303, at 626.

³¹⁶ Zacharias, *supra* note 303, at 621.

³¹⁷ Zacharias, *supra* note 303, at 621.

³¹⁸ See Zacharias, *supra* note 303, at 627.

³¹⁹ ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* ch. I-VI (1933).

³²⁰ Zacharias, *supra* note 303, at 618, 626-27.

³²¹ See Zacharias, *supra* note 303, at 627.

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Brandeis' position:

There ain't no clean way to make a hundred million bucks Somewhere along the line guys got pushed to the wall, nice little businesses got the ground cut from under them . . . decent people lost their jobs Big money is big power and big power gets used wrong. It's the system.³²²

³²² RAYMOND CHANDLER, *THE LONG GOODBYE* 187-88 (1954).